

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

From July 1947, to June 30, 1948

RICHMOND:
DIVISION OF PURCHASING AND PRINTING
1948

LETTER OF TRANSMITTAL.

July 9, 1948.

HONORABLE WILLIAM 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 the annual report of the office of the Attorney General.

Pursuant to the statute I have included in this report such official opinions rendered from July 1st, 1947 to October 6th, 1947, by the Honorable Abram P. Staples, former Attorney General, the opinions rendered from October 7th, 1947 to January 31st, 1948, by the late Honorable Harvey B. Apperson, former Attorney General, and opinions rendered by me from April 19th, 1948 to June 30th, 1948, 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 the last report from this office.

You will also observe that the opinions embraced by this report from February 1st, 1948 to April 19th, 1948, are signed by the duly qualified Assistants to the Attorney General, which period represents the interval of time elapsing between the death of Attorney General Apperson and the qualification for the assumption of the duties of the office by the present incumbent.

Respectfully submitted,

J. LINDSAY ALMOND, JR.,

Attorney General.

PERSONNEL OF THE OFFICE

(Postoffice address, Richmond)

NAME	COUNTY	OFFICIAL TITLE
J. LINDSAY ALMOND, JR.....	Roanoke City	Attorney General
KENNETH C. PATTY.....	Tazewell	Assistant
G. STANLEY CLARKE.....	Henrico	Assistant
D. GARDINER TYLER, JR.....	Charles City	Assistant
WALTER E. ROGERS.....	Richmond City	Assistant
C. CHAMPION BOWLES.....	Goochland	Assistant
ERNEST BALLARD BAKER.....	Richmond City	Jr. Attorney
HENRY T. WICKHAM.....	Richmond City	Jr. Attorney
LOUISE W. POORE.....	Richmond City	Secretary
PEARL K. BAIN.....	Roanoke City	Secretary
ELEANOR L. WHITE.....	Smyth	Secretary
MABEL G. HURT.....	Tazewell	Secretary
HELEN R. MILLER.....	Richmond City	Secretary

ATTORNEYS GENERAL OF VIRGINIA

From 1776 to 1948

EDMUND RANDOLPH	1776-1786
JAMES INNES	1786-1796
ROBERT BROOKE	1796-1799
PHILIP NORBORNE NICHOLAS	1799-1819
JAMES ROBERTSON	1819-1834
SIDNEY S. BAXTER	1834-1852
WILLIS P. BOCOCK	1852-1857
JOHN RANDOLPH TUCKER	1857-1865
THOMAS RUSSELL BOWDEN	1865-1869
CHARLES WHITTLESEY (military appointee)	1869-1870
JAMES C. TAYLOR	1870-1874
RALEIGH T. DANIEL	1874-1877
JAMES G. FIELD	1877-1882
FRANK S. BLAIR	1882-1886
RUFUS A. AYRES	1886-1890
R. TAYLOR SCOTT	1890-1897
R. CARTER SCOTT	1897-1898
A. J. MONTAGUE	1898-1902
WILLIAM A. ANDERSON	1902-1910
SAMUEL W. WILLIAMS	1910-1914
JOHN GARLAND POLLARD	1914-1918
*J. D. HANKS, JR.	1918-
JOHN R. SAUNDERS	1918-1934
**ABRAM P. STAPLES	1934-1947
***HARVEY B. APPERSON	1947-1948
****J. LINDSAY ALMOND, JR.	1948-

*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. Mr. Staples was elected November 2, 1937 for a term of four years.

***Hon. Harvey B. Apperson was appointed Attorney General to fill the unexpired term of Hon. Abram P. Staples, resigned, and assumed office on October 7th, 1947.

****Hon. J. Lindsay Almond, Jr., was elected Attorney General by the General Assembly on February 11th, 1948, while serving as a Member of the Congress of the United States, and took the oath of office on April 19th, 1948, to fill the unexpired term of Hon. Harvey B. Apperson, who died on February 2, 1948.

Cases Pending in the Supreme Court of Appeals of Virginia

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1. *Almond, J. Lindsay, Jr., Attorney General v. Henry G. Gilmer, Comptroller, and Jesse W. Dillon, Treasurer.* Petition for Writ of Mandamus. Literary fund loan.
2. *Almond, J. Lindsay, Jr., Attorney General v. Henry G. Gilmer, Comptroller.* Petition for Writ of Mandamus. Revenue Bond Act of 1940.
3. *Carson, Walter J. v. Commonwealth.* From Corporation Court of the City of Bristol. Murder in the 2nd. degree.
4. *Cleek, Katherine v. Commonwealth.* From Circuit Court of Lee County. Forfeiture of automobile under A. B. C. Act.
5. *Hall, Dan Leroy v. Commonwealth.* From the Hustings Court of the City of Richmond. Trespassing.
6. *Lee, Robert Edward v. Commonwealth.* From the Circuit Court of the County of King William. Voluntary manslaughter.
7. *McMillan, Christopher Columbus v. Commonwealth.* From the Corporation Court for the City of Bristol. Pandering.
8. *Rice, Spurgeon S., et als v. Commonwealth.* From the Circuit Court of Nottoway County. Compulsory school attendance.
9. *Spangler, Fred M. v. Commonwealth.* From the Circuit Court of Botetourt County. Seduction.
10. *Travelers Health Association, et al v. Commonwealth, ex rel.* From the State Corporation Commission. Soliciting membership through the use of the United States mails.
11. *Williams, Raymond v. Commonwealth.* From the Circuit Court of the County of Surry. Burglary.

Cases Decided in the Supreme Court of Appeals of Virginia

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1. *Atlantic States Motor Lines, Inc. v. Commonwealth.* From State Corporation Commission. Motor Fuel Tax. Affirmed.
2. *American Cyanamid Company v. Commonwealth.* From Circuit Court of Nelson County, River pollution. Affirmed in part, reversed in part and final judgment.
3. *Bobo, Ernest v. Commonwealth.* From Circuit Court of Caroline County. Murder. Reversed and remanded.
4. *Bott, W. M. et als v. Commonwealth.* From Corporation Court City of Norfolk. Intangible property tax. Reversed and remanded.
5. *Carpenter, Walter v. Commonwealth.* From Circuit Court City of Hopewell. Unlawfully beating an infant child. Affirmed.
6. *Cox, George v. Commonwealth.* From Circuit Court of Scott County. Voluntary manslaughter. Affirmed.
7. *Crockett, Louis v. Commonwealth.* From Circuit Court of Middlesex County. Murder. Reargued Feb. 23, 1948. Reversed.
8. *Cottrell, Melvin v. Commonwealth.* From Circuit Court of Warwick County. Statutory rape. Affirmed.
9. *Crutchfield, Henry v. Commonwealth.* From Corporation Court City of Lynchburg. Unlawfully cutting and wounding with intent to maim, etc. Reversed and remanded.
10. *Cousins, Jacob v. Commonwealth.* From Circuit Court of Pittsylvania County. Murder. Writ Dismissed.
11. *Davis, Leonard E., v. Commonwealth.* From Hustings Court City of Richmond. Rape. Affirmed.

12. *Dickerson, Andrew v. Commonwealth.* From Circuit Court of Henrico County. Murder. Affirmed.
13. *Day, Grat, v. Commonwealth.* From Circuit Court of Buchanan County. Attempted rape. Reversed and dismissed.
14. *Famular, Frank Valentine, v Commonwealth.* From Hustings Court of City of Richmond. Kidnapping. Affirmed.
15. *Garner, Ralph H., v. Commonwealth.* From Circuit Court of Rockingham County. Murder. Reversed and remanded.
16. *Hackney, Montana v. Commonwealth.* From Circuit Court of Giles County. Disorderly conduct. Affirmed.
17. *Howell, Beulah, et als v. Commonwealth.* From Circuit Court of Norfolk County. Unlawful and malicious shooting. Affirmed.
18. *Howell, Arthur Rice, alias Jack J. Dillard, v. Commonwealth.* From Circuit Court of Westmoreland County. Statutory larceny. Affirmed.
19. *Haughey, James P. v. W. Frank Smyth, Jr. Superintendent Virginia State Penitentiary.* From Circuit Court City of Richmond. Habeas corpus. Affirmed.
20. *Jones, Johnnie, v. Commonwealth.* From Circuit Court City of Suffolk. Murder. Reversed and remanded.
21. *Jenkins, Harry Lee, etc. v. W. Frank Smyth, Jr., Superintendent Virginia State Penitentiary.* From Hustings Court City of Richmond. Habeas corpus. Affirmed.
22. *Kirk, Harvey O., v. Commonwealth.* From the Circuit Court of Wise County. Involuntary manslaughter. Reversed and remanded.
23. *Krummert, Clarence Fred, v. Commonwealth.* From Hustings Court City of Richmond. Kidnapping. Affirmed.
24. *Macon, Mary Louise Hundley v. Commonwealth.* From Circuit Court of Southampton County. Voluntary manslaughter. Reversed and remanded.
25. *McDorman, Daniel v. W. Frank Smyth, Jr., Superintendent, etc.* From Circuit Court of City of Richmond. Habeas Corpus.
26. *Natural Gas Company of Virginia, Inc. v. Commonwealth.* From Law and Equity Court of the City of Richmond. Merchant's license tax. Affirmed.
27. *Nicholas, Robert v. Commonwealth.* From Circuit Court of Cumberland County. Violation of A. B. C. Act. Reversed and remanded.
28. *Nicholas, Robert, v. Commonwealth.* From Circuit Court of Cumberland County. Contempt of court. Reversed and remanded.
29. *Newman, George A. v. Commonwealth.* From Corporation Court City of Norfolk, Part II. Violation of A. B. C. Act. Reversed and dismissed.
30. *Newman, George A., Owner, etc. v. Commonwealth.* From Corporation Court City of Norfolk. Forfeiture of automobile. Dismissed for failure to post bond.
31. *Owens, Abbott, v. Commonwealth.* From Corporation Court City of Norfolk, Part II. Grand Larceny. Reversed and remanded.
32. *Ossen, Joseph v. Commonwealth.* From Corporation Court City of Norfolk, Part II. Bribery. Reversed and remanded.
33. *Perkins, Albert Woodley, v. Commonwealth.* From Corporation Court City of Norfolk, Part II. Voluntary manslaughter. Reversed and remanded.
34. *Patterson, Sam D., etc. v. Commonwealth.* From Hustings Court City of Richmond. Forfeiture of automobile. Reversed and dismissed.
35. *Robinson, Augustine, v. Commonwealth.* From Circuit Court of Henrico County. Unlawful wounding. Affirmed.
36. *Richards, T. J., v. Commonwealth.* From Circuit Court of Augusta County. Selling beer without a license on the Sabbath. Affirmed.
37. *Saunders, Hammond v. Commonwealth.* From Corporation Court City of Norfolk. Pandering. Affirmed.
38. *Savage, H. E. Jr., etc. v. Commonwealth.* From State Corporation Commission. Road tax. Affirmed.

39. *Stonebreaker, Ralph v. W. Frank Smyth, Jr., Superintendent Virginia State Penitentiary.* From Corporation Court of Newport News and Circuit Court of Warwick County. Habeas corpus. Petitioner remanded to custody of Corporation Court of Newport News.
40. *Surratt, Luther v. Commonwealth.* From Circuit Court of Dickenson County Violation of A. B. C. Act. Affirmed.
41. *Taylor, Edward V., v. Commonwealth.* From Circuit Court of York County. Involuntary manslaughter. Affirmed.
42. *Taylor, Herman and Nathaniel Taylor v. Commonwealth.* From Circuit Court of Warwick County. Using violent and abusive language. Affirmed.
43. *Thomas, James v. Commonwealth.* From Circuit Court of County of Goochland. Murder. Affirmed. Case reheard January 5, 1948. Reversed and remanded.
44. *Taylor, Lottie E., v. Commonwealth.* From Circuit Court of Fairfax, County. Segregation. Reversed and final judgment.
45. *Valentine, Winnie v. Commonwealth.* From Corporation Court City of Norfolk. Involuntary manslaughter. Reversed and dismissed.
46. *Walton, W. J. v. Commonwealth.* From Circuit Court of Wise County. Violation of Virginia Embalmer's Act. Reversed and dismissed.

**Cases Decided in the Supreme
Court of the United States**

1. *Atlantic States Motor Lines, Inc. v. Commonwealth of Virginia.* On petition for writ of certiorari to the Supreme Court of Appeals of Virginia. Gasoline tax. Writ denied January 5, 1948.
2. *Haughey, James P. v. W. Frank Smyth, Jr., Supt. of Virginia State Penitentiary.* On petition for writ of certiorari to the Supreme Court of Appeals of Virginia. Habeas corpus. Writ denied June 15, 1948.

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

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1. *Stonebreaker, Ralph v. W. Frank Smyth, Jr., Supt of Virginia State Penitentiary...* Habeas corpus. Judgement of District Court affirmed.
2. *Washington, William v. W. Frank Smyth, Jr., Superintendent of Virginia State Penitentiary..* Habeas corpus. Judgment of District Court affirmed.
3. *Davis, Willie v. W. Frank Smyth, Jr., Superintendent of Virginia State Penitentiary.* Habeas corpus. Judgment of District Court affirmed.

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

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1. *Allen, Ashton Gunter v. Joyner, C. F. Jr., Commissioner.* Hustings Court of the City of Richmond. Appeal under the Virginia Safety Responsibility Act, Chapter 384, Acts of 1944. Relief partially granted, partially denied.
2. *Artis, George Washington v. Commonwealth of Virginia, ex rel C. F. Joyner, Jr., Commissioner of Motor Vehicles of Virginia.* Appeal under Virginia Safety Responsibility Act (Chapter 384, Acts of 1944). Judgment for the Commonwealth. Hustings Court for the City of Portsmouth.
3. *Baker, Paul F. Sr., v. Morton G. Goode, et al.* Circuit Court of City of Richmond. Taxpayers suit against the State. Demurrer sustained.
4. *Barnes, James v. W. Frank Smyth, Jr., Superintendent of the Virginia State Penitentiary.* Hustings Court of the City of Richmond, Part 11. Habeas Corpus. Petition dismissed. Writ discharged.

5. *Blount, Preston, alias Blunt, Junius, v. W. Frank Smith, Jr., Superintendent of the Virginia State Penitentiary.* Hustings Court of the city of Richmond, Part 11. Petitioner discharged.
6. *Bruce, Mrs. R. V. v. Combs, William I and C. F. Joyner, Jr., Motor Vehicle Commissioner of Virginia.* Attachment Circuit Court of Norfolk County. Dismissed as to the Motor Vehicle Commissioner.
7. *Butler, James T. v. Commonwealth of Virginia, ex rel C. F. Joyner, Jr., Commissioner of the Division of Motor Vehicles.* Appeal under the Virginia Safety Responsibility Act. Judgment for the Commonwealth—Circuit Court of Mecklenburg County.
8. *Caldwell, Silas Herman v. C. F. Joyner, Jr., Commissioner of the Division of Motor Vehicles.* Appeal under Virginia Safety Responsibility Act. Judgment in the Hustings Court of the City of Roanoke for the Commissioner of the Division of Motor Vehicles.
9. *Cities Service Oil Company v. Commonwealth of Virginia, ex rel C. F. Joyner, Jr., Commissioner of the Division of Motor Vehicles.* To collect refund of motor fuel tax. Judgment for the Commonwealth—refund denied—Circuit Court of the City of Richmond.
10. *Cobb, W. W., Trading as Cobb Frozen Food Locker Plant v. Commonwealth of Virginia.* In the Circuit Court of Nansemond County. License tax. Relief denied.
11. *Commonwealth of Virginia, ex rel C. F. Joyner, Jr., Commissioner of Motor Vehicles, v. Charles K. Bolick and Mary L. Bolick.* Proceedings to collect motor fuel tax. Payment secured—action dismissed. Circuit Court of the City of Richmond.
12. *Commonwealth of Virginia, ex rel State Comptroller v. James Dixon, Kelley Auto Service, et als.* Attachment. Collection made. Trial Justice Court of Henrico and Circuit Court of the City of Richmond.
13. *Commonwealth of Virginia v. Leroy Franklin.* Appeal under Virginia Safety Responsibility Act. (Chapter 384, Acts of 1944) Dismissed. Revocation order confirmed. Circuit Court of Frederick County.
14. *Commonwealth of Virginia, ex rel C. F. Joyner, Jr., Commissioner Division of Motor Vehicles, v. H. A. McGuire, t/a Mac's Truck Center.* Judgment for Motor Fuel tax. Circuit Court of City of Richmond. Commonwealth intervened as a party in suit of A. W. Murden, et als. v. H. A. McGuire, t/a Mac's Truck Center, pending in the Circuit Court of Shenandoah County.
15. *Commonwealth of Virginia v. William Earnest Motley.* Appeal under Safety Responsibility Act. Appeal dismissed. Corporation Court of the City of Norfolk.
16. *Commonwealth of Virginia v. Benjamin Rhyne Wood.* Hustings Court of City of Richmond. Judgment for Commonwealth. Convicted under Virginia Safety Responsibility Act. Writ of error refused by Supreme Court of Appeals.
17. *Commonwealth v. The Turf Club, et al.* Law and Equity Court, Part 11 of the City of Richmond. Conducting a nuisance. Injunction granted.
18. *Cortland Equipment Lessors, Inc., v. C. F. Joyner, Jr., Commissioner of the Division of Motor Vehicles.* Mandamus (License fees) Judgment for petitioner. Petition for writ of error from the Circuit Court of the City of Richmond. Writ refused by Supreme Court of Appeals, October 14, 1947.
19. *Crater, C. A. v. Commonwealth of Virginia, ex rel C. F. Joyner, Jr., Commissioner of Division of Motor Vehicles.* Corporation Court No 1. of the City of Norfolk. Appeal from the action of the Commissioner in refusing to issue automobile dealer's license. Appeal withdrawn.
20. *Critzer, Roy v. Commonwealth of Virginia, ex rel C. F. Joyner, Jr., Commissioner of the Division of Motor Vehicles.* Petition for appeal under the Virginia Safety Responsibility Act. Judgment for the Commissioner, Corporation Court Part 1, City of Norfolk.

21. *Dawson, Claude v. M. L. Royster, Superintendent of the Virginia State Farm.* Circuit Court of Goochland County. Habeas Corpus. Petition Dismissed. Writ discharged.
22. *Doolin, Hugh Stanley v. C. F. Joyner, Jr., Motor Vehicle Commissioner.* Corporation Court of Danville. Appeal under Safety Responsibility Act (Chapter 384, Acts of 1944). Appeal withdrawn and dismissed.
23. *Downing, Robert Henry v. C. F. Joyner, Jr., Commissioner Division of Motor Vehicles of Virginia.* Appeal under Virginia Safety Responsibility Act (Chapter 384, Acts of 1944), Corporation Court of the City of Charlottesville. Pending.
24. *Eller, Robert Miles v. Director of the Division of Motor Vehicles.* Appeal under Virginia Safety Responsibility Act (Chapter 384, Acts of 1944). Dismissed. Circuit Court of the City of Clifton Forge.
25. *Foster, Harold v. C. F. Joyner, Jr., Commissioner of the Division of Motor Vehicles.* Appeal under Safety Responsibility Act. (Chapter 384, Acts of 1944). Relief granted and revocation order vacated. Circuit Court of Elizabeth City County.
26. *Godwin, Charles v. W. Frank Smyth, Jr., Superintendent of the Virginia State Penitentiary.* Hustings Court of the City of Richmond, Part 11. Habeas Corpus. Decision Pending.
27. *Griggs, Horace Edward v. W. Frank Smyth, Jr., Superintendent of the Virginia State Penitentiary.* Law and Equity Court of the City of Richmond. Habeas Corpus. Petition dismissed. Writ Discharged.
28. *Hall, Harry Edward v. C. F. Joyner, Jr., Commissioner of Division of Motor Vehicles.* Appeal under Safety Responsibility Act. Error confessed on part of Defendant. Revocation order withdrawn. Corporation Court of the City of Alexandria.
29. *Hayes, Robert E. v. C. F. Joyner, Jr., Commissioner of Motor Vehicles of Virginia, et al.* Appeal under Safety Responsibility Act. Circuit Court of Wise County. Pending.
30. *Hill, John W. v. W. Frank Smyth, Jr., Superintendent of the Virginia State Penitentiary.* Hustings Court of the City of Richmond, Part 11. Habeas Corpus. Petition dismissed, Writ discharged.
31. *Johns, Mary Davis, et als, v. Commonwealth.* Chancery Court of the City of Richmond. Inheritance Tax. Relief denied.
32. *Kirk, William v. Brantner Sawyer and C. F. Joyner, Jr., Commissioner of Motor Vehicles, co-defendant.* Attachment. Pending. Circuit Court of Nansemond County.
33. *McDorman, Daniel v. W. Frank Smyth, Jr., Superintendent of the Virginia State Penitentiary.* Circuit Court of the City of Richmond. Habeas Corpus. Petition Dismissed. Writ Discharged.
34. *Miller, James v. C. F. Joyner, Jr., Commissioner Division of Motor Vehicles.* Appeal under Safety Responsibility Act. Relief granted. Mistaken identity. Corporation Court of City of Norfolk.
35. *Mize, Harold E. v. W. Frank Smyth, Jr., Superintendent of the Virginia State Penitentiary.* Circuit Court of Fluvanna County. Habeas Corpus. Decision pending.
36. *Norvell, John N. Administrator v. Commonwealth of Virginia, et als.* Chancery Court of the City of Richmond. Recovery by State of property derelict. Pending.
37. *Penn, John Henry v. W. Frank Smyth, Jr., Superintendent of the Virginia State Penitentiary.* Hustings Court of the City of Richmond, Part II Habeas Corpus. Petition Dismissed. Writ discharged.
38. *Re: Application for Relief from Inheritance Taxes assessed against the Estate of Whiteford K. Fitzsimons.* Circuit Court of Arlington County. Petition pending.

39. *Secrist, David Roland v. C. F. Joyner, Jr., Commissioner, of the Division of Motor Vehicles, et al.*. Suit to declare order of revocation null and void. Pending. Hustings Court of the City of Roanoke.
40. *Smith, Thomas Jefferson, v. Commonwealth of Virginia, ex rel C. F. Joyner, Jr., Commissioner of Motor Vehicles of Virginia.* Appeal under Safety Responsibility Act. Appeal dismissed.
41. *State Planters Bank and Trust Company, Executor v. Charles Curtis Thompson, et als.* Chancery Court of the City of Richmond. Deductions from gross estate in computing the Federal Estate Tax. Pending.
42. *Stone, Irving L. v. C. F. Joyner, Jr., Commissioner of Motor Vehicles, et al.* Appeal under Safety Responsibility Act. Relief partially granted. Circuit Court of the County of Roanoke.
43. *Teasley, Junius v. W. Frank Smyth, Jr., Superintendent of the Virginia State Penitentiary.* Hustings Court of the City of Richmond. Part 11. Habeas Corpus. Petitioner discharged.
44. *Waterfield, Eugene v. W. Frank Smyth, Jr., Superintendent of the Virginia State Penitentiary.* Hustings Court of the City of Richmond, Part 11. Habeas Corpus. Petition dismissed, Writ discharged.
45. *White, Wallace v. Commonwealth of Virginia, ex rel C. F. Joyner, Jr., Commissioner of the Division of Motor Vehicles.* Appeal under Safety Responsibility Act. Dismissed. Circuit Court of Fairfax County.

OPINIONS

AGRICULTURE AND IMMIGRATION—Reports of Audits by Certain Associations for the Use by State Officials are Not Open to Inspection by Interested Parties.

September 30, 1947

HONORABLE J. H. MEEK, *Director*
Division of Markets,
1030 State Office Building,
Richmond, Virginia.

My dear Mr. Meek:

In your letter of September 26 you ask if audits filed by Southern States Cooperative, Incorporated, in compliance with Section 1265 (19) of the Virginia Code, are open to inspection by interested parties.

In your letter you quote the first part of this section. The rest as follows:

"* * * The Director of the Division of Markets with the approval of the Commissioner of Agriculture and Immigration and the Board of Agriculture and Immigration shall report to the Attorney General any violation of the provisions of this act by any association, and the Attorney General shall thereupon institute appropriate proceedings against any such association if in his opinion such proceedings are justified.

"A written report of the audit, including a statement of services rendered by the association with total amount of business transacted and balance sheet, income and expenses, salaries of officers, directors, managers and administrative personnel and other proper information, shall be submitted to the annual meeting of the members of the association."

It is my opinion that these annual reports as required by this section are for the Director of the Division of Markets and the Commissioner of Agriculture. The purpose appears to be to give these State officials certain information as to the operation of the association and to provide a means whereby it can be determined if the provisions of the Cooperative Marketing Act are being complied with.

You will note that the statute also provides that a written report of the audit shall be submitted to the annual meeting of the members of the association. Inasmuch as the statute does not declare these audits to be subject to inspection by interested parties, and as the purpose appears to be to keep officials informed as indicated above, it is my opinion that they are not to be records subject to inspection by interested parties.

With best wishes, I am

Very truly yours,

ABRAM P. STAPLES,

APPROPRIATION ACT—Legality of transfer of Funds from One Item in the Act to Another is Dependent Upon the Relationship of the Object of the Two Items.

December 31, 1947

DR. JOSEPH E. BARRETT, *Commissioner*
Department of Mental Hygiene and Hospitals.
309 North 12th Street,
Richmond 19, Virginia.

My dear Doctor Barrett:

In your letter of December 18, 1947, you ask whether you can legally transfer funds from one item to another item appropriated to the State Hospital Board by the Appropriation Act of 1946. The appropriation to the State Hospital Board is limited to two items, Item 364 and Item 365.

Item 364 is for the general supervision, administration and control of the several State hospitals, while Item 365 is for clinical library and engineering field service. Funds appropriated for Item 364 are running short, and you wish to transfer \$4,000.00 from Item 365 to Item 364.

Section 58 of the Appropriation Act, on page 945 of the Acts of Assembly of 1946, provides, in part, as follows:

"* * * provided, however, that the several appropriations made by this act may not only be used for the purposes specified in this act, but authority is hereby given to the governing board of any State department, institution or other agency, or, if there be no governing board, to the head of such department, institution or other agency named in this act, to transfer, within the respective department, institution or other agency, any such appropriations from the object for which specifically appropriated or set aside to some other object definitely and closely related to the object for which the appropriation was made, and provided an appropriation is also made by this Act to said related object, and provided also that, in the opinion of the Governor and department head, later developments have rendered such transfer appropriate to carry out the original intention of the General Assembly in making this appropriation, subject, however, in every case, to the consent and approval of the Governor, in writing, first obtained; and provided, that the total amount appropriated to the respective department, institution or other agency shall in no case be exceeded, * * *."

Therefore, the legality of a transfer of funds from Item 365 to Item 364 depends upon whether the object of the appropriation in the one item is definitely and closely related to the object for which the appropriation in the other item is made. It appears to me that there may be a definite and close relationship between the objects of the appropriation in these two items, and if this be so, then you may legally make the contemplated transfer of funds in the manner prescribed by section 58.

With best wishes, I am

Yours very truly,

HARVEY B. APPERSON,
Attorney General.

ATTORNEYS AT LAW—Collection Agency not Permitted to Employ Attorney for Customer.

August 19, 1947

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

Dear Mr. Massie:

This is in reply to your letter of August 18, 1947, from which I quote:

"Under the statutes regulating the practice of law, particularly relating to the collection of accounts, I understand that a creditor who employs a collection agent, not a practicing attorney may give his agent power of attorney to employ a lawyer for him (the creditor) to handle the matter in court when legal proceedings are necessary, and that the attorney employed under the power of attorney may represent the creditor in court.
"Please let me know if this is correct."

I call your attention to the case of *Richmond Association of Credit Men, Incorporated, vs. The Bar Association of the City of Richmond, et als*, 167 Va. 327, in which the Supreme Court of Appeals of Virginia held that the Credit Association, which operated under an arrangement similar to that stated in your letter, was engaged in the illegal practice of law. The basis of the court's decision was that the Credit Association was soliciting business and was controlling the employment of the attorney to bring suit when this was necessary to collect the claims.

The question you ask would depend upon all of the facts and circumstances surrounding the arrangement with the collection agent. If his activities are such as are discussed in the above case, they would constitute the illegal practice of law. The opinion in that case is lengthy and I am unable to set forth in this letter all of the facts of that case or the reasons of the court. I refer you to the opinion of the court for a full discussion of this matter.

With best wishes, I am

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ATTORNEY GENERAL—Not Authorized to Comply with House Resolution Directing an Investigation.

April 23, 1948

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

My dear Colonel Dodson:

The Attorney General is in receipt of a copy of House Resolution No. 22, approved by the House of Delegates on March 13, 1948, wherein the Attorney General is directed to investigate the practices and policies of Richmond Newspapers, Incorporated with a view to determining whether or not such corporation is engaged in monopolistic practices. If a monopoly be found to exist, the Attorney General is directed to proceed in the manner provided by law.

The extent of the authority of this office to conduct such an investigation is a matter of primary importance. Such authority, if it be found to exist, must be found in the authority expressly conferred upon the Attorney General by the Constitution and statutes of Virginia, in the powers attached to the office at common law, or in House Resolution No. 22.

The Constitution of Virginia, in section 107, provides for the election of an Attorney General, and further provides that he shall " * * * perform such duties * * * as may be prescribed by law, * * *."

The duties of the Attorney General, as prescribed by statute, are set forth in Section 374a of the Virginia Code. Upon an examination of that section, I am unable to find any authority for the Attorney General to undertake this investigation. Subsection 6 of this section, applying to criminal cases, expressly states that:

"Unless specifically requested by the Governor so to do, the Attorney General shall have no authority to institute or conduct criminal prosecutions in the circuit or corporation courts of the State * * *."

Certain exceptions mentioned are not applicable. In so far as this resolution contemplates criminal action, the above quoted subsection clearly forbids it.

Section 4722 (15) provides under what conditions and impetus the Attorney General shall take legal action in regard to trusts, monopolies and combinations. I quote below this section in full:

"Whenever affidavits of fifty or more citizens of the Commonwealth shall be submitted to the attorney-general alleging a violation or violations of the provisions of this act upon the part of citizens of two or more counties, or of a city and one or more counties, or whenever the governor shall request such action, it shall be the duty of the attorney-general to file a bill for an injunction against the alleged violators thereof in the circuit court of the city of Richmond, which shall have jurisdiction to summon the defendants and try the issues involved as though such defendants were citizens of the city of Richmond, and may issue injunctions pendente lite or permanent injunctions for the purpose of enforcing the provisions of this act."

This section, when considered with other sections in the same code chapter providing additional means for the enforcement of the laws against trusts, combinations and monopolies, appears to me to limit whatever common law duty and authority the Attorney General might otherwise have in this respect.

There remains only House Resolution No. 22 to be considered. The duties of the Attorney General, being limited to those duties prescribed by law, the question arises as to whether House Resolution No. 22 has the force of law. Clearly, it does not. The manner of enacting laws is set forth in Section 50 of the Virginia Constitution in clear, unambiguous language. I am unable to find any provision in the State Constitution or the Virginia Code authorizing the House of Delegates, by a resolution, to direct the Attorney General to make an investigation of the nature contemplated by House Resolution No. 22. Furthermore, as indicated, this resolution is in conflict with the two sections of the Virginia Code quoted above.

I am, therefore, of the opinion that the Attorney General is without authority to comply with the direction of House Resolution No. 22.

Yours very truly,

J. LINDSAY ALMOND, JR.,
Attorney General.

AUDITOR OF PUBLIC ACCOUNTS—Salary of—Can be increased after Constitutional Prohibition is Removed.

August 22, 1947

HONORABLE J. GORDON BENNETT,
Auditor of Public Accounts,
Richmond 10, Virginia.

Dear Mr. Bennett:

I have your letter of August 20, which is as follows:

"The General Assembly in regular session of 1946 included in the Appropriation Bill item 391½ providing for increases in the salaries of the officers and employees of the State government, effective as of July 1, 1946. According to my interpretation of this item of the Appropriation Act, the rate of pay provided for the position of Auditor of Public Accounts was increased in the same proportion as that of other State officers and employees, as provided for by the item of the Appropriation Bill. However, because of the Constitutional provisions with respect to the auditor receiving an increase in salary during his term of office, I have been unable to receive the increase provided by the Appropriation Bill.

"The new term of the Auditor of Public Accounts begins on March 1, 1948 and, as I interpret the item of the Appropriation Bill, the auditor would be entitled to the increase provided by the formula included in the item and commonly referred to as the 'Tuck formula' as of that date. Will you advise me if you concur with this interpretation. This information is needed in order that the proper salary for the Auditor of Public Accounts may be shown in the budget request to the Governor for the next biennium and which has to be sent to him by September 15th."

I concur in the views which you express concerning the interpretation of the provisions contained in Item 391½. In my opinion, the effect of the provision is to increase the salary of the office of Auditor of Public Accounts at such time during the biennium as the prohibitions of the Constitution against the increase of the salary of an Auditor during his term of office are removed.

It is my view, therefore, that on March 1, 1948, the date of the beginning of a new term of the Auditor of Public Accounts, the increase of the salary of that office as provided in Item 391½ will become effective.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

AVIATION—State Corporation Commission has no Authority to Abate Nuisance Resulting from Noise Made by Airplanes. Circuit Court Would have Such Jurisdiction.

December 4, 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 December 2, in which you state that a group of citizens who live in homes located near an airport have complained of noise and are concerned about the fact that the planes are operated at a very

low altitude in landing and taking off. You desire my opinion as to whether the State Corporation Commission would have jurisdiction over a complaint of this nature under the provisions of section 3775-o, Chapter 445, Acts of Assembly of 1936 (section 3775-n of the Code, Michie 1942).

The above named Act provides that the State Corporation Commission shall have jurisdiction over the establishment, maintenance and operation of any airport or landing field and shall govern the licensing of airplanes, pilots, mechanics, et cetera and supervise the same.

It is my opinion that the State Corporation Commission is concerned only with the safe operation of airports and airplanes and the regulations governing them and, therefore, has no jurisdiction to hear complaints of citizens concerning planes flying near their homes upon taking off and landing.

I might add that the case of *Batcheller v. Commonwealth*, 176 Va. 109, 10 S. E. (2d) 529, discusses "aviation and nuisances" to some extent, and I suggest that the Circuit Court would have jurisdiction to hear the complaints of the citizens in question.

Very sincerely yours,

HARVEY B. APPERSON,
Attorney General.

BOARD OF SUPERVISORS—A Member Thereof Having no Financial Interest in Corporation, although a Director, is not Disqualified in Voting on Zoning Application Filed by Corporation.

December 11, 1947

HONORABLE BURNS N. GIBSON,
Member of the Board of Supervisors,
Fairfax County,
P. O. Box 931,
Alexandria, Virginia.

My dear Mr. Gibson:

This is in reply to your letter of December 2, in which you present the following question: You are a member of the Fairfax County Board of Supervisors, which Board will be called upon to pass on the zoning application by the Mount Comfort Cemetery, Incorporated. The purpose of the application is to obtain permission to use additional grounds owned by the Corporation for cemetery purposes. You are also a member of the Board of Directors of this corporation, which is a non-profit, non-stock corporation. You have no financial interest in the corporation in any way, nor do you have any contractual arrangement with the corporation except that you do receive a fee for attending directors' meetings. You ask whether under these circumstances you are qualified to sit in on the deliberation of the zoning application and vote when the matter is presented to the Board of Supervisors.

It is my opinion that you are not disqualified from voting on this matter when it is presented to the Board of Supervisors. Section 2707 of the Code of Virginia provides:

"No supervisors * * * shall become interested, directly or indirectly, in any contract, or in the profits of any contract, made * * * on behalf of the supervisors * * *."

It is my opinion that this section does not cover the situation presented by you, nor am I advised of any other Code section or any other provision of law which would disqualify you from voting in this matter.

The question of what interest will disqualify a city councilman from voting

on a matter before the council is discussed in Revised Vol. 2 of McQuillin on Municipal Corporations, Section 629. Many cases are cited in which the councilman's interest was held not to be a disqualifying interest, and it appears to me that the situation presented by you is similar to those cases.

With best wishes, I am

Yours very truly,

HARVEY B. APPERSON,
Attorney General.

BOARD OF SUPERVISORS—Has Authority to Use Portion of Court House Green for Erection of Community Hall Provided More Than Two Acres are Available.

August 12, 1947

HONORABLE GILBERT L. DIGGS,
Commonwealth's Attorney for Mathews County,
Mathews, Virginia.

My dear Mr. Diggs:

This is in reply to your letter of August 11, 1947, in which you request my opinion as to whether or not the Board of Supervisors of your county may authorize any part of the Court House Green to be used for the erection of a community hall and recreation center as a memorial to deceased members of the armed forces of Mathews County who served in the late war.

I am unable to answer your question without having information as to the amount of land owned by the county and used as a Court House Green. I call your attention to section 2854 of the Code of Virginia, which in effect provides that the Board of Supervisors of a county shall acquire land for a Court House, Clerk's Office and Jail to the extent of two acres and any surplus thereof which is not needed for this purpose shall be planted with trees and kept as a place for the people of the county to meet and confer together. This provision was held mandatory in the case of *County of Alleghany v Parrish*, 93 Va. 615. You will note that section 2854 authorizes Boards of Supervisors to acquire additional land to be used for other county purposes. In my opinion, the purpose you mentioned in your letter is an appropriate one and, if the county has more than two acres of land available, it would seem that the Board could authorize a portion of the same to be used for this purpose.

With best wishes, I am

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BOARDS OF SUPERVISORS—Of Certain Counties May Supplement Salary of Circuit Court Judge.

November 7, 1947.

HONORABLE HAROLD M. RATCLIFFE,
Attorney for the Commonwealth,
402-3-4 Travelers Building,
Richmond, Virginia.

My dear Mr. Ratcliffe:

This is in reply to your letter of November 5 in which you ask my opinion

as to whether the County of Henrico has the authority to supplement the salary of the Judge of the Circuit Court of Henrico County.

Chapter 389 of the Acts of Assembly of 1942 amended and re-enacted Chapter 69 of the Acts of Assembly of 1932 (found as section 2743b of the Code) and conferred certain powers on boards of supervisors of certain counties. The pertinent part of this chapter is as follows:

"Section 1. The Boards of supervisors of counties adjoining and abutting any city within or without this State, having a population of one hundred and twenty-five thousand or more, as shown by the last preceding United States census, * * * are hereby vested with the same powers and authority as are now vested or which may hereafter be vested in the councils of cities and towns by virtue of the Constitution of the State of Virginia or the acts of the General Assembly passed or which may hereafter be passed, in pursuance thereof; * * *."

As you know, section 3469 of the Code authorizes any city, by ordinance, to increase the salary of its circuit judge. Therefore, it is my opinion that since the County of Henrico adjoins the City of Richmond its board of supervisors has the authority to supplement the salary of the judge of its Circuit Court.

With kindest regards,

Very truly yours,

HARVEY B. APPERSON,
Attorney General.

BOARD OF SUPERVISORS—Have no Authority to Use General fund of County for Secondary Road Construction.

HIGHWAYS—Boards of Supervisors cannot Appropriate Money in General Fund for Road Construction.

May 27, 1948.

HONORABLE JOHN H. DANIEL, *Member*
House of Delegates,
Charlotte Court House, Virginia.

My dear Mr. Daniel:

This will acknowledge receipt of your letter of May 15, 1948, which I quote as follows:

"We have a matter in Charlotte County which I would like to have your office clarify for me.

"There seems to be a difference of opinion on the part of several of our local attorneys as to the legality of the Board of Supervisors of the County making appropriations from the General Fund of the County for secondary road construction.

"I will very much appreciate your early opinion on the subject matter of this letter."

The secondary system of highways was created by the Acts of the General Assembly of 1932, page 872, and was amended in minor detail by the General Assembly of 1936 and 1940. However, such amendments do not effect the question presented in your letter.

The Acts of the General Assembly of 1932 pertinent to your inquiry are

carried in Michie's 1942 Code as sections 1975hh, 1975ii and 1975jj. It will be seen by the first mentioned section that the secondary system of State highways is created and established consisting of all public roads, causeways, bridges, landings and wharves in the several counties in the State, as of March 1, 1932.

Section 1975ii pertains to the control, supervision, management and jurisdiction of the roads in the secondary system of State highways, and provides that the same shall be vested in the Department of Highways of the Commonwealth of Virginia, and the maintenance and improvement, including construction and reconstruction, shall be by the State under the supervision of the State Highway Commissioner; and further provides that the Boards of Supervisors of the several counties shall be relieved of the control, supervision, management and jurisdiction.

I quote the pertinent part of section 1975jj as follows:

"The boards of supervisors of the several counties shall not make any levy in nineteen hundred and thirty-two or in any year thereafter of county or district road taxes or contract any further indebtedness for the construction, maintenance, or improvement of roads, and any levy heretofore or hereafter made for the year nineteen hundred and thirty-two of county or district road taxes in any county not withdrawing from the operation of this act under section eleven thereof is hereby invalidated; * * *."

This section provides for certain exceptions which are not herein enumerated because the exceptions are not applicable to the County of Charlotte.

This question was presented before the Supreme Court of Appeals of Virginia in the annexation case of *Henrico County v. City of Richmond*, 177 Va. page 754. I quote from Title 30 of the Syllabus of this case as follows:

"The manifest purpose of the Act of 1932, sections 1975hh, *et seq.*, of the Code of 1936, providing for a system of secondary highways, was to relieve the county taxpayer of the cost of construction and maintenance of the county roads."

It would seem from the language of the statutes herein referred to and the construction placed upon the same by the Supreme Court of Appeals of Virginia that counties are not only relieved but prohibited, except in certain instances not here applicable, from making a levy for road purposes.

I am, therefore, of the opinion that the Board of Supervisors of Charlotte County cannot legally make an appropriation from the General Fund of the County for secondary road construction.

Sincerely yours,

J. LINDSAY ALMOND, JR.,
Attorney General.

BOARD OF SUPERVISORS—Member of Board of Supervisors can not Legally Sell Supplies to Sheriff to be Used in Feeding Prisoners.

April 1, 1948.

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 23, 1948, in which you ask whether or not a member of the Board of Supervisors, who owns and operates a

grocery store, can legally sell groceries to the sheriff of his county to be used in feeding the prisoners in the county jail.

Section 2707 of the Code provides that no supervisor shall become interested, directly or indirectly, in any contract or in the profits of any contract made by or with any officer, agent or person acting on behalf of the Board of Supervisors, or in the sale or furnishing of supplies or materials to such county.

Section 8 of Chapter 386 of the Acts of 1942, placing sheriffs and sergeants on a salary basis, provides that sheriffs and sergeants shall continue to perform all the duties required of them by law with reference to feeding and caring for prisoners in jail. Subsection (b) of this section provides that the officers shall purchase all foodstuffs and other provisions used in the feeding of jail prisoners and submit itemized invoices for such purchases to the Board of Supervisors. The Board of Supervisors then, under section 9 of the Act, passes on the invoices and, if they are found to be correct, orders such invoices to be paid out of county funds. Subsection (b) of section 9 then provides to what extent the Commonwealth shall reimburse the county.

In my opinion, it is clear that the sheriff, in purchasing food for the prisoners, acts as an agent or officer of the county and is purchasing supplies which have to be paid for by the county. In view of section 2707 of the Code, it is clear that a member of the Board of Supervisors cannot legally sell such supplies to the sheriff.

With further reference to your letter, I call your attention to the provision of section 2707 which provides that "the amount embraced by any such contract, the value of any such supplies or materials and the amount of any such claim shall never be paid; or, if paid, may be recovered back, with interest, by the county, in the circuit court of the county, by action or motion, within two years from the payment."

Very truly yours,

WALTER E. ROGERS,
Assistant Attorney General.

BOARD OF SUPERVISORS—No Authority to Appropriate County Funds for Town Project and to Convey Lot Resulting in the Diminution of Court House Tract to Less Than Two Acres.

October 23, 1947.

HONORABLE CHESTER J. STAFFORD,
Commonwealth's Attorney for Giles County,
Pearisburg, Virginia.

My dear Mr. Stafford:

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

"I am writing to ask if the Board of Supervisors of Giles County has the authority to transfer a part of the Court House square to the town of Pearisburg for the town to build a community building and whether the Board of Supervisors can make an appropriation to the town of Pearisburg and to the other towns of the county of funds for the construction of community buildings. If the lot in question is conveyed to the town, it will leave less than two acres in the Court House square, and I wonder if this would violate section 2854 of the Code."

Section 2854 of the Code provides that the Board of Supervisors may purchase so much land as will make two acres and such land shall be occupied by

the court house, clerk's office and jail, and the residue planted in trees and used as a meeting place for the people of the county.

In *Alleghany v. Parrish*, 93 Va. 615, 25 S. E. 882, the Court held that the above section was mandatory; therefore, it would appear that the Board of Supervisors could not convey the lot in question if it left less than two acres in the Court House square.

In answer to your second question, I can find no statute which gives to the Board of Supervisors of Giles County the authority to appropriate county funds to the town of Pearisburg or to other towns in the county for the construction of a community building.

Very sincerely yours,

HARVEY B. APPERSON,
Attorney General.

BOARD OF SUPERVISORS—May Invest Funds in Bonds of the United States During Period of War.

October 14, 1947.

HONORABLE R. A. EDWARDS, *Clerk*
Circuit Court of Isle of Wight County,
Isle of Wight, Virginia.

My dear Mr. Edwards:

This is in reply to your letter of October 10, 1947, in which you inquire whether Chapter 15 of the Acts of the General Assembly approved at the extra session on October 5, 1942, is still in force. As you know, this Act 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 invest certain funds available in the purchase of bonds of the United States of America or of the State or any political subdivision thereof.

Inasmuch as the President has never declared that the state of war has terminated, it is my opinion that this Act is still in force.

With best wishes, I am

Very truly yours,

HARVEY B. APPERSON,
Attorney General.

BOARD OF SUPERVISORS—No Authority to Bind County to Pay Obligations Payable Beyond Termination of Current Fiscal Year.

March 18, 1948

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

My dear Mr. Higginbotham:

The delay in answering your letter of February 25 has been due to the large volume of work in this office in the past few weeks.

You desire to know whether or not the present Board of Supervisors or future Boards will be bound by the following resolution passed at a meeting of the Board of Supervisors of Orange County on April 8, 1947:

"On motion of James T. Payne seconded by W. T. Woolfolk be it RESOLVED; That, in the event sufficient funds to erect the proposed Memorial Building are not raised by private subscription or otherwise, the County of Orange pay the deficit, such payment, however, not to exceed the sum of Forty Thousand Dollars (\$40,000.00) and to be paid within 8 years next ensuing, in the amounts, manner and times to be decided upon by this Board."

Section 115a of the Constitution provides in substance that no county shall contract any debt except to meet casual deficits in the revenue, or in the anticipation of the collection of revenues for the current year, or to redeem a previous liability, unless made subject to a referendum.

In the case of *American-La France, Etc. Inc. v. Arlington County*, 164 Va. 1, 178 S. E. 783, the Supreme Court of Appeals held that the above constitutional provision applies not only to actual borrowing of money, but to the contraction of other debts payable in the future.

An approval by a majority of the citizens voting on the question properly submitted to them is necessary before a Board of Supervisors may create obligations for any purpose payable beyond the termination of the current fiscal year; therefore, it is my opinion that neither the present Board nor any future Board is bound by the resolution set forth above.

Very sincerely yours,

WALTER E. ROGERS,
Assistant Attorney General.

BOARD OF SUPERVISORS—No Authority to Contribute to cost of Street Lights Limited to Certain Counties.

EXTRADITION—For Desertion and Non-Support—After indictment in Corporation Court.

August 14, 1947.

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

My dear Mr. Johnson:

This is in reply to your letter of August 6, 1947, in which you request my opinion as to whether the Board of Supervisors of Isle of Wight County may make an appropriation to the Community Current Club of Zuni to aid in paying the cost of providing street lights in the village of Zuni.

Section 2742b of the Code of Virginia (Michie, 1942) expressly authorizes the Boards of Supervisors of counties "adjoining and abutting a city with a population of 25,000 or more inhabitants" to install and maintain street and highway lighting systems in the villages and built-up portions of such counties. I find no specific statute authorizing the Boards of Supervisors of other counties to expend funds for this purpose.

In the absence of such a statute as this it would seem that authority to provide such a lighting system might be predicated upon the general welfare clause of section 2743. Since, however, the Legislature has expressly dealt with the subject in section 2742b and in doing so has confined the grant of such authority to counties adjoining or abutting large cities, it is my opinion that the authority of the Boards of Supervisors of other counties to expend funds for this purpose is extremely doubtful. In any event, I think that any contract the county may make for this service should be directly with the utility rather than by way of an appropriation to the unincorporated organization of citizens known as the

Community Current Club of Zuni. The Club could make a contribution to the support of this project, but I think it would be improper for the Board to appropriate funds to this agency to be expended without direct control by the county.

The second question you ask deals with the extradition proceedings you contemplate bringing against an individual who has left this State after deserting and failing to support his infant children. You refer to sections 1937 and 1937c of the 1946 Supplement to the Code and ask if an individual can be indicted by the grand jury of the county circuit court.

Section 1937c provides that in counties and cities having them the juvenile and domestic relations court shall have exclusive original jurisdiction in all cases arising under chapter 80 of the Code. It provides, however, that in any case wherein the defendant is a fugitive from the State the grand jury of a corporation court may indict for desertion and non-support. No provision is made for indictment by the grand jury of the circuit court of a county. I agree with you that there seems to be no reason why a corporation court grand jury should have the power to indict while the grand jury of the circuit court of the county does not. However, in view of the language of the statute, I do not think that you should proceed by having the grand jury of the circuit court indict.

I call your attention to the fact that in cases of desertion and non-support a certificate of the judge of the juvenile and domestic relations court to the effect that he is of the opinion that the charge is well founded and the case is a proper one for extradition is required by the Governor's office to support an application for requisition. See page 15 of the pamphlet issued by the Governor's office on "Applications for requisitions for fugitives from justice". In view of this requirement, I think it would be just as satisfactory for you to proceed originally in the juvenile and domestic relations court and base your application on a warrant based upon the petition required to be filed by section 1937 of the Code.

With best wishes, I am

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BOARD OF SUPERVISORS—No Authority to Pay Clerk of Trial Justice Court a Salary.

July 31, 1947.

HONORABLE C. R. WOOD,
Treasurer of Rappahannock County,
Washington, Virginia.

My dear Mr. Wood:

This has reference to your letter of July 25, 1947, in which you ask if the Board of Supervisors of Rappahannock County has the authority to make a payment of fifty dollars a month to the clerk of the trial justice court of that county.

Section 4987g of the Virginia Code reads in part as follows:

"Any trial Justice in the counties of Virginia may appoint a clerk * * * who shall hold office at the pleasure of such trial justice, and shall receive such salary as may be fixed by the committee.

* * * * *

"Such clerk, deputy clerk or substitute clerk shall receive no compensation for his services other than the salary above provided. * * *"

The committee which is referred to as fixing the clerk's salary is the committee of three circuit court judges appointed by the Governor to fix the salaries of trial justices and their assistants under section 4987e. It seems clear that section 4987g prevents the clerk of the trial justice court from receiving any compensation from any other source. It follows that the Board of Supervisors has no authority to authorize the payment of fifty dollars per month to such clerk.

You also ask whether you or your bondsman would be liable if the Board of Supervisors does authorize such payment and you pay the warrant issued by them.

Section 350, paragraph j, of the Tax Code provides that county money shall be disbursed "only upon checks signed by the county treasurer and drawn in payment of legally issued and properly drawn orders or warrants." In the case of *Leachman v. Board of Supervisors*, 124 Va. 616, the Court of Appeals held that, while a county treasurer "cannot refuse to pay claims for which warrants have been legally issued simply because he thinks they are not just or lawful," the treasurer is liable if he pays a claim for which no legal warrant has been issued. By legal issue, the Court seems to mean that the procedure in the Board of Supervisors was according to law.

In your case, if the Board of Supervisors issues the warrant, it seems clear that they will have exceeded this authority. That being so, the question of your liability in paying such warrant might be a close one.

As this matter is an important one to you, I suggest that you have it passed upon by your court in an appropriate proceeding instituted for that purpose. I suggest that you refuse to honor the warrant, and then the question could be determined in mandamus proceedings brought against you directing you to honor it.

With best wishes, I am

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BOARD OF SUPERVISORS—No Authority to Require Power Companies to Construct Underground Transmission Lines.

August 27, 1947.

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

My dear Mr. Marsh:

This is in reply to your letter of August 23, in which you request my opinion upon the question of the authority of the board of supervisors of Fairfax County to pass an ordinance which would require power companies in the future to construct underground all their transmission lines of high voltage electric current.

I have given this matter considerable thought and have reached the conclusion that the regulation of this type of construction of power lines is a State function and not a local one. Inasmuch as the overhead type of construction is customarily employed in practically all of the counties of the State, I do not believe that it can be said to present such a substantial threat to the safety or welfare of the people of Fairfax County as could be said to constitute a nuisance or to justify the requirement of an underground transmission system. These transmission lines usually traverse a great number of counties. The rates which the power company is permitted by the State Corporation Commission to charge

are based primarily upon the cost of the plant and transmission lines. Since it would obviously cost a great deal more to construct such lines underground, the result of the imposition of a financial burden of this kind by one county would be an increase in the rates which the consumers, not only in that county but in others, would have to pay for their current.

The Constitution and statutes of Virginia contemplate that public utilities shall be regulated by the State, and generally through the agency of the State Corporation Commission. I do not believe, therefore, that the general welfare clause contained in section 2743 of the Code would authorize the board of supervisors to regulate the construction of electric power lines in the manner contemplated. See the case of *Old Dominion Land Company vs. The County of Warwick*, 172 Va. 160. In my opinion, in order for the board of supervisors to be empowered to enact an ordinance of this kind, it is necessary for the General Assembly to expressly and specifically authorize same by appropriate legislation.

With best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BOARD OF SUPERVISORS—No Authority Vested in Board to Pay a Bonus to the Clerical Help in Office of Treasurer, Commissioner of Revenue and Commonwealth's Attorney.

December 16, 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 December 12, in which you ask my opinion as to whether or not the Board of Supervisors of Alleghany County can legally pay out of the general county fund a bonus to the clerical help in the office of the Treasurer, Commissioner of the Revenue and Commonwealth's Attorney of Alleghany County.

In Virginia we are committed to the doctrine that the Board of Supervisors, being a 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. *Ernest v. Patrick County*, 158 Va. 565 at 567. I find no expressed statutory authority for the payment of a bonus as suggested by your question, nor do I think such a payment would be within the implied authority of the Board of Supervisors.

With best wishes, I am

Yours very truly,

HARVEY B. APPERSON,
Attorney General.

BOARD OF SUPERVISORS—Not Authorized to Elect a Vice-Chairman.

January 12, 1948.

HONORABLE M. A. COGBILL,
Attorney for the Commonwealth,
Chesterfield County
Chesterfield Court House,
Virginia.

My dear Mr. Cogbill:

This is in answer to your letter of January 10 in which you ask whether the Board of Supervisors is empowered to elect a vice-chairman under section 2712 of the Code.

As you suggest, it appears upon reading the above named section that the Board is only empowered to choose one of its members to act in place of the chairman who might be absent from a meeting.

I have been able to find no statute that provides for a vice-chairman of the Board of Supervisors, and in the absence of such legislation, I am of the opinion that Boards may not elect a member to so serve.

With kindest regards,

Sincerely yours,

HARVEY B. APPERSON,
Attorney General.

BOARD OF SUPERVISORS—Not Liable for Indebtedness Incurred by School Board in Excess of School Budget.

June 14, 1948.

MR. WILLIAM R. BLANDFORD
Attorney for the Commonwealth,
Powhatan, Virginia.

Dear Mr. Blandford:

This is to reply to your letter of June 8th, from which I quote as follows:
"The Board of Supervisors of Powhatan County has asked for a ruling on the following question: Is the Board of Supervisors liable for indebtedness incurred by the school board which exceeds the budget of the School Board?"

It is assumed that the indebtedness incurred over and above the school budget was not approved by the Board of Supervisors."

Section 656 of the Code, as amended (Michie's Supp. 1946) provides, among other things, that the school board shall have the authority to pay teachers, maintain school buildings, furnish text books and "in general, to incur such costs and expenses, but only such costs and expenses as are provided for in its budget without the consent of the tax levying body; * * *"

It is seen, therefore, that a county school board has no authority to incur expenses which exceed its budget without first obtaining the consent of the Board of Supervisors and, if it does so, I am of the opinion that the Board of Supervisors is not liable for the indebtedness so incurred.

Very sincerely yours,

J. LINDSAY ALMOND, JR.,
Attorney General.

BOARD OF SUPERVISORS—In Counties Adjoining any Country Having Population of More Than One-Thousand per Square Mile May Create a Small District Within Large Sanitary District.

November 5, 1947.

HONORABLE ANDREW W. CLARKE,
102 North Fairfax Street,
Alexandria, Virginia.

My dear Mr. Clarke:

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

"There is quite a large development on U. S. Highway Number 1, just South of the City of Alexandria, lying on the Northwest boundary of the large Sanitary District. The territory in question has approximately 1700 homes and could be served with a sewer lateral line and have the same flow by gravity to the trunk line. The question now arises is whether or not a small Sanitary District can be created within the confines of a large Sanitary District, so that they might float a bond issue to make the necessary improvements in their own community. I have called to Mr. Marsh's attention, Section 1560 L 1 in the 1944 Supplement of the Virginia Code of 1942 Annotated, titled "Small Districts". I realize that the Section in question falls under Chapter 65a, Sanitary Districts, Article 1, in Counties having more than 500 inhabitants per square mile but I am now wondering and would appreciate your opinion in the matter, whether or not Fairfax County Board of Supervisors cannot create the small District under this Section and then have the people of the District float a bond issue for the improvements they need. * * *

Chapter 304, Acts of 1944, amended sections 1, 11, 12-a and 12-b of Chapter 161, Acts of 1926, (which is found as Chapter 65A, Article 1 of Michie's Code). Section 1 was amended to include, among others counties adjoining any county having a population of more than one thousand inhabitants per square mile. Since Fairfax County adjoins Arlington County, which has a population of more than one thousand inhabitants per square mile, it can be seen that the said Act is now applicable to Fairfax County.

Section 12 was amended to authorize the creation of a small sanitary district within a large sanitary district, and to provide a bond issue therefor. The last paragraph of the amended section is as follows:

"In lieu of allocating such sums from the sanitary district bond issue or issues, as hereinbefore provided, the board of supervisors, in order to raise the necessary funds to furnish public utilities to such "small district" shall have the power, subject to the conditions and limitations of sections four to twelve, both inclusive, of chapter one hundred sixty-one of the Acts of Assembly of nineteen hundred twenty-six, as amended, to issue bonds of the "small district" to an amount in the aggregate of not exceeding eighteen per centum of the assessed value of all real estate in the "small district" subject to local taxation and it is further declared that whenever this paragraph is utilized the words "small district" and "district" appearing in sections four to twelve, both inclusive, of such chapter, as amended, shall be construed to mean "small district" as referred to in this paragraph."

Therefore, it is my opinion that the Board of Supervisors of Fairfax County can create the small district in question and issue bonds for the necessary improvements subject, of course, to the restrictions set forth above.

With best wishes, I am

HARVEY B. APPERSON,
Attorney General.

BOARDS OF SUPERVISORS—Vacancy in Such Boards, in Counties Operating Under County Executive Form, Should be Filled by Judge of the Circuit Court.

December 26, 1947.

HONORABLE WILLIAM O. FIFE,
Commonwealth's Attorney for Albemarle County,
Charlottesville, Virginia.

My dear Mr. Fife:

This is in reply to your letter of December 17, 1947, in which you state that at the November, 1947, election Dr. T. E. Bruce, of Scottsville District in Albemarle County, was elected as a member of the Board of County Supervisors of Albemarle County for the term beginning January 1, 1948, but that Dr. Bruce died on or about December 1 without having qualified.

You call the attention to section 2697 of the Code, which provides that, if any officer fails to qualify on or before the day on which his term begins, his office shall be deemed vacant, and you ask whether or not there is any statute providing for a special election to fill this vacancy on the Board of Supervisors of Albemarle County, which operates under the County Executive form of government.

Section 2773-n4 of the Code (Michie, 1942, sec. 2773(27)), which applies to counties operating under the County Executive form of government, provides that "any vacancy on the Board of County Supervisors shall be filled by the Judge of the Circuit Court of the County; his appointee shall hold office during the remainder of the term of his predecessor in office." I find no other statutory provision for filling a vacancy on the Board of Supervisors of a county operating under the County Executive form of government, and I am, therefore, of the opinion that the vacancy to which you refer should be filled by the Judge of the Circuit Court of Albemarle County. I know of no authority for calling a special election in this case.

Very sincerely yours,

HARVEY B. APPERSON,
Attorney General.

BOARD OF SUPERVISORS—In Certain Counties have Authority to Install and Maintain Street Lighting System.

August 14, 1947.

HONORABLE EDWARD McC. WILLIAMS,
Commonwealth's Attorney for Clarke County,
Berryville, Virginia.

My dear Mr. Williams:

This is in reply to your letter of August 5, 1947, in which you ask if there is any authority for the Board of Supervisors to expend funds for street lighting in thickly settled areas of the county.

Section 2742b of the Code of Virginia (Michie, 1942) expressly authorizes the Boards of Supervisors of counties "adjoining and abutting a city with population of 25,000 or more inhabitants" to install and maintain street and highway lighting system in the villages and built-up portions of such counties. I find no specific statute authorizing the Boards of Supervisors of other counties to expend funds for this purpose.

In the absence of such a statute as this it would seem that authority to provide such a lighting system might be predicated upon the general welfare clause of section 2743. Since, however, the Legislature has expressly dealt with

the subject in section 2742b and in doing so has confined the grant of such authority to counties adjoining or abutting large cities, it is my opinion that the authority of the Boards of Supervisors of other counties to expend funds for this purpose is extremely doubtful.

With best wishes, I am

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**CHILDREN—Residence of in Terms of Public Aid and Assistance Act
is Place of Actual Abode with Certain Relatives.**

October 29, 1947.

HONORABLE JAMES HOGE RICKS, *Judge*,
Juvenile and Domestic Relations Court,
1115 East Clay Street,
Richmond, Virginia.

My dear Judge Ricks:

This is in reply to your letter of October 28, in which you ask for an opinion concerning the legal residence of a child charged with being a dependant and neglected child without proper parental guardianship. The pertinent facts of the case are as follows:

The parents and the child resided in Henrico County until around August 15, 1947, at which time the father was committed to the Eastern State Hospital because of insanity. Shortly after the commitment the mother and child moved to Richmond.

In the latter part of September, 1947, the father was furloughed to a brother who resides in Henrico County, but the mother and child continued to reside in the City of Richmond at 2816 East Marshall Street. It further appears that there is not sufficient room in the brother's home in Henrico County for the child.

The Welfare Department of the City of Richmond has refused to accept the case for the foster home replacement until the legal residence of the child has been determined.

The pertinent provisions of Chapter 379, sections 27 and 28, of the Acts of 1938 (sections 1904(25) and 1904(26) of the Code) are as follows:

"Section 27. Eligibility for Aid to Dependent Children.—A dependent child shall be eligible for aid to dependent children if such child

* * * * *

"(d) Is living with father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle or aunt *in a place of residence maintained by one or more such relatives as his or their own home*; * * *

"Section 28. Applications.—Application for aid to a dependent child under this Act shall be made to the local board, and filed with the local superintendent, of the county or city *in which the dependent child resides*. * * *

(Italics Supplied.)

Therefore, it is my opinion that the residence of the child, in so far as the question of aid to dependent children is concerned, is in the City of Richmond,

since the child is living with his mother, who maintains a "place of residence" in the City of Richmond.

Very sincerely yours,

HARVEY B. APPERSON,
Attorney General.

CHIROPODY—Unlawful for Any One but a Licensed Chiropodist to Advertise.

November 26, 1947.

DR. KENNETH DAWSON GRAVES, *Secretary*,
State Board of Medical Examiners,
Roanoke, Virginia.

My dear Dr. Graves:

This is in reply to a verbal inquiry of Dr. Albert Pincus, of Richmond, Virginia, in which he asked whether the enclosed advertisement is a violation of the Virginia statute dealing with the practice of chiropody.

The last sentence of section 1621 of the Code is as follows:

" * * * It shall be unlawful for any person to designate himself or occupation by the use of any words or letters or trade diplomas calculated to lead others to believe that he is a chiropodist or foot specialist unless he is duly licensed as provided by law."

Therefore it is my opinion that the portion of the advertisement that states

"Consult Our Cuboid Specialist" is a violation of the above named section.

The remaining portion of the advertisement under consideration which uses such words as "Foot Balancer" etc. appears to me to describe only some mechanical device which is offered for sale and, therefore, in my opinion is not a violation of any law dealing with the practice of chiropody.

Very sincerely yours,

HARVEY B. APPERSON,
Attorney General.

CITIES AND TOWNS—A Municipal Corporation is Such a Political Subdivision as Would Make it a Participating Member of a Hospital Center Commission.

February 3, 1948.

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

Dear Mr. Butler:

Due to the untimely passing of Judge Harvey B. Apperson, Attorney General, your letter of January 27, 1948, has been handed to me for attention.

I quote the third, fourth and fifth paragraphs from your letter as follows:

"You will please notice that a portion of said regulation provides that said hospital or health center commission shall consist of six members, three of which shall be residents of Alleghany County, Virginia, and shall reside outside the Corporate limits of the Town of Covington, Virginia, and shall be appointed by the Board of Supervisors of Alleghany County, Virginia; and three of which shall be residents of the Town of Covington, Virginia, and shall be appointed by the Town Council of the Town of Covington, Virginia."

"Will you please give me your opinion as to whether or not the aforesaid portion of said resolution, pertaining to the appointment of Commissioners, is legal and if the Board of Supervisors of Alleghany County, Virginia, are bound thereby to appoint as members of the Commission established by said joint resolution only residents of Alleghany County, Virginia, who live outside of the Corporate limits of the Town of Covington, Virginia."

"I will deeply appreciate an opinion from you on or before the first of next week."

Chapter 344 of the Acts of the General Assembly of 1946, carried in the 1946 Supplement to the 1942 Code of Virginia as section 1554(9), provides in part as follows:

"A hospital or health center commission shall consist of the following number of members based upon the number of political subdivisions, participating: For one political subdivision, five members; for two, six members; * * *. The respective members shall be appointed by the governing bodies of the subdivisions they represent, shall be residents of such subdivisions, and shall be appointed for such terms as the appointing body shall designate."

Since the statute bases the membership of the commission upon the number of political subdivisions participating, it becomes necessary, in answer to your inquiry, to determine whether under the existing circumstances the Town of Covington is in itself a political subdivision.

In the case of *Richmond etc. R. Co. v. Richmond*, 145 Va. 225, 133 S. E. 800, the court defined a political subdivision as follows:

"Municipal corporations are subordinate political divisions of the State, established for the better administration and government in strictly local affairs."

There are some other Virginia cases on this point, such as

Campbell v. Birchett, 143 Va. 686, 126 S. E. 665;

Richmond v. Richmond Ry. Company, 21 Gratt 604;

Hunter v. Pittsburgh, 207 U. S. 161, 28 S. Ct. 40, 19 R. C. L., pp. 729-731.

In view of the fact that the Town of Covington is a political subdivision, it would seem clear that the intent of the statute is that three members of the commission should be selected from the Town of Covington and three members selected from Alleghany County, outside of the corporate limits of the Town.

I am, therefore, of the opinion that that portion of the resolution referred to in your letter is in compliance with the statute, and that the Board of Supervisors of Alleghany County should appoint members of the commission as provided for in the joint resolution which you enclosed with your letter who live outside of the corporate limits of the Town of Covington, Virginia.

With kind regards, I am

Very truly yours,

C. CHAMPION BOWLES,
Assistant Attorney General.

CITIES AND TOWNS—Annexation by Can Not be Accomplished by Charter.

January 28, 1948.

HONORABLE R. DHU COLEMAN,
Member of the House of Delegates,
Hotel Richmond,
Richmond, Virginia.

My dear Mr. Coleman:

This is in reference to our conversation early this week in which you requested my opinion on whether or not the Town of Gate City could, by a new charter, annex additional territory.

It is my opinion that this method of annexation is contrary to section 126 of the Constitution of Virginia. That section is as follows:

"The General Assembly shall provide by general laws for the extension and the contraction, from time to time, of the corporate limits of cities and towns; and no special act for such purpose shall be valid."

The Court of Appeals of this State has had opportunity to consider the question of attempted annexation by charter. In *Town of Narrows v. Giles County*, 128 Va. 572, 105 S. E. 82, the Court held that "If cities could take in new territory by simply obtaining a new charter, it would furnish an easy method for evading section 126 of the Constitution, * * *. Clearly the Constitution cannot be thus evaded."

Yours very truly,

HARVEY B. APPERSON,
Attorney General.

CITIES AND TOWNS—Authority of Municipality to Issue Bonds for Certain Improvements is Derived from the Constitution and Not from Its Charter.

January 6, 1948.

HONORABLE CLUDE M. WELLS,
Treasurer, Town of Falls Church,
Falls Church, Virginia.

Dear Mr. Wells:

In response to your request for an opinion of the Attorney General upon the questions embodied in your letter of December 9, 1947, you are advised that in my opinion

1. The charter of the Town of Falls Church as granted by the General Assembly of 1946 supersedes the charter theretofore granted by the General Assembly of 1924.

2. I am likewise of the opinion that the elections called for in Paragraph 5 of the 3rd Section is not the one applicable to the issuance of bonds for the enlargement of your water works. The limitations appearing in Paragraph 5 of Section 3 have only to do with the borrowing of money for the current expenses of the town, and do not deal with bond issues which are otherwise provided for. See *Ennis v. Town of Herndon*, 168 Va. 539, where a similar question was involved interpreting the provisions of the town charter of Herndon, Virginia.

3. It is my opinion that the authority to issue bonds for the improve-

ments to your water works is in addition to the power to borrow money as given you in Paragraph 5 Section 3 of your present charter. This authority is derived from Section 123 of the Constitution of Virginia and subsection (b) of Section 127 of the Constitution of Virginia.

The procedure to be followed in the enacting of the ordinance and the election to be held is set forth in the Code of Virginia in what is known as Chapter 122. which commences with Section 3079, et. seq. I believe if you will read these sections you will find the proper procedure.

Very truly yours,

HARVEY B. APPERSON,
Attorney General.

CITIES AND TOWNS—City is Liable for a Just and Reasonable Proportion of the Indebtedness of County as Evidenced by School Bonds after Town Becomes City.

June 11, 1948.

HONORABLE M. A. COGBILL,
Commonwealth's Attorney,
Chesterfield County,
Chesterfield C. H., Virginia.

My dear Mr. Cogbill:

This is in reply to your letter of June 2. In that letter you ask my opinion as to the liability of the City of Colonial Heights on certain school bonds and literary loans of Chesterfield County. It appears that these bonds were issued and the literary loans were made prior to March 19, 1948. On March 19, 1948, Colonial Heights became a City of the second class, and the question now arises as to its liability for these above-mentioned debts incurred by the county while Colonial Heights was a town in the county.

It appears to me that sections 2902 and 2903 of the Code of Virginia make provisions for such a situation as this. I quote below these two sections:

Section 2902. "Whenever a town hereafter becomes a city, as herein provided, the city shall assume and provide for the reimbursement of the county of a just and reasonable proportion of any debt of said county existing at the date the town becomes a city, and also for compensation to any school district of which said town was a part for the city's just and reasonable proportion of any debt existing on the district at such date.

"The common council of the city and the board of supervisors, in the one case, and the said council and the district school trustees, in the other case, shall make an equitable adjustment of such debts, and the same shall be provided for as those bodies shall determine and agree upon. In making such adjustment the parties shall take into consideration the city's just proportion of money collected by the county treasurer under the preceding section and of any unexpended balance in the county treasurer belonging to any fund to which the territory embraced in said city has contributed, and shall take into consideration all other equitable claims of the city, county and districts.

Section 2903. "In the event of the failure of the parties aforesaid to make such adjustment and to agree upon such terms, either party may proceed against the other by a bill in equity in the circuit court of the county in which the city lies for a proper adjustment of such matter."

It is my opinion, based upon these sections, that the City of Colonial Heights is liable for a just and reasonable proportion of the indebtedness of the county as evidenced by school bonds and literary loans outstanding on March 19, 1948. I do not feel that the subsequent refunding operation by Chesterfield County in which the majority of these earlier loans and bonds were retired would relieve the City of Colonial Heights of its liability for its proportion of the debt existing on March 19, 1948.

Whether the items included under questions 3 and 4 of your letter were debts of the County on March 19, 1948, might depend upon certain facts on which this office has no information. However, it does seem that whatever the exact situation as to these items, they could be considered in the equitable adjustment to be reached by the parties.

You also request that I advise as to the formula to be used in determining the amount of the indebtedness of the City of Colonial Heights. It appears to me, upon consideration of the above-quoted sections, that the fixing of the amount of the indebtedness of the City is to be determined by the proper authorities of the City and the county, subject to adjustment in court in the event the parties fail to agree. That being so, it does not seem proper that this office should attempt to suggest any formula to be used in determining the liability.

With best wishes, I am

Very sincerely yours,

J. LINDSAY ALMOND, JR.,
Attorney General.

CITIES AND TOWNS—Have No Authority to Impose a Beverage Excise Tax on Alcoholic Beverages.

January 16, 1948.

HONORABLE R. DHU COLEMAN,
Member of the House of Delegates,
Gate City, Virginia.

My dear Mr. Coleman:

This is in reply to your letter of January 5, 1948, in which you ask my opinion on whether the Town of Gate City has the authority to impose a beverage excise tax on beverages containing not more than 3.2% of alcohol by volume, where there is no charter provision specifically granting such authority to the Town of Gate City.

Section 4675(78) of Michie's Code, which is a part of the act regulating beverages of not more than 3.2% alcohol, provides as follows:

"In addition to the foregoing State licenses provided for in this act, the board of supervisors or other governing body of each county, and the council or other governing body of each city and town in the State is hereby authorized to provide by ordinance for the issuance of county, city and town licenses, and to charge and collect license taxes therefor, to persons to manufacture, bottle, and sell, within said county, city or town, beverages.
* * *"

This section refers specifically to license taxes, and nowhere in the Act is there any provision granting cities, towns or counties the authority to impose excise taxes.

It is, therefore, my opinion that the Town of Gate City has no authority to impose a beverage excise tax on beverages containing not more than 3.2% of alcohol by volume.

With best wishes, I am

Yours very truly,

HARVEY B. APPERSON,
Attorney General.

CITIES AND TOWNS—Legislature is Not Bound to Accept a Proposed New Charter which has been Approved by the Electorate of the Municipality.

December 23, 1947

HONORABLE JOSEPH J WILLIAMS, JR.,
Member of the House of Delegates,
725 American Building,
10th and Main Streets,
Richmond, Virginia.

My dear Mr. Williams:

This is in reply to your letter of December 5, in which you state that the electorate of the City of Richmond in the recent general election voted in favor of a new charter, which is to be submitted to the next session of the General Assembly of Virginia. You desire my opinion on the following questions:

- "(1) Can the Legislature of Virginia amend the proposed charter and pass same as amended or must the Legislature accept or reject same identically as drawn?
- "(2) If, in your opinion, the Legislature cannot amend the charter before passage can the Legislature pass the charter identically as drawn and then amend same at the 1948 session but as a later date?"

The pertinent part of section 117 of the Constitution of Virginia is as follows:

" * * * (b) The General Assembly may, by general law or by special act (passed in the manner provided in article four of this Constitution) provide for the *organization and government* of cities and towns without regard to, and unaffected by any of the provisions of this article, except those of sections one hundred and twenty-four, one hundred and twenty-five (except so far as the provisions of section one hundred and twenty-five recognize the office of mayor and the power of veto), one hundred and twenty-six and one hundred and twenty-seven of this article, and except those mentioned in subsection (d) of this section. * * * But such *organization and government shall apply only to such cities or towns as may thereafter adopt the same* by a majority vote of those qualified voters of any such city or town voting in any election to be held for the purpose, as may be provided by law.

" (c) The General Assembly, at the request of any city or town, made in manner provided by law, may grant to it *any special form of organization and government* authorized by subsection (b) of this section, and subject to all of the provisions of that subsection, except that it shall not be necessary for such city or town to thereafter adopt the same."
(Italics supplied)

The proceedings incident to the approval of the new charter were had pursuant to subsection (b) of section 2925 of the Code of Virginia, as amended by chapter 122 of the Acts of the General Assembly of 1946, page 173, which is the enabling legislation providing the manner in which a city of over 190,000 population may request the General Assembly to grant to it a special form of organization and government and under which the following question was submitted to the voters of the city:

"Shall the General Assembly be requested to grant to this city the special form of government contained in the charter proposed by the charter commission?"

Since the enabling legislation and the question submitted to the voters deal with the question of whether a *special form of organization and government* contained in the charter should be granted to the City and not whether the charter with all of its provisions as written should be granted to the city, it is my opinion that the General Assembly may amend the charter as to any matter *which will not alter the special form of organization and government therein* contained without further action by the voters. Moreover, I am of the opinion that the General Assembly may accept, reject, or amend any city charter submitted to it, but, if any amendment constitutes a *change in the form of organization and government*, the charter as so amended would have to be re-submitted to the electorate of the City of Richmond as provided by subsection (b) of section 117 of the Constitution set forth above.

Following the conclusion stated above, the answer to your second question would be that the General Assembly may always amend a city charter, but, if such an amendment *changes the form of organization and government*, the electorate of the city in question has the right to adopt or reject same.

A decision which may be of interest to you in considering the problem here presented and which deals generally with the power of the General Assembly of Virginia as to municipal charters is *Burch v. Hardwicke*, 30 Gratt. (71 Va.) 24, in which the Supreme Court of Appeals said at page 32:

"It must be borne in mind that cities and towns are mere territorial divisions of the state, endowed with corporate powers to aid in the administration of public affairs. They are instrumentalities of the government acting under delegated powers, subject to the control of the legislature, except so far as may be otherwise expressly provided by the constitution."

Also it appears to be well established that *in the absence of constitutional provisions* the General Assembly may repeal any charter or law under which municipalities are created on the theory that municipal corporations have no inherent right of self-government which is beyond legislative control. See *City of Trenton v. State of New Jersey*, 262 U. S. 182, 43 Sup. Ct. 534; *Brackman's, Inc. v. City of Huntington*, 126 W. Va. 21, 27 S. E. (2d) 71.

In the case of *R. F. and P. Ry Co. v. City of Richmond*, 145 Va. 225, the Supreme Court of Appeals in discussing the rights of municipal corporations had this to say:

" * * * They are mere political subdivisions of the State, created for the convenient administration of such governmental powers as may be entrusted to them. They are creatures of the State, which may grant or withhold such powers as to it shall seem meet. The State may grant these powers in whole or in part, conditionally or unconditionally, and may, at its pleasure, modify or withdraw them, with or without the consent of the citizens, or even against their protest. It may, if it chooses, repeal the charter and destroy the corporation. * * * " (p. 238)

Very sincerely yours,

HARVEY B. APPERSON,
Attorney General.

CIVIC AND POLICE JUSTICE—Elected by City Council, City of Richmond. Repeal by Implication. No Reference Necessary.

November 3, 1947.

HONORABLE W. H. ADAMS,
Member House of Delegates,
Richmond, Virginia.

Dear Mr. Adams:

This is in reply to your letter of October 31st, 1947, in which you ask whether or not Section 3112 of the Code of Virginia has been amended as to permit the vacancy existing in the Civil Justice Court of the City of Richmond to be filled by an election by the City Council of Richmond.

Section 3112 of the Code provides for Civil Justices in Cities containing 45,000 or more, and states that they shall be elected by a joint vote of the two Houses of the General Assembly. This Section has not been expressly amended or repealed and, therefore, as to its general application, it is still in effect. However, by Chapter 271, of the Acts of Assembly of 1936, an Act to amend and re-enact Section 105 of the Charter of the City of Richmond, the Charter of that City was amended to provide "That hereafter, at the expiration of the present term of office, or a vacancy occurring therein, the city council shall elect the civil justice as provided for in section thirty-one hundred and twelve of the Code of Virginia". This special Act, and later amendments of this Section of the Charter of the City of Richmond, which contain the same language, have the effect of changing the method of electing the civil justice insofar as the City of Richmond is concerned.

You refer to Section 52 of the Constitution which provides that "No law shall embrace more than one object, which shall be expressed in its title, nor shall any law be revived or amended with reference to its title, but the Act revived or the Section amended shall be re-enacted and published at length." You ask, if in view of the fact that the title to Chapter 271, of the Acts of 1936, contained no reference to an amendment of Section 3112 of the Code, and the fact that said Section 3112 of the Code, was not re-enacted and published at length, the provision of Chapter 271, Acts of 1936, providing for election of the civil justice by the City Council, is valid.

Chapter 271 of the Acts of 1936, was an amendment of Section 105 of the Charter of the City of Richmond, and its title so stated, and that Section was re-enacted and published at length as required by Section 52 of the Constitution. The fact that it contained provisions inconsistent with provisions of Section 3112 of the Code, and to the extent of such inconsistency made a different rule applicable to the City of Richmond, did not make it necessary to re-enact and publish at length Section 3112 of the Code.

Statutes may be amended or repealed expressly or by necessary implication as by the enactment of subsequent statutes inconsistent with provisions contained in the former. It is generally held that in the case of such amendment by implication it is not essential that the subsequent statute even refer to the Acts or Section which by implication it amends. See the Cases cited in Michie's Digest, Volume 9, Statutes Section 99, particularly the case of *Ford's Adm'r., vs Commonwealth* 57 Va., (16 Gratt.) 1; See also *Western Assur. Co., v Stone*, 145 Va., 776. The purpose of the requirement that any law revived, or amended, be re-enacted and published at length is to insure that the meaning of the law be apparent from an examination of the statute itself, and was not to change the doctrine of repeal or amendment by implication through an independent and original Act complete and intelligible in itself. See *Ex Parte Settle*, 114 Va., 715, and *City of Danville v. Ragland* 175 Va., 27.

It is my opinion, therefore, that Chapter 271 of the Acts of Assembly of 1936, which amended Section 105 of the Charter of the City of Richmond,

is valid, and that the clause providing a mode of electing the civil justice different from that specified by Section 3112 of the Code, being a later enactment and one applicable specifically to the City of Richmond, is controlling.

Yours very truly,

HARVEY B. APPERSON,
Attorney General.

CLERKS—No Duty of Clerk to Record Without Cost Photostatic Copies of Veterans Discharges Unless Same are Properly Authenticated.

December 1, 1947.

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

My dear Mr. Looney:

This is to acknowledge receipt of your letter of November 26, 1947, which I quote as follows:

"I have had presented to me for recordation in my office photostatic copies of World War II Discharges, and I am writing you for an opinion as to whether or not I am permitted to record photostatic copies of Discharges under the act passed by the 1944 General Assembly, Chapter 31, page 33, of said Acts, authorizing and directing the Clerk to record World War II Discharges. The original Discharge in this case has been lost and cannot be produced."

Section 4 of Chapter 31 of the Acts of the General Assembly of 1944, page 33, to which you refer in your letter, provides in part as follows:

"When the honorable or dishonorable discharge of any person who served in the armed forces of the United States * * *, during World War II and who was a resident of the county or city at the time of his induction, is presented, it shall be the duty of the clerk to record the information contained therein in the proper spaces provided for such purpose in the book known as 'Induction and Discharge Record World War II'."

This language does not refer to a copy but to the original discharge. I am, therefore, of the opinion that the provisions of this statute are not broad enough to permit recording of photostatic copies of World War II discharges, unless the same is properly authenticated and proven as required by law.

With kindest regards,

Sincerely yours,

HARVEY B. APPERSON,
Attorney General.

COMMISSION OF GAME AND INLAND FISHERIES—Authority to Construct Cottages and Barn where necessary to Protect and Propagate Game, etc.

October 24, 1947.

HONORABLE I. T. QUINN, *Executive Director*,
Commission of Game and Inland Fisheries,
Seven North Second Street,
Richmond 13, Virginia.

My dear Mr. Quinn:

This is in reply to your letter of October 22, from which I quote in part as follows:

"The Commission of Game and Inland Fisheries desires to construct a four room cottage and barn for one of its Deputy Wildlife Managers in the Poor Valley section of Tazewell County, Virginia. * * * * *

"The construction of the cottage and barn would be on lands owned by the U. S. Forest Service of the Department of Agriculture. They agreed to issue to the Commission of Game and Inland Fisheries a ten year term permit with option for renewal without cost to the Commission. This permit would show that the title to the improvements would be in the name of the Commission of Game and Inland Fisheries.

"It will be appreciated if you will inform me whether or not the commission has the authority, under the foregoing conditions, to construct the buildings in question."

Section 3305(4) provides, among other things, that the Commission shall have the authority to "acquire by purchase, lease, exchange, gift or otherwise, such lands and waters anywhere in this State as it may deem expedient and proper." Therefore, the fact that the land on which the buildings are to be erected is owned by the U. S. Forest Service of the Department of Agriculture appears to be immaterial since the only limitation is that the land be located in this State.

Also, section 3305(4) provides that the Commission shall have the power to erect such buildings as it deems necessary in order to protect and propagate game birds and other wild life of the State.

In a telephone conversation on October 23 you informed this office that the construction of the buildings in question is necessary for the proper protection of the wild life in the Poor Valley section of Tazewell County since there are no living quarters available within fifteen miles of the section which the Deputy is required to protect and his only means of transportation is by horseback.

Therefore, in view of the facts set forth, it is my opinion that the construction of a cottage and barn for the Deputy Wildfire Manager of the Poor Valley section is a necessary incident to carrying out the duties of the Commission and the above named section is the authority therefor.

Very sincerely yours,

HARVEY B. APPERSON,
Attorney General.

COMMISSIONER OF REVENUE—Authority to Re-Assess Sub-divided Tracts of Land Limited to Total Presently Assessed Value of Whole Tract.

September 4, 1947

HONORABLE EDWARD P. SIMPKINS, JR.,
Attorney for the Commonwealth,
Mutual Building,
Richmond 19, Virginia.

My dear Mr. Simpkins:

I am in receipt of your letter of August 27, 1947, in which you state that the Commissioner of the Revenue of Hanover County desires an opinion as to his duty in reassessing land which has been divided into lots. You briefly state the problem in your letter as follows:

"Certain farm land in the county has been divided into building lots and plats of sub-divisions recorded. Hanover County has not had a general re-assessment of real estate since a number of years prior to 1936. Tax Code, section 265-A, makes it the duty of the Commissioner of the Revenue, under certain conditions, to re-assess sub-divided tracts of land as lots. Does the Commissioner of the Revenue of Hanover County have this authority in the light of the fact that Hanover has had no general re-assessment as indicated?"

Section 265a of the Tax Code of Virginia, to which you refer in your letter, only applies to assessments of real estate by the Commissioner of the Revenue of lots at their fair market value in counties which have had a general reassessment in the year 1936 or thereafter. Since Hanover County has had no such general reassessment, I am of the opinion that the Commissioner of the Revenue should assess such tract or lot where it becomes the property of different owners pursuant to the provisions of the preceding section (265) of the Tax Code, but the total assessed value of the tracts or lots may not be greater than the value at which the whole tract is at present assessed.

Your attention is directed to a further provision of this section which provides that assessment of tracts or lots located in a town or within one mile of the corporate limits thereof shall be made at their fair market value.

With kind regards, I am

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COMMISSIONER OF REVENUE—Office not Vacated when County Residence is Lost by Shift of County Line due to Creation of City of First Class.

November 28, 1947,

HONORABLE J. E. DRUMHELLER,
Commissioner of the Revenue for Augusta County,
P. O. Box 604,
Staunton, Virginia.

My dear Mr. Drumheller:

This is in reply to your letter of November 14, 1947, to Mr. C. H. Morrissett, which letter was referred to this office by Mr. Morrissett. In your letter you presented the following question. The Commissioner of the Revenue for

Augusta County was elected on November 4, 1947, for a four-year term. At the date of the election he was a resident of Waynesboro, which was a part of Augusta County. On January 1, 1948, Waynesboro will become a city of the first class and will, therefore, no longer be a part of Augusta County. You ask if the Commissioner of the Revenue, who has legal residence in Waynesboro, can serve as Commissioner of the Revenue for Augusta County during the four years following 1947.

Sections 2703-2704 of the Virginia Code cover the question raised by you. Section 2703 provides that " * * * Every county officer shall, at the time of his election or appointment, have resided one year next preceding his election or appointment, either in the county for which he is elected or appointed, or in the city wherein the courthouse of said county is, * * * ." It is my opinion that, as the Commissioner of the Revenue resided in Augusta County for several years prior to the date of his election, he was properly elected under section 2703.

Section 2704 provides: "If any officer, required by the preceding section to be a resident, at the time of his election or appointment, of the county, city, district or town for which he is elected or appointed, * * * remove therefrom, * * * his office shall be deemed vacant." It is my opinion that this section is designed to cover cases in which the elected official changes his physical residence. I do not think it is intended to cover the case presented in your letter, where the official loses his county residence because of the shift in the county line.

It is, therefore, my opinion that the Commissioner of the Revenue who was elected on November 4, 1947, can serve as Commissioner of Augusta County during the four years following 1947.

Very sincerely yours,

HARVEY B. APPERSON,
Attorney General.

**COMMONWEALTH ATTORNEYS—Presence Required—An Associate
has no Official Legal Status as an Assistant.**

May 6, 1948.

HONORABLE ROBERT BOLLING LAMBETH,
Attorney for the Commonwealth,
Bedford, Virginia.

My dear Mr. Lambeth:

This is in reply to your letter of April 23 addressed to Mr. Rogers, of this office, in which you state that in a number of counties the Commonwealth's Attorney has an associate to assist him in his duties. You then state:

"I would appreciate any information you can give me concerning the legal status of an assistant to the Commonwealth's Attorney. If the Trial Justice Court, the Circuit Court, and the Board of Supervisors recognize his appearance on behalf of the County of Bedford or the Commonwealth, in my absence, is such appearance a full and regular appearance as if I

were present myself? I would appreciate your advice."

I find no statute which specifically authorizes an assistant to the Commonwealth's Attorney except section 3008, which deals with the City of Richmond. While I understand that it is not unusual for a Commonwealth's Attorney to employ an associate to assist him in his duties, and in some cases the Compensation Board has approved the payment of compensation to such associate as an expense of the office, just as in the case of other employees, I do not consider

that the associate has any official legal status as an Assistant Commonwealth's Attorney.

Therefore, in any case where the Commonwealth's Attorney himself is required to appear officially, I do not think that an appearance by the associate would be a compliance with the requirement. There may be many instances, however, where the appearance of the Commonwealth's Attorney is not required, and in such cases I see no reason why his associate could not appear and act on his behalf, if this meets with the approval of those calling upon the services of the Commonwealth's Attorney's office.

With best wishes, I am

J. LINDSAY ALMOND, JR.,
Attorney General.

CONSTITUTION—General Assembly Can Not Enact Legislation Concerning Proposed Amendments to the Constitution at Same Session it Approves Said Amendments.

December 17, 1947.

HONORABLE ROBERT C. VADEN,
Gretna, Virginia.

My dear Senator Vaden:

I am in receipt of your letter of December 16, in which you enclosed a letter from Mrs. Charles E. Planck, who requested information on the amendments to the Constitution as regards our voting laws, passed by the General Assembly in 1946 and referred to the next regular session of that body. The specific questions asked are as follows:

"2. If the amendments are passed in the 1948 session, can statutory legislation governing their application be passed at the same session (To go into effect, of course, only after ratification of the amendments themselves by people) ? * * *

"3. If the amendments are passed, in what form will they come before the voters? * * *

"4. On our copy of the amendments, two other joint resolutions are also printed. Are we correct in assuming that their passage or defeat will not effect the voting law amendments since they pertain to education matters entirely unrelated?"

The first question must be answered in the negative, since any legislation governing the application of a proposed amendment would be, in my opinion, invalid before the said amendment was actually ratified and became a part of the Constitution.

In answer to the question numbered "3", section 196 of the Constitution of Virginia provides that it shall be *the duty of the General Assembly* to submit such proposed amendment or amendments in such manner *as it shall prescribe*.

Your last question is answered by pointing out that the proposed amendment is a separate House Joint Resolution and appears as Chapter 402, Acts of Assembly of 1946.

Very sincerely yours,

HARVEY B. APPERSON,
Attorney General.

CONFEDERATE WOMEN—Home for Needy; Appropriation therefor may be used Under Certain Conditions.

May 26, 1948

HONORABLE J. GORDON BENNETT,
Auditor of Public Accounts,
Richmond 10, Virginia.

My dear Mr. Bennett:

Your letter of May 21, 1948, presents certain questions in connection with an appropriation by the 1948 General Assembly for the Home for Needy Confederate Women at Richmond. Item 44 of the 1948 Appropriation Bill provides among other things for an appropriation of \$40,000.00 each year to be expended for the care of needy Confederate women who are inmates of the Home for Needy Confederate Women at Richmond. It is further provided that no part of this appropriation shall be available for expenditure until satisfactory evidence of compliance with certain named conditions has been presented to the Auditor of Public Accounts. Your letter requests an interpretation of some of these provisions.

Provision No. 7, attached to this appropriation, provides that no part of the appropriation shall be available directly or indirectly for the care or maintenance of any person who is not a member of the class for which the home was originally established.

The Home was originally established about 1890, and in 1898, the General Assembly granted a charter for the Home as a charitable corporation for "The establishment and conduct of a home for the needy widows, wives, sisters and daughters of Confederate soldiers." In 1914, by Chapter 40, Acts of 1914, the General Assembly made an appropriation for the support of the above-named ladies. In 1916, the charter was amended, and the purposes for which the Home was established were enlarged so as to be "the establishment and operation of a home for needy widows, wives, sisters, daughters, and female descendants of Confederate soldiers."

In 1926, the General Assembly passed two acts with respect to the Home. Chapter 3 of the Acts of 1926 stipulated that the institution was to be a home for needy widows, wives, sisters and daughters of Confederate soldiers, sailors and marines. Chapter 91 of the Acts of 1926, passed subsequent to Chapter 3, provided that not only needy widows, wives, sisters and daughters were eligible for admission to the Home, but also female descendants of Confederate soldiers, sailors and marines.

The question raised by you is whether provision No. 7 providing that the appropriation is not available for the care or maintenance of any person not a member of the class for which the Home was originally established, prevents any part of this appropriation being used for the care or maintenance of persons not widows, wives, sisters or daughters of Confederate soldiers. In 1946, the General Assembly, by House Joint Resolution No. 27, provided for a commission to study the Home for Needy Confederate Women. This Commission made a report to the 1948 General Assembly, which report is House Document No. 11. In their report the Commission considers the point raised by you, and reached the conclusion that an appropriation for the care of needy Confederate women should be applied only for the care and maintenance of needy widows, wives, sisters and daughters of Confederate veterans. It is, therefore, my opinion that no part of this appropriation can be used for the care or maintenance of any female descendants of Confederate veterans, other than widows, wives, sisters and daughters.

The Commission's report did not consider whether the appropriation could be used for the care and maintenance of widows, wives, sisters and daughters of Confederate sailors and marines. However, Webster's Dictionary defines a soldier as one engaged in military service. Under this definition a widow, wife, sister or daughter of a sailor or marine would be eligible for aid under this

appropriation. It also appears from a study of the Commission's report that these ladies would come within that group so closely related to the Confederacy as to enable them to partake of the appropriation. It is my opinion, therefore, that needy widows, wives, sisters and daughters of Confederate sailors and marines may be aided by this appropriation.

Your letter also calls attention to two other provisions dealing with applications and admissions. Provision No. 3 requires that copies of all applications for admission be filed with the Auditor of Public Accounts. Provision No. 4 requires that proof must be made that admissions to the Home are being made as far as practicable on the basis of first come first served. You ask my opinion as to what constitutes an application, and as to what information should be required to see that admissions are made upon a first-come-first-served basis.

It appears that the institution has a formal application form which it requires each applicant to complete and submit prior to admission. It is my opinion that a copy of this formal application must be filed with the Auditor of Public Accounts in order to comply with Provision No. 3.

As to what would constitute proof that admissions are being made on a first-come-first-served basis, it seems to me that the Home should stamp upon the formal application the date and hour received, and pass upon the applications in that order. I think this would be satisfactory if it were shown that the application form was given or sent to the applicant when first requested.

Very truly yours,

J. LINDSAY ALMOND, JR.,
Attorney General.

CORONERS—Jurisdiction on Navigable Waters and Foreign Ships; None on Federal Military Reservations.

August 5, 1947.

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

My dear Dr. Breyfogle:

This is in reply to your letter of June 30, 1947, which was received during my absence from the office on vacation. You present several questions pertaining to the jurisdiction of coroners in rivers, ports and military reservations in Virginia.

Specifically, you ask if the jurisdiction of the Warwick County coroner extends to and includes Fort Eustis. The Federal Government has exclusive jurisdiction over this military base and, therefore, the coroner of Warwick County has no jurisdiction in Fort Eustis.

As to the jurisdiction of the Warwick County coroner over ships operated by the U. S. Maritime Commission and anchored in the vicinity of Fort Eustis, it is my opinion that the Commonwealth of Virginia retains jurisdiction over its navigable waters in this vicinity. This being so, the Commonwealth retains its right to investigate any death aboard any ship anchored in these waters. No coroner being specifically appointed to act upon the navigable waterways, it is my opinion that the coroner of the county off which the ship is anchored has the authority to make the investigation.

Your other question relates to the jurisdiction of the Warwick County coroner in the case of death of personnel employed by the U. S. Maritime Commission believed to have been caused by a fall into the James River from a

pier where such ships are anchored. It is my opinion that the Warwick County coroner has jurisdiction over deaths occurring on the pier or in the waters adjacent to the county, and therefore, he would have jurisdiction in the case suggested by your letter.

In general as to the coroner's jurisdiction in military bases in Virginia, the Federal Government, in the majority of cases, has acquired exclusive jurisdiction over such land, and the county coroner would have no authority to act upon such land. Whether the jurisdiction of the Federal Government is exclusive or concurrent will depend upon whether under the particular Virginia Statute or statutes applicable the State has granted exclusive governmental jurisdiction to the United States, and such jurisdiction has been accepted by the Secretary of War or Navy, as the case may be, in compliance with the Federal Act requiring such acceptance before the State grant of jurisdiction can become effective.

You also refer to inquiries with respect to deaths involving personnel on foreign ships anchored at Virginia ports. While such a matter may be subject to a treaty regulation in any specific case, the general rule is that in the case of major crimes affecting the peace of the port, the jurisdiction of the sovereignty of the port prevails over that of the vessel. This being so, it would follow that the coroner of the county in which the port is located would have jurisdiction to investigate deaths occurring on board foreign ships anchored in the port.

With best wishes, I am ,

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

COSTS IN CIVIL CASES—Fee Prescribed for Service Process Includes that for Serving Papers Attached to Process. Cost Must be Paid in Advance.

April 7, 1948.

MR. WALTER B. GENTRY, *Sergeant*,
City of Richmond,
Room 219 City Hall,
Richmond 19, Virginia.

Dear Mr. Gentry:

Due to the fact that Judge Almond has not yet qualified for office I am acknowledging your letter of March 18th, 1948.

I have talked with Mr. Young, of your office, and he tells me that your problem is whether the 75c charge for services of process as set forth in Chapter 227, Acts of 1946, should be made as to all papers, such as affidavits, statement of accounts, etc., which are attached to a warrant, or whether in such cases the charge for one service only should be made. He also stated that the same question has arisen when two copies of a process are given to the Secretary of the Commonwealth for service on non residents.

It is my opinion that the papers described above are related and should be treated as a part of the notice for the purpose of charging the fee for service prescribed by Chapter 227, Acts of 1946, not only because Section 6133 of the Code permits a plaintiff, in an action of assumpsit, to file a copy of account with affidavit attached with his declaration, but also by virtue of the fact that actually only one service is involved. The same would be true when serving two copies on the Secretary of the Commonwealth, for again there is only one service involved.

Of course if the plaintiff desires a summons to be served on a given day and on a later date desires an affidavit or some other instrument to be served on the same defendant, or witness, the fact that the papers may be related would not effect the fee, for there would be, in fact, two separate services, and the charges therefor should be made accordingly.

Also I do not mean to suggest that, if an attorney attached two entirely separate and unrelated instruments together and they were served on the defendant at the same time, you would not be justified in treating them as two papers and charging the fee prescribed for two services.

You also asked in your letter whether or not service of a process should be refused until the full amount due for fees has been paid. In civil cases you may require that the proper fee be paid in advance (Section 3495 of the Code), except in the case of persons suing as provided by Section 3517 of the Code.

Very truly yours,

WALTER E. ROGERS,
Assistant Attorney General.

COUNTIES—Governing Body Thereof has no Authority to Regulate Parking on Streets Adjacent to Court House.

March 15, 1948.

HONORABLE CARY J. RANDOLPH,
Attorney for the Commonwealth,
Martinsville, Virginia.

My dear Mr. Randolph:

Due to the fact that Judge Almond has not yet qualified as Attorney General, I am acknowledging your letter of March 3, in which you ask whether Henry County has the authority to regulate the parking of vehicles along the sides of the streets adjacent to the Courthouse which is located in the City of Martinsville.

I am unable to find any statute that authorizes a county to regulate the parking of vehicles along the sides of streets adjacent to a Courthouse.

Assuming that the Courthouse is actually within the corporate limits of Martinsville, it is my opinion that section 86 of Chapter 421 of the Acts of Assembly of 1942 (found as subsection (e) of section 2154(133) of the Code) is controlling. I quote in part:

"The council or other governing body of any city or town may, by a general ordinance, provide for the regulation of parking within its limits, including the right to install and maintain parking meters and to require the deposit therein of a coin of a denomination to be prescribed in said ordinance, and to determine the time during which a vehicle may be parked and may authorize the city manager, the director of public safety, the chief of police, or other designated officer within said city or town to put said regulations into effect, including specifically the right and authority to classify vehicles with reference to parking, and to designate the time, place and manner such vehicles may be allowed to park on city or town streets, and may delegate to the appropriate administrative official or officials the authority to make and enforce such additional rules and regulations as parking conditions may require, and may prescribe penalties for failure to conform thereto." (Italics supplied)

Also, for your information, I am enclosing a copy of an opinion written on March 16, 1942, to the Honorable W. R. Broaddus, Jr., Commonwealth's

Attorney, Martinsville, Virginia, in which it was held that the Board of Supervisors had no authority to regulate the parking of vehicles on a strip of land over which a city has an easement for street purposes, even though the fee simple title is vested in the county.

Very sincerely yours,

WALTER E. ROGERS,
Assistant Attorney General.

COUNTIES—No Authority Vested in Counties and Unincorporated Towns to Regulate Parking of Vehicles.
DEPARTMENT OF HIGHWAYS—Has no Authority to Set Aside Curb Parking Space for use by Any Person.

February 3, 1948.

MR. BURTON MARYE, JR.,
Traffic & Planning Engineer,
Department of Highways,
Richmond, Virginia.

Re: Village of Schoolfield

Dear Mr. Marye:

In your letter of January 21, 1948, you present two questions which are as follows:

"Does the Police force of Schoolfield have legal authority to promulgate and put into effect the parking regulations on a highway built and maintained by the State Highway Department?"

- - - - -
"Does the State Highway Commission itself have the legal authority to set aside curb parking space on highways under its jurisdiction for the special privilege of any person, company or corporation?"

The village of Schoolfield is unincorporated and located in the County of Pittsylvania, Virginia. I have been unable to find any authority for counties or unincorporated towns to promulgate and to put into effect parking regulations on State Highways.

In regard to your second question, the Highway Commission is authorized under certain conditions to regulate traffic upon the highways. However, this authority does not extend to setting aside curb parking space on the highways for the privilege of any person, company, or corporation. Your attention is called to the statute giving such authority for the establishment of parking regulations in incorporated cities and towns having a population of 3500 or more.

With kind regards, I am

Very truly yours,

C. CHAMPION BOWLES,
Assistant Attorney General.

COUNTIES—Limitation of Bonded Debt is Eighteen Percent of Assessed Value of Real Estate.

January 16, 1948.

HONORABLE HANSEL FLEMING,
Commonwealth's Attorney,
Clintwood, Virginia.

Dear Mr. Fleming:

This is in reply to your letter of January 8, in which you ask if there are any constitutional or statutory limitations placed on the total bonded indebtedness of a county, either in proportion to its net worth or assessed value.

Section 115-a of the Constitution sets forth the power of a county to borrow money and provides, among other things, that no debt shall be contracted except pursuant to authority conferred by the General Assembly by general law and in the manner authorized by the Constitution.

It can be seen, therefore, that whether or not a particular bond issue would be limited in proportion to the assessed value of the real property in a county depends upon the general law governing that particular bond issue. For example, section 1560-d of the Code provides that when a sanitary district has been created the Board of Supervisors shall have the power to issue bonds of said district, the aggregate amount not to exceed 18 per cent of the assessed value of all real estate in said district subject to local taxation.

If you have any specific problem in mind, I will be glad to give the matter further consideration.

Very sincerely yours.

HARVEY B. APPERSON,
Attorney General.

COUNTIES—May Adopt Zoning Ordinances.

July 7, 1947.

HONORABLE RAYMOND V. LONG, *Director*
Virginia State Planning Board,
State Finance Building,
Richmond, Virginia.

My dear Mr. Long:

This has reference to your letter of June 25, 1947, in which you request an opinion as to the authority of local governing bodies to enact and enforce regulations in connection with highway strip-zoning, and in particular whether the set-back provisions of the ordinance of Amherst County and Loudoun County can be upheld.

There are three separate acts in Virginia giving the authority to local governing bodies to establish zoning ordinances.

City Zoning Act, Chapter 197, Acts of Assembly 1926.
County Zoning Act, Chapter 15, Acts of Assembly 1927.
County Zoning Act, Chapter 145, Acts of Assembly 1938.

The City Zoning Act, carried in Michie's Code as sections 3091(1) and 3091(26) specifically provides that cities or towns may "establish, set-back building lines, regulate and restrict the location, erection . . . or use of buildings . . . or size of yards, courts and other open spaces." Under this act a set-back ordinance of the City of Roanoke was upheld by the Supreme Court of the United States in *Gorieb v. Fox*, 274 U. S. 603, decided May 31, 1927. It was

held that the set-back ordinances involved held a rational relation to the public safety, health, morals or general welfare and were a valid exercise of the police power.

The County Zoning Act of 1927 was passed before this decision was rendered, but after the Virginia Supreme Court of Appeals had upheld the Roanoke ordinance. This act amended, sections 2880k through 2880-11 in Michie's Code, provides that governing bodies of counties of certain specified size may "regulate . . . the size of yards, courts and other open spaces, . . . and the location and use of buildings, structures and land for trade, industry, residence or other purposes." It will be noted that the provisions in the City Act as to set-back building lines is omitted.

However, a reference to the title of this act of 1927 reveals that one of the purposes of the act is to authorize the board of supervisors "to establish building lines." This being one of the purposes of the act, it is reasonable to assume that the legislature felt that the power given to regulate the location of buildings and the size of yards and courts carried with it the power to establish building lines.

It would appear that the governing body of counties of the size prescribed by section 2880k have the authority to establish set-back building lines.

Counties not coming within section 2880k are covered in section 2880mm. Under this section the governing body is given the authority "to regulate the location of those areas which may be used as places of residence, or in which . . . specific use may be conducted, and the minimum size of yards, courts or other open spaces." While the title carries no reference to building lines, it would appear that the authority to regulate minimum sizes of yards would support a building line ordinance.

The governing bodies of cities, towns and counties having been thus granted the authority to pass zoning ordinances, including set-back provisions, the question now is whether a particular ordinance is a reasonable exercise of this power.

Whether a particular ordinance is valid or not will depend upon the facts and conditions existing in the locality. A set-back line of 150 feet may be a reasonable exercise of the police power at one place in a county, but may be unreasonable at another place in the same county. As long as the ordinance provides a means whereby the different conditions in different places can be taken into consideration and allowances made for those places where a strict adherence to the regulations in the ordinance would not be a reasonable exercise of the police power, the ordinance would seem to be valid.

The Loudoun County ordinance provides that a board of zoning appeals may grant a variance in any special case if it finds the variance will not adversely affect public safety and the variance is necessary to preserve substantial property rights, or because of special circumstances or conditions applying to the land. This appears to be sufficient to allow for elasticity in the application of the ordinance to take care of varying conditions within the county.

The Amherst County ordinance likewise provides that a board of zoning appeals may vary application of the specific terms of the ordinance and may grant special exceptions where a literal enforcement of the provisions would result in unnecessary hardships.

By an act of legislature the decisions of these zoning boards are subject to review by the courts of the State.

The ordinances in question being within the authority granted by the legislature and being valid on their faces, the question of whether any decision of a zoning board under the ordinance is valid will depend upon whether the specific restriction imposed in that case bears some substantial relation to the public safety, public health, morals or general welfare. While the courts will give great weight to the decision of the local board as to the necessity for the

restriction which is challenged, this decision will not be upheld if plainly wrong. I hope this answers the problems raised in your letter of June 25.

With best wishes, I am

Very truly yours, ·

ABRAM P. STAPLES,
Attorney General.

CRIMINAL LAW—Courts May Authorize Payment to Photographer for Services Rendered and Charge Same to Appropriation for Criminal Charges.

November 20, 1947.

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

Dear Mr. Johnson:

Your letter of November 19, 1947, was duly received, from which I quote in part as follows:

"From time to time it becomes necessary for the sheriff or me as Commonwealth's Attorney, to secure the services of a private photographer and some one to take and remove finger prints inasmuch as our County has no one in its employ who can render such services. * * * I will, therefore, appreciate your opinion as to whether or not the Board of Supervisors of this County has authority to pay the expenses and charges of photographers, persons taking finger prints and others rendering special, technical and expert services in criminal cases."

Section 4960 of the Code of Virginia (Michie 1942) provides in the first paragraph as follows:

"When in a criminal case an officer or any person rendering any other service in the State of Virginia for which no specific compensation is provided, the court in which such case is, may allow therefor what it deems reasonable, and such allowance shall be paid out of the Treasury from the appropriation for criminal charges on the certificate of the court stating the nature of the service."

There seems to be no specific compensation provided for the services which you mention in your letter. I am, therefore, of the opinion that such services are not properly chargeable against the Board of Supervisors of your County, but should be paid from the appropriation for criminal charges from the State Treasury upon proper certificate of the Judge before whom such was tried. Charges for services of this nature should be contained on form No. 4 as furnished by the Comptroller's Office with a certificate on said form from the court trying the case to the effect that the charges are deemed by said court to be necessary and reasonable. If the procedure herein outlined is followed, I feel sure that you will not experience any difficulty for the payment of such services.

With kindest regards,

Sincerely yours,

HARVEY B. APPERSON,
Attorney General.

**CRIMINAL LAW—Donations Made in Return for Ticket Evidencing
Chance for Car—Constitute a Lottery.**

September 15, 1947.

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

My dear Mr. Singleton:

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

"The American Legion Post in Amherst, Virginia and Madison Heights, Virginia, and the Odd Fellows Lodge of those two places, are taking donations in return for which they give a ticket with a number on it, and they plan to give away a car to the holder of the lucky ticket.

"Please let me know if this will constitute a lottery under the Virginia Statutes.

"The tickets are not sold, but are given in return for a donation to the different posts or lodges.

"They have asked me, as their representative in the Legislature, to get an official opinion from you."

In 1931 our Supreme Court of Appeals had occasion to consider a very similar plan in the case of *Maughs v. Porter*, 157 Va. 415. In that case the defendant advertised in the press that he would give a free Ford automobile to the lucky person attending an auction sale of residence lots. Each person attending the sale was given a slip of paper upon which his name was written and deposited in a box held by the auctioneer. The person whose name was drawn from the box was adjudged the winner of the automobile.

In an unanimous opinion of the Court delivered by Chief Justice Prentiss, it was held that the mere attendance at the sale constituted a consideration which rendered the scheme a lottery, and, therefore, unlawful. This was a civil action brought to recover the automobile by the person adjudged to be the winner and recovery was denied. I cannot see that it makes any difference, however, whether the case was civil or criminal. In this connection see also the case of *Rosenberg v. Commonwealth*, 165 Va. 739.

In the plan outlined in your letter, the fact that the ticket holders make donations in return for the ticket would seem to me to clearly constitute a consideration under the principles laid down by our Court in the above case.

It is my view, therefore, that the carrying out of the plan you describe in your letter would be attendant to the risk of being held a violation of section 4693 of the Code, which carries a maximum penalty of confinement in jail of one year and a fine not exceeding \$500.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CRIMINAL LAW—Lottery: Turkey Where Contestants Pay for Privilege of Shooting No Lottery.

September 30, 1947.

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

My dear Mr. Marsh:

I have your letter of September 25, which was addressed to Honorable Harvey B. Apperson as Attorney General, and which he has sent to me for reply inasmuch as he will not qualify until October 6. I quote from your letter as follows:

"Accotink Lodge of Odd Fellows, No. 75, situated at Accotink, in Fairfax County, Virginia, have consulted me relative to their conducting a turkey shoot. The facts are that the lodge will buy several turkeys or other things of value, and contestants will be invited to come and bring their own guns at the place where the shoot is to be held. Each contestant pays so much for the privilege of shooting. The contestants shoot at an object or a bullseye, and those shooting the nearest to the bullseye, win the turkey or other thing of value, as the prize."

You request the opinion of the Attorney General upon the question whether such a contest is in violation of section 4685 or section 4687 of the Code.

In my opinion, it is not such a violation. A contest of this kind is more analogous to a golf tournament, in which each participant contributes his pro rata part of the prize which will be won by the successful contestant. While there is some element of chance no doubt in a shooting contest, this is also true with respect to a golf game. In my opinion, it does not constitute a lottery, nor does such a contest constitute gambling within the contemplation of section 4687. I think this conclusion is to be drawn particularly in view of the fact that sections 4682, 4683, and 4684 specifically prohibit the awarding of any prize in connection with horse racing, or any trials of speed of any animals or beasts taking place within the limits of the Commonwealth. The statute contains no specific prohibition with respect to shooting contests.

With best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CRIMINAL LAW—Element of Chance must be Dominant in Scheme to Constitute Lottery.**LOTTERY—Element of Chance must Dominate Scheme to Constitute Lottery.**

June 2, 1948

HONORABLE J. SYDNEY SMITH, JR.
Commonwealth's Attorney,
City of Norfolk,
818 National Bank of Commerce Building,
Norfolk, Virginia.

My dear Mr. Smith:

This is in reply to your letter of May 27, in which you ask for my opinion as to the legality of a sales promotion program which Colonial Stores, In-

corporated, is planning to inaugurate. The details of this program, as set forth in your letter, are as follows:

"1. Colonial Stores Incorporated is planning a sales promotion program throughout the six states in which it operates, namely: Virginia, North Carolina, South Carolina, Georgia, Alabama and Florida, to run for a period of fifteen days, involving the giving of daily prizes ranging from one automobile per day to quite a large number of pressure cookers.

"2. The promotion scheme is based upon the first birthday of the 'CS Rooster', the new trademark of the Company, which will be one year old when the program commences.

"3. Customers and prospective customers are invited to participate by obtaining a contest blank, delivered one to a customer, when passing through the checking stands in any Colonial Store. The person is to fill in blanks showing his name, address, date and suggestion for an appropriate name for the 'CS Rooster'.

"4. At the end of each day, the participants suggestions will be turned over to some group, such as the student body of sundry colleges in the territory, who will list the participants by name and file them alphabetically, selecting from the lists the most unusual, spectacular, and appropriate names with a higher level of judges to take the choice from the states and certify to the promotion management the winners of the various awards.

"5. In the event of duplication in any of the award brackets, the award is to be made in alphabetic order using a different letter of the alphabet each day of the promotion program as a starting point for the selection of the participant to whom the award is to go.

"It would appear fairly certain that the giving of the awards on the basis of appropriate name selection eliminates the element of chance necessary to constitute the program a lottery. The only difficulty being the disposition to be made of duplication.

"It is thought that by using the library alphabet system, based on a letter designated in the instructions to the judges in advance, the gambling element which would make the program objectionable under the lottery laws is removed.

"The way this would work out would be, say on a particular day the letter 'M' was the key letter, then Matthews would win out over Miller and James Matthews would win out over Richard Matthews."

To constitute a lottery it is necessary that the essential elements of consideration, prize and chance be present. Clearly, under the above plan there is consideration and prize. The difficult question involves whether or not the distribution of the prize depends upon chance. While the matter is not free from doubt, it is my opinion that the element of chance is not sufficiently dominant in this program to constitute it a lottery. It appears to me that skill and judgment are involved in the suggestion of the most "unusual, spectacular and appropriate" name for the CS Rooster.

With best wishes, I am

Very truly yours,

J. LINDSAY ALMOND, JR.,
Attorney General.

CRIMINAL LAW—No Authority to Assess Defendant with Cost of Transportation to County Jail.
TRIAL JUSTICE—Costs—Cannot Assess Costs of Transportation Against Defendant in Criminal Case.

March 31, 1948.

HONORABLE J. GORDON BENNETT,
 Auditor of Public Accounts,
 Richmond 10, Virginia.

My dear Mr. Bennett:

This is in reply to your letter of March 23, from which I quote in part:
 " * * * In the town of Stanley in Page County, police officers of the town make arrests for violations of the criminal laws of the State. Individuals so arrested are transported to the county seat of Luray, at which place the county jail is located and at which place the trials are conducted by the trial justice.

"The town of Stanley has requested the trial justice to assess as part of the costs the sum of \$1.00, which when recovered from the defendants, is to be paid to the police officers in reimbursement for the transportation expense incurred by them in taking the individuals arrested to the county jail at Luray. The trial justice wishes to know if it will be proper for him to assess, as part of the costs, the sum of \$1.00 for this expense and when recovered from the defendant in the case of conviction, to be paid to the police officers of Stanley."

I can find no authority for a trial justice to assess as part of the costs in criminal cases the sum of \$1.00 in order to reimburse police officers of towns and cities for transportation expense incurred by them in taking individuals arrested to county jails, as outlined in your letter.

However, it is my opinion that section 2991 of the Code, dealing with the powers and duties of the police force of cities and towns, is controlling. The pertinent part of that section is as follows:

" * * * If, however, it shall become necessary or expedient for him to travel beyond the limits of said city or town in his capacity as a policeman, *he shall be entitled to his actual expenses*, to be allowed and paid as is now provided by law for other expenses in criminal cases." (Italics supplied)

Very sincerely yours,

WALTER E. ROGERS,
Assistant Attorney General.

CRIMINAL LAW—Person (Not Driving) Found in an Automobile but on a Public Highway in an Intoxicated Condition is Guilty of Misdemeanor.
 May 20, 1948.

MR. JULIUS GOODMAN,
 Attorney at Law,
 Christiansburg, Virginia.

Dear Mr. Goodman:

This is in reply to your letter of May 18th, from which I quote, in part, as follows:

"Section 4568, of the Code of Virginia, reads as follows:

' " If any person arrived at the age of discretion, profanely curse or swear or get or *be drunk in public*, he shall be deemed guilty of a misdemeanor xxx.'

"Does not this Statute cover a person who is found drunk in an automobile, while said automobile is being driven on the public highway, the person found drunk in said automobile while being driven on the highway, not being the driver of said car? I will appreciate very much your opinion on this."

Since the Section in question is found under Chapter 183 of the Code, entitled "Offenses Against Morality And Decency", it appears to me that the intent of the Legislature was to prevent intoxicated persons from annoying or disgusting people in public places. In other words, the act of the intoxicated person must be obnoxious to the public and made manifest by some indecent condition or by indecent language.

Therefore, it can be seen that I am of the opinion that whether or not an intoxicated person, who is found in an automobile on a public highway, is subject to punishment under Section 4568 would depend upon the facts of each case.

Very truly yours,

J. LINDSAY ALMOND, JR.,
Attorney General.

DIVISION OF PURCHASE AND PRINTING—Unless Ordered to do so by the Governor a State Agency can Make Small Purchases Direct.

July 8, 1947.

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

My dear Mr. Gilmer:

This is in reply to your letter of July 3, 1947, from which I quote:

"On August 28, 1946, Mr. A. B. Gathright, Director of Purchase and Printing, notified all of the State agencies and institutions that he had made a contract with a company in the State for the purchase of various office supplies, including ink and carbon paper and articles of this nature. When I received this letter from Mr. Gathright, I notified the various agencies and institutions that we would not accept any direct purchase orders for any items that were included in this contract.

"On June 13, 1947, Captain Robert Littrell, Purchasing Agent for Virginia Military Institute, Lexington, Virginia, issued Purchase Order No. A-189 to the Staunton Typewriter Company, Staunton, Virginia, for 40 boxes of Carter's Midnight Carbon for \$94.00, which I have refused to honor.

"This morning I have a letter from Captain Littrell, dated June 30, 1947, in which he claims that under section 401e(8) of the 1946 Supplement to Michie's Code of 1942 he has the right to purchase this, regardless of the fact that the State Director of Purchase and Printing had made a contract and notified him of the existence of such contract."

Section 401e of the Code of Virginia reads in part as follows:

"(a) Unless otherwise ordered by the Governor, the purchasing of materials, equipment and supplies through the Director of the Division of

Purchase and Printing is not mandatory in the following cases:

* * * * *

(8) Any purchases by a State institution of materials, equipment and supplies, not in excess of one hundred dollars, provided such purchase is not a part of a larger purchase which has been divided for the express purpose of coming within the provisions of this exception."

In view of this provision it is my opinion that, unless the Governor has ordered otherwise and the purchase is not a part of a large purchase which has been divided for the express purpose of coming within the exception quoted a State agency has the authority to make such a purchase as you set forth in your letter directly instead of through the Director of the Division of Purchase and Printing.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Absentee Ballots may be Counted if Received at any Time Prior to Closing of Polls.

October 30, 1947.

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

My dear Mr. Louderback:

This is in reply to your letter of October 28, 1947, in which you ask what is the latest time at which the electoral boards should receive absent voters' ballots by registered mail to be delivered by them to the judges of the various precincts.

This office has previously ruled that absentee ballots may be counted if received by the electoral board at any time prior to the closing of the polls on election day. Section 213 of the Virginia Code provides that sealed containers, containing among other things the sealed ballots, shall be delivered by the electoral board to the judges of election "on the day of election". This duty may be performed any time during the day of election.

If it is necessary to make a second delivery, the sealed containers containing the ballots received later during the day of the election should contain amended lists required by section 211 of the Code to show the additional voters whose ballots had been received and placed in the container containing the additional ballots. The copy of such lists required to be posted on the morning of the day of the election by section 212 of the Code can be amended when the additional ballots are delivered. The copy of such lists posted on the morning of election day would already show who had applied for absentee ballots and also those persons who had returned such ballots unused. There would, therefore, be no confusion as to those who are entitled to vote in person as distinguished from those who are voting by absentee ballot.

Very sincerely yours,

HARVEY B. APPERSON,
Attorney General.

ELECTIONS—Absentee Ballot Should be Sent Voter When Postage is not Tendered.

October 21, 1947.

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

.Dear Mr. Davis:

This in reply to you letter of October 15, 1947, inquiring as to whether or not an absentee ballot should be sent to a voter who duly makes application for the same, but who fails to send with his application the necessary postage or the correct amount in legal tender necessary for registering the ballot from the electoral board to such applicant.

The statute provides that the application shall be made to the registrar and "shall contain necessary postage, or the correct amount in legal tender, necessary for registering the ballot from the electoral board to such applicant. But the failure to enclose necessary postage shall not render void a vote otherwise legally cast." Section 205 makes it the duty of the registrar, if the applicant is duly registered in his precinct, to forward the application, with the required affidavit attached, to the secretary of the electoral board, noting thereon that the applicant is a registered voter of his precinct. It then provides that, if it appear to the electoral board that the applicant is a registered voter of the precinct in which he offers to vote, the ballot be sent to the applicant by registered mail. The statute contains no express provision dealing with the situation when the necessary postage was not sent with the application. However, in view of the express provisions of section 203 that the failure to enclose the necessary postage shall not render void a vote otherwise legally cast, it was apparently contemplated that the voter may receive the ballot even though he did not enclose the necessary postage, so, if the ballot has been sent to him and is voted by him, it should be counted.

Very sincerely yours,

HARVEY B. APPERSON,
Attorney General.

ELECTIONS—Ballots Sent Absentee Voter Containing Names of Officers in Other Districts are Nullity to District Offices—Valid to Offices of County at Large.

November 3, 1947.

HONORABLE J. CLOPTON KNIBB
Attorney for the Commonwealth,
Goochland, Virginia.

My dear Mr. Knibb:

This is in reply to your request on behalf of the Electoral Board of Goochland County for an opinion from this office on the following situation existing in Goochland County:

The ballots printed for use in the various precincts in the County contain the names of candidates to be voted upon by the County at large and the names of candidates for district offices to be voted upon by the voters of the respective precincts. The Secretary of the Electoral Board has in some instances sent to absentee voters residing in one precinct the ballots prepared

for use in other precincts; that is, the ballots so sent contain the names of candidates to be voted upon by the County at large and the names of district offices to be voted upon by the voters of some precinct other than that of the voter to whom the ballot was sent, rather than the district offices to be voted for in the precinct of the absentee voter. It appears that while there are contests for some of the offices to be voted upon by the County at large, there are, in fact no contests for the district offices in any of the districts. In view of this irregularity, you asked whether or not such ballots if voted by the absentee voters should be counted as to the offices to be voted upon by the County at large.

It is my opinion that while such ballots are a nullity as to the district offices, there is no reason why they should not be counted as to the offices to be voted upon by the County at large and that the absentee voters receiving such ballots may vote the same as to such offices and that the ballots when so voted should be counted as to such offices. Since the wrong ballots as to district offices have been sent to the voters, I do not think that such ballots should be counted as to district offices, even though the voters may attempt to write in the names of candidates for such offices, because the voters have not been able to see from any official ballot the names of the candidates who have properly qualified for district offices. However, the invalidity of the ballot for certain offices should not, in my opinion, affect its validity for the offices to be voted upon by the County at large.

With kindest regards,

Very sincerely yours,

HARVEY B. APPERSON,
Attorney General.

ELECTIONS—Candidate for Any State or Local Office Must be a Qualified Voter of the County or City Wherein he Resides.

May 7, 1948

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

Dear Mr. Davis:

This is in reply to your letter of May 5, enclosing a letter from Mr. Henry A. Wise, in which he asks whether a party nominee is entitled to be a candidate for office, regardless of whether he is a qualified voter or not.

The qualification to hold office is governed by section 32 of the Constitution of Virginia, which provides that "every person *qualified to vote* shall be eligible to any office of the State or in any county, city or town or other sub-division of the State wherein he resides." It is to be noted that section 154 of the Code expressly states that "no person not announcing his candidacy in a specified way or who is not qualified to vote in the election shall have his name printed on the ballot. The phrase "unless he be a party primary nominee" is not intended to mean that a party nominee does not have to be qualified to vote, for section 229 requires a candidate in any party primary election to be legally qualified to hold the office for which he is a candidate and to be eligible to vote in the primary before he can have his name printed upon the ballot for the primary election. The second paragraph of section 154 merely exempts party nominees from filing notices of candidacy and petitions

when their names have been certified by the chairman of the party and does not exempt such nominees from the constitutional requirement that they be qualified to vote.

I am returning Mr. Wise's letter herewith.

Very sincerely yours,

J. LINDSAY ALMOND, JR.,
Attorney General.

ELECTIONS—Candidate for City Council for the City of Portsmouth Must File a Petition Signed by Fifty Qualified Voters.

February 10, 1948.

HONORABLE J. ALDEN OAST,
Attorney for the Commonwealth,
316 New Kirn Building,
Portsmouth, Virginia.

Dear Mr. Oast:

Your letter of February 7, 1948, addressed to the Office of the Attorney General, has been handed to me for attention. I quote a portion of your letter as follows:

"As Commonwealth's Attorney for the City of Portsmouth, I have been requested to give an opinion as to whether a candidate for city councilman from a ward in the city should file with his declaration of candidacy, a petition signed by fifty qualified voters of the city or fifty qualified voters of the ward in which he lives and is a candidate. The city operates under the ward system and the councilmen are elected by the qualified voters of each ward."

You state that it is your view that since the State law requires the petition to be signed by fifty qualified voters of the city and the special act changing the system does not set up a different requirement that a petition be signed by fifty qualified voters of the city at large would meet the requirements of the law pertaining to the candidacy of a ward councilman. I have examined the charter of the city of Portsmouth as amended by the General Assembly of Virginia, Acts of Assembly of 1936, Chapter 94, and also section 229 of the Code of Virginia pertaining to declarations of candidacy. That portion of this section which you quote seems to be applicable, that is,

" * * * Nor shall the name of any candidate for the General Assembly, or for any city or county office be printed upon any official ballot used in a primary unless he file along with his declaration of candidacy a petition therefor signed by fifty qualified voters of his city or county witnessed as aforesaid and with like affidavit attached thereto."

It, therefore, follows that I concur with you in your view that a candidate for the city council of Portsmouth may have his petition signed by fifty qualified voters of the city which need not be limited to the particular ward in which the candidate resides.

With kind regards, I am

Very truly yours,

C. CHAMPION BOWLES,
Assistant Attorney General.

ELECTIONS—Candidates Must File Notice of Candidacy and Petitions Within Seven Days after the First Tuesday in August.

July 2, 1947.

HONORABLE H. BRUCE GREEN,
Clerk of Arlington County,
Court House,
Arlington, Virginia.

My dear Mr. Green:

This is in reply to your letter of July 1, in which you request my opinion as to the time within which petitions of independent candidates for the Arlington County Board and the Arlington County School Board must be filed for the general election to be held this November.

Section 3 of Chapter 2 of the Acts of the General Assembly, Extra Session 1945, as amended by Chapter 1 of the Acts of Assembly of 1946, which section is found in Michie's Code, 1946 Supplement, as section 220(43), provides that notices of candidacy and petitions of such candidates shall be filed within seven days after the first Tuesday in August. It is my opinion, therefore, that August 12 is the last day such notices and petitions can be filed.

With best wishes, I am

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Only one Set of Commissioners of Election where Primaries of Both Parties held on Same Day.

May 27, 1948.

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

My dear Mr. Marsh:

This is in reply to your letter of May 22, in which you request my opinion on a matter pertaining to the primary elections to be held in Fairfax County in August. It appears that there will be a Democratic and a Republican primary held on the same primary day. You ask if section 239 of the election laws requires the electoral board to appoint a separate set of commissioners of election for each party.

Section 239, in so far as is pertinent here, reads as follows:

"The electoral board in each county and city shall at the time they appoint judges and clerks of election designate five of the judges so appointed to act as commissioners, who, or any three of whom, shall constitute a board, which shall elect one of their number secretary, whose duty it shall be to meet at the clerk's office of the county or city for which they are appointed, on the second day after any primary election held therein, and proceed to open the returns which shall have been made at that office; and the said commissioners shall ascertain from the returns the candidates who have received the greatest number of votes in the county or city. * * *"

From this section it appears that the commissioners are selected from the judges and clerks of election appointed by the electoral board. Section 224 provides for the appointment of judges and clerks of primaries and, in so far as is pertinent here, reads as follows:

"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 such manner as may be provided by the party plan of such party or parties, one of which judges so appointed shall act as clerk in the conduct of such primary so held, at each of the several precincts as now designated or as may be hereafter provided by law. No judge or clerk of any election held under this chapter shall, during the progress of the same, attempt to influence any voter for or against any candidate. The said primaries shall be held by three judges and two clerks, appointed as above provided, for each party participating in said primary, if in the judgment of said board the two clerks are necessary in order to have the vote cast at any voting place. The judges so appointed for each party shall conduct the primary for that party. All provisions and requirements of the statutes of this State in relation to the holding of elections, the counting of ballots, the making and certifying of returns and all other kindred subjects shall apply to all primaries insofar as they are consistent with this chapter. * * *

It appears to me that section 239 contemplates that the commissioners of elections appointed for a primary shall be appointed from the judges designated under section 224. Both of these sections are in the Chapter dealing with Primary Elections. Other sections in this chapter, in addition to section 224, specifically sections 236 and 237, clearly indicate that the legislature contemplated that two primaries might be held on the same day. These sections make provisions for separate ballots, separate poll books and separate ballot boxes. Had the legislature deemed it necessary that there be a separate set of commissioners for each party such a desire could have been clearly expressed.

An examination of the statutes pertaining to primary elections indicates that only one set of commissioners is required. These commissioners perform a function which is primarily ministerial. They meet two days after the primary and open the returns which have been made by the primary judges to the clerk of the court. From these returns the commissioners determine the persons who have received the highest number of votes for nomination to any office. The secretary of the board of commissioners then makes out abstracts and certificates of the votes cast and forwards certified copies of the abstracts in accordance with section 241. It will be noted that the secretary also mails copies to the chairman or chairmen of the party or parties under whose auspices the primary is held.

It is my opinion that there need be but one set of commissioners for these two primary elections, and that these commissioners must be selected by the electoral board from among the judges appointed for the primary under section 224.

I call your attention to the fact that this set of commissioners is not the same set appointed for the general election. Section 182 of the election laws provides for the appointment of commissioners for general elections. A comparison of section 182 with section 239 indicates that there are two separate boards, one to meet and open returns at primaries, the other to meet and open returns at general elections. The commissioners appointed under section 182 are selected from the judges appointed under section 148. It is my opinion that the above-mentioned sections contemplate that there shall be appointments of judges and commissioners for primaries in addition to the appointments of

judges and commissioners for general elections. I do not mean to convey the idea that the same persons may not be appointed to serve in both the primary and the general election, but there must be separate appointments for each of the two elections.

With best wishes I am

Yours very truly,

J. LINDSAY ALMOND, JR.,
Attorney General.

ELECTIONS—Compensation of Registrar for Purging Registration Books must be Authorized by Board of Supervisors.

August 18, 1947.

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

Dear Mr. Davis:

This is in reply to your letter of August 1, 1947, regarding compensation of registrars for purging the registration books. Code section 200 provides that registrars "shall receive as compensation for their services the sum of \$5.00 each for each day's service rendered * * * to be paid out of the treasury of the county, city or town." It is not entirely clear, however, that this section applies to the services rendered by the registrar in purging his registration books, and there appears to be no specific provision elsewhere expressly covering this matter.

For this reason, this office has heretofore expressed the opinion that it would be wise for county registrars to seek an agreement in advance with the electoral board as to compensation for these services. In this connection, the electoral board should obtain the approval of the county board of supervisors which must appropriate the necessary funds. In cases where the work has already been done, I can only suggest that the registrars take the matter up with the local county authorities in order that an agreement can be reached as to the reasonable compensation to be paid for this service.

Mr. Beamer's letter of July 24 is returned herewith.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTION—Compensation of Secretary of Electoral Board Can Not Exceed Twenty-Five Dollars Exclusive of Mileage.

November 17, 1947.

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

My dear Mr. Davis:

Your letter of November 14 has been received in the absence of Mr. Apperson. In that letter you ask if the Board of Supervisors of Madison County

has any authority to pay the Secretary of the County Electoral Board more than \$25.00, exclusive of mileage, for his services performed in 1947.

Section 89 of the Virginia Election Laws makes provision for compensation due members of the electoral boards. That section provides, in part, " * * * that members of such board shall receive from the county, city or town, respectively, no more than \$25.00 in any one year, exclusive of mileage * * *." Further on the section provides " * * * 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; but the secretary of the board shall in addition to the per diem herein provided for be allowed his expenses not to exceed twenty-five dollars in any one year, * * *."

It is my opinion that the secretary of the electoral board can receive no compensation other than that mentioned in this section. The fact that his per diem amounts to considerably more than \$25.00 does not give the board of Supervisors any authority to exceed the amount set forth in the above quoted section of the Election Laws in the payment of the secretary of the board. I am returning herewith the letter enclosed in your letter.

With best wishes, I am

Very sincerely yours,

C. CHAMPION BOWLES,
Assistant Attorney General.

ELECTIONS—Duty of Election Judge to Challenge Vote; Registrar must Deliver Books to Judge of Elections; Application and Affidavit for Absentee Vote may be Made on Sunday.

October 22, 1947.

MR. WAYNE MITCHELL,
Judge of Elections,
R. F. D. No. 2, Box 14,
Fries, Virginia.

My dear Mr. Mitchell:

This is in reply to your letter of October 20, 1947, in which you ask the following questions:

1. Should a precinct judge of elections challenge and stop the vote of any person who has not properly been registered but whose name has been placed on the registration book?

Under section 174 of the Code of Virginia it is the duty of an election judge to challenge the vote of any person known or suspected not to be a duly qualified voter. If a person has not been properly registered, he may not be a duly qualified voter, and the judge of elections should challenge his vote.

2. Should a judge of elections accept the registration books from any other person other than a registrar, and after the election should he turn them over to any person other than the registrar?

Section 104 of the Code specifically provides that the registrar deliver the books to the judges of election, and after the election the judges shall turn over the books to the registrar. It is, therefore, my opinion, and this office has previously held, that the registrar should not part with the books except

when he turns them over in compliance with section 104, nor should the judges turn the books over to anyone other than the registrar.

3. Should the registrar be permitted to enter the voting place when a challenge of a vote is made unless he is properly concerned?

Section 175 of the Code provides how judges of elections shall proceed when they challenge the vote of any person. This section provides that the judges may receive evidence as to whether the person challenged is a duly qualified voter. It is my opinion that the challenge should be run by the election judge, and the registrar should not be permitted to enter the voting place unless he is needed to produce evidence as to the qualifications of the voter.

4. Is it legal for an absentee voter to make affidavit and application on Sunday before the proper officer for a mail ballot?

I know of no provision in the law which would invalidate an affidavit or application made on Sunday, if it is otherwise properly made, nor which would invalidate a mail ballot cast on Sunday.

I trust this answers all the questions in your letter, and with best wishes, I am

Very truly yours,

HARVEY B. APPERSON,
Attorney General.

ELECTION—Discharged Veteran Must Register to Be Eligible to Vote.

September 10, 1947.

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

My dear Mr. Louderback:

In your letter of September 8, you inquire as to the method of absentee voting by a former service man who received his discharge during the year 1946 (what I have to say would also apply to a person receiving his discharge in 1947). You say that this man is away from his county now and will be until after election day.

In the first place, of course, it is necessary that the voter should have registered if he is not actually in active service. If he is registered, it is sufficient for him to fill out the application for ballot, a copy of which is enclosed herewith, and make affidavit to the effect that he is exempt from the payment of poll taxes for the years 1944, 1945, and 1946, and indicate on the application blank the date of his discharge. This, in my opinion, should be accepted as satisfactory evidence of the fact that he is exempt from taxes for these years, both by the registrar, the electoral board, and also the judges of election.

I have filled in the blank to cover a person discharged in 1946. However, the only change necessary for a person discharged in 1947 would be to change the figure 6 added in the line which is checked in the square and insert in lieu thereof the figure 7. In other words, the affidavit would show that he was discharged in 1947, and was, therefore, exempt from 1944, 1945, and 1946 taxes. No provision is made in the Constitution or statutes for a discharged veteran voting without having registered, and, if the person you refer to has not

registered and cannot return to his precinct before election day, it would seem that he is unable to vote.

With best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Duty of Determining Whether Applicant is a Registered Voter Can not be Delegated by Electoral Board to Clerical Assistant.
September 23, 1947.

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

My dear Mr. Davis:

This is in reply to your letter of September 19, requesting my opinion as to whether or not electoral boards may employ an assistant to aid the secretary of the board in the handling of absentee ballots and give him the power to do any and all things that the secretary of the electoral board can do.

Chapter 14 of the Code, which deals with absentee voting, provides that voters shall make application for absentee ballots to the registrar, who then forwards the application to the secretary of the electoral board. The statute then requires the electoral board, if it determines that the applicant is a registered voter of the precinct in which he offers to vote, to send the ballot and related papers to the applicant by registered mail.

Section 216-a of the Code provides that 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 relating to absentee voting. This statute authorizes the employment of an assistant to stay in the office of the secretary of the board to assist in receiving the applications, keeping the necessary records, and doing the other work incidental to absentee voting. The assistance contemplated by this section is, in my opinion, assistance in connection with the clerical and ministerial work that has to be done and not assistants to whom all of the functions of the board may be delegated.

The duty of determining whether an applicant is a registered voter and entitled to receive the ballot is a duty imposed upon the electoral board itself. This duty should not, in my opinion, be delegated to a mere clerical assistant, but should be performed by a member of the board pursuant to authority from the whole board. This member may be either the secretary or any other member of the board.

Senator Robinette's letter is returned herewith.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Electoral Boards are Authorized to Divulge Information Concerning Official Ballots Prior to the Election.

May 10, 1948.

MR. E. S. BISHOP, *Secretary*
Montgomery County Electoral Board,
Box 264,
Blacksburg, Virginia.

My dear Mr. Bishop:

This is in reply to your letter of April 29, 1948. In that letter you quote a portion of section 167 of the Code which provides that no member of the electoral board "* * * shall sell or give to any person whomsoever, except where it is distinctly provided by this chapter, an official ballot or copy, or any facsimile of the same * * *." You ask if the members of the electoral board may divulge information concerning official ballots prior to the election, such information to be used for printing "informative ballots".

Section 156 of the Virginia Code, as pointed out by you, provides:

"Nothing herein contained shall be construed to prohibit any electoral board from publishing or otherwise disclosing the contents, style and size of ballots, which information electoral boards are hereby authorized and empowered to publish or otherwise disclose."

Section 167, in addition to that part referred to above, contains the following provision:

"Nothing contained in this section shall be construed to prohibit: (a) the printing and circulation of 'informative ballots', provided such 'informative ballots', are not printed on white paper, and (b) the publication in newspaperse of 'informative ballots'."

It is my opinion from a consideration of the above mentioned sections that the electoral board is authorized to divulge information concerning official ballots prior to the election, which information may be used for the printing of "informative ballots".

With best wishes, I am

Very truly yours,

J. LINDSAY ALMOND, JR.,
Attorney General.

ELECTIONS—Electoral Boards must have Ballots Printed Immediately after Time for Qualification; Party Authorities can Notify Clerk in Lieu of Filing Individual Notices; Registrar Must Sit Thirty Days before Primary Election Date even where There is no Primary in County; Chairman of Party can not Withdraw Name of Party Nominee.

August 14, 1947.

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

My dear Mr. Switzer:

In your letter of August 13 you request my views with reference to the following questions:

1. Since the time for candidates to qualify to have their names printed

upon the ballots has passed, should the electoral boards proceed immediately with the printing of the ballots, placing thereon the names of such candidates as have qualified?

Section 4, Chapter 2, of the Acts of the Extra Session of 1945, provides that the ballots shall be printed immediately after the expiration of the time by the Secretary of the Commonwealth in cases in which that officer will cause the ballots to be printed. The section provides also that the Secretary of the Commonwealth may obtain suitable ballots from the electoral boards in appropriate cases where same are promptly available. It is my opinion that the general purport of the statute is that the electoral board shall immediately proceed to print the ballots, in order that they may be made available to the Secretary of the Commonwealth for transmission to applicants overseas who desire to vote an absentee ballot.

I note that you are under the impression that the Secretary of the Commonwealth should notify the electoral boards of the names of candidates filing at Richmond. This is true in cases of elections for the State at large and for members of Congress. However, section 4 provides that such certification shall be made by the Secretary of the Commonwealth *when required by law*. There is no requirement of general law which would apply to the certification by the Secretary of the Commonwealth of candidates for members of the General Assembly and local officers. I have just given an opinion to the Secretary of the State Board of Elections to that effect, a copy of which I am herewith enclosing.

2. You are correct in your understanding that party nominees do not have to file individual notices with the clerk, provided the proper party authorities have notified the clerk that such candidates are party nominees. (See the second paragraph of section 154 of the Code).

3. You next inquire whether or not the registrar shall sit for registration purposes in a county where there is to be no primary.

The statute only requires the registrar to sit thirty days before the date fixed by law for every regular primary election and every general election. The fact that all of the candidates filing may be declared nominees without opposition, and that no primary will actually be held, would not, in my opinion, relieve the registrar of the duty of sitting as the statute provides. The same would apply to like situations in towns.

4. The next question is whether the chairman of the party may withdraw the name of said party's nominee which has been certified by the chairman to the clerk.

In my opinion, the party chairman has no authority to withdraw the name of the party nominee. However, the nominee himself may withdraw same and direct the clerk not to certify his name to the electoral board.

With my sincere good wishes, I am

Cordially yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Electoral Board not Required Permit Public inspection of its Records Prior to Posting List of Absentee Voters.

August 8, 1947.

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

My dear Mr. Thompson:

This is in reply to your letter of August 6, 1947, from which I quote:

"Under the provisions of sections 205 and 211 of the absent voters law the registrar, upon receipt of an application for a ballot, if the applicant is registered in the precinct, is required to enroll the name and address of the applicant on a list to be kept by the registrar and to forward such application with the required affidavits to the secretary of the electoral board, and upon receipt of the ballot from the voter the electoral board is required to enroll the name and address of the voter on the list to be kept by precincts.

"Will you please advise me whether, in your opinion, the records required to be kept by the electoral board, upon receipt of the application for ballot, are open for public inspection prior to the morning of the election when a list is posted at the polling place.

"In other words, does the citizen have the right to see the records of the electoral board to determine who has applied for a ballot and if they have properly applied, before the electoral board is required to post a list of the applicants?"

As you point out in your letter, the electoral board is required on the morning of the day of election to post in a conspicuous place at the polling place in the proper precincts a copy of a list of those absentee voters who have applied for ballots and have returned the same to the electoral board. In view of the fact that the statute prescribes this specific method of making public this information, it is my opinion that the electoral board is not required to permit public inspection of its records prior to the time it is required to post the list.

With best wishes, I am

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Eligibility of Voters Payment of Poll Tax not Necessary if Person becomes of Age Within Year of Election.

October 16, 1947.

MR. S. E. PORTER, *Registrar*
Wytheville, Virginia.

My dear Mr. Porter:

This is in reply to your letter of October 7, 1947, in which you ask the following question: Can a voter who has come of age at a time when there is no tax assessable against him that is due until 1948, and who has paid his poll tax for 1948, vote in the coming November election?

It appears that the voter you have in mind came of age in 1947. If his twenty-first birthday was after January 1, 1947, he may vote in the November election without having to pay any poll tax for 1948, and without having been assessed any poll tax for 1947. If he became twenty-one on January 1, 1947, than a poll tax for 1947 is assessable against him and must be paid in order that he may vote.

I trust this answers the question raised in your letter.

With best wishes, I am

Yours very truly,

HARVEY B. APPERSON,
Attorney General.

ELECTIONS—Eligibility of Voters—Person Not Eligible to Vote in Last General Election Can Not Vote in Special Election; Persons Becoming of Age since January 1 can Register and Vote Therein.

January 20, 1948.

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

..

My dear Mr. Watkins:

This is in reply to your letter of January 17, in which you ask two questions pertaining to the eligibility of persons to vote in the special election to be held in the Fourth District on February 17.

Section 83 of the Virginia Code provides as follows:

"The qualifications of voters at any special election shall be such as are hereinbefore prescribed for voters at general elections, 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, * * *."

You ask two questions. You first present the case of a person who was listed on the treasurer's list as having paid the poll taxes necessary to qualify to vote in the November 1947 election, but who never registered for that election. He has now applied to the registrar to register, but he did not pay his 1947 poll tax prior to December 8.

It is my opinion that this person is not eligible to vote in the special election, because he was not eligible to vote at the last preceding regular November election due to his failure to register, and he is not eligible to vote in the coming election in June, due to his failure to pay his 1947 tax prior to December 8.

You next present the case of a person who became 21 years of age after January 1, 1947, and prior to January 1, 1948. He paid his capitation tax for 1948 on January 10, 1948.

It is my opinion that this person can now register and be eligible to vote

on February 17. As no poll tax was assessable against him for 1947, he would be eligible to vote in the election on June 1948, if he registered in proper time, and is, therefore, eligible to vote in the special election.

I trust this answers the questions raised by your letter.

Very truly yours,

HARVEY B. APPERSON,
Attorney General.

**ELECTIONS—If Domicile is Retained in State by Voter, he can Vote
Notwithstanding the Fact he is Eligible to and Does Vote Elsewhere.**

December 31, 1947.

HONORABLE JAMES C. AUCHINCLOSS,
House of Representatives,
Washington, D. C.

Dear Congressman Auchincloss:

Your letters of December 16 and December 20, addressed to Governor Tuck, have been submitted to this office in order that you may be advised as to the question contained in your letter of December 16.

Under the preliminary report for the organization of the District of Columbia it is recommended that an independent form of government for the District of Columbia be organized. It is further recommended "that the qualified electors of the District of Columbia consist of all persons who have resided in the District for one year prior to the date of election, * * *." This right of suffrage would be extended to persons who have resided in the District for one year whether or not they maintain a residence elsewhere for voting purposes, according to a further recommendation. You ask if a resident of Virginia would lose his voting rights in Virginia by voting in the District of Columbia.

Section 18 of the Constitution of Virginia establishes qualifications for voters in Virginia, and provides, among other things, that every person "who has been a resident of the State one year" shall be entitled to vote. The word residence as used in this section has been construed to mean domicile. Under this interpretation it has been held that once a person acquires a domicile, or voting residence, in Virginia he retains that domicile until he acquires another. A residence in the District of Columbia, which does not amount to the acquiring of a new domicile, does not prevent a person domiciled in Virginia from continuing to vote in Virginia.

It is my opinion that if this right of suffrage in the District of Columbia is given to persons who maintain only a temporary residence in the District and is not dependent upon such persons acquiring a domicile in the District, then a person domiciled in Virginia who votes in the District of Columbia would not lose his voting rights in Virginia.

This opinion is based upon the assurance contained in your letter of December 16, that the elections contemplated by the proposed organization for the District will be purely local elections.

With best wishes, I am

Yours very truly,

HARVEY B. APPERSON,
Attorney General.

ELECTIONS COMPENSATION—Judges and Clerks of Election are Entitled to a Day's Pay for Each Day and Portion Thereof Served.

December 2, 1947.

MR. C. W. NEWTON,
Registrar for Graham Precinct,
Bluefield, Virginia.

Dear Mr. Newton:

This in reply to your letter of November 29, in which you ask whether the judges and clerks in the recent election of November 4 who worked from 6 A. M., November 4, until 3 A. M., November 5, are entitled to one day's pay or two day's pay.

Chapter 273 of the Acts of Assembly of 1946 amended and re-enacted section 200 of the Code and provides in part as follows:

"The judges, clerks, registrars and commissioners of any election shall receive as compensation for their services the sum of five dollars each for *each day's services rendered * * **" (Italics supplied)

Since the period of time the judges and clerks of election worked included the 4th and 5th of November, it is my opinion that they are entitled to be paid for two day's service.

Very sincerely yours,

HARVEY B. APPERSON,
Attorney General.

ELECTIONS—Democratic and Republican Primaries can be Held in Same Room on Same Date; Separate Ballot, Judges and Ballot Boxes Necessary.

June 9, 1948.

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

My dear Mr. Marsh:

This is in reply to your letter of June 2, in which you ask several questions pertaining to the elections to be held in Fairfax County on August 3, 1948. It appears that on that date there will be a Republican primary election and a Democratic primary election, and this has led rise to a number of inquiries concerning the conduct of these elections. I answer below, in the order presented by you, the various questions.

1. Must the Republican and Democratic primary be held in the same room or in separate rooms?

Upon an examination of the laws pertaining to primaries in general, and section 237 in particular, it is my opinion that the Republican primary and the Democratic primary should be held in the same room.

2. Section 237 provides, in part, "The ballot box of each party shall have plainly marked upon its top the words 'Primary Ballot Box' and immediately under the words the name of the party which uses the same." You ask

whether or not it is necessary to have printed or stenciled on top of the ballot box the phraseology required or if it is only necessary to print or stencil the necessary phraseology on a piece of cardboard, which cardboard may be tacked to the ballot box.

I am in entire agreement with you that the above quoted language is for the purpose of designating that the ballot box is a primary ballot box, and to indicate the name of the party using the particular box. It is my opinion that it is proper to cause the phraseology required by the section to be printed on cardboard and tacked to the separate ballot boxes.

3. Should there be separate ballots, one for the Democratic candidates and one for the Republican candidates?

It is my opinion that section 236 requires separate ballots for each of the parties.

4. Must there be separate sets of judges, or could there be one set of judges, with representatives from each party?

It is my opinion that section 224 covers this, and there must be a separate set of judges for each party holding a primary.

5. Must there be separate ballot boxes?

In my opinion, section 237 clearly provides that there shall be a separate ballot box provided for each party taking part in the primary.

6. Can both Democratic and Republican voters use the same booth, or must there be separate voting booths for each party?

I am unable to find anything in the primary laws dealing with this question. However, it appears to me that both Democratic and Republican voters may use the same voting booth or booths. The ballots are kept separate by the separate ballot boxes, and I see no objection to the voters of the various parties using the same voting booth. I should think the voting would be speeded up if a voter could use any one of the booths in the primary room.

7. Is a voter entitled to ask for either a Democratic or Republican ballot irrespective of what his former affiliations have been?

It is my opinion that this is covered by section 228 of the primary laws. That section provides, in part, as follows:

"All persons qualified to vote at the election for which the primary is held, and not disqualified by reasons of other requirements in the law of the party to which he belongs, may vote at the primary; except that:

"No person shall vote for the candidates of more than one party;

"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; and, upon challenge, such person shall declare on oath that he or she is a member of such party and supported such nominees as hereinbefore required before being permitted to vote.

"If such person has never voted before, then it shall be necessary only that such person is a member of such party and will support the nominees of such party in the ensuing election.

"Any person offering to vote at a primary may be challenged as provided in section one hundred and seventy-four of this Code, and upon challenge, shall be sworn by one of the judges of the primary and if he knowingly makes any false statement as to any matter material to his right to vote, he shall be deemed guilty of perjury, and upon conviction, shall be punished accordingly.

"If he shall refuse to be sworn, or if he shall refuse to answer any questions material to his right to vote, or if he is not eligible to vote under the State law or law of his party, he shall not be permitted to vote in such primary."

As you will note, this section provides that, to be eligible to vote in any party primary, a person must be a member of that party and " * * * in the last preceding general election, in which such person participated, he or she voted for the nominees of such party; * * *." If any person voted for the nominees of one party in the last preceding general election in which he participated, he is not entitled, in my opinion, to vote in a primary held by another party. If he is not entitled to vote in such primary, I do not think he is entitled to ask for a ballot for such primary.

8. Would it be desirable and lawful to have copies of instructions in line with the opinion of this office posted in each voting place and given publicity in the local newspapers in advance of the election?

I know of no legal objection to the publication of the opinion of this office in regard to this election, and I have no personal objection to such being done.

9. When a voter presents himself and it appears that he is a qualified voter, should he be asked the question of whether he desires a Democratic or a Republican ballot?

I find nothing in the election laws covering this question. It is my opinion that it is the duty of the voter to request the Democratic or Republican ballot himself, and it is not up to the election officials to put the question to him.

10. Who is to manage the registration book and the qualified voter's list at the election and determine who is qualified to vote?

I am in agreement with you that the answer to this question must be a practical one. I think it would be proper for a judge representing each of the parties participating to sit at a table and have accessible the registration book. These judges could determine the qualifications, from a standpoint of registration of each person offering to vote. As for the lists of qualified voters, section 224 provides that these lists shall be furnished the judges of the primary of each party participating in the same manner as they are directed by law to be furnished judges of election.

I wish to thank you for presenting these various questions to this office, as this is the first time to my knowledge that both a Democratic and Republican primary have been held on the same day. I also wish to thank you for expressing your opinion upon these various questions, your views and references being most helpful in this matter.

With best wishes, I am

Very sincerely yours,

J. LINDSAY ALMOND, JR.,
Attorney General.

ELECTIONS—Legal Residence for Voting Purposes Must be Determined by Facts in Each Case.

October 27, 1947.

MR. S. E. STRICKLAND,
Judge of Elections,
Buchanan Theatre,
Buchanan, Virginia.

My dear Mr. Strickland:

This is in reply to your letter of October 23, in which you ask the following question: "Has a voter the privilege to continue to vote in the precinct or town from which he has moved himself and family for a number of years."

Section 82 of the Virginia Code provides that a person must be a resident of

the precinct in which he offers to vote for thirty days next preceding the election, and a resident of a county, city or town for six months preceding the election. The question of legal residence for voting purposes is one depending upon all of the facts of the particular case and is largely controlled by the intention of the individual involved. If a person has actually transferred his legal residence from the town or precinct to another, he may no longer vote in the town or precinct from which he moved. However, the question as to whether or not any particular individual has actually moved his legal residence is one which must be determined by the facts in each case.

Yours very truly,

HARVEY B. APPERSON,
Attorney General.

ELECTIONS—List of Absentee Voters are Subject to Inspection by Public Registrar may Deliver Application to Electoral Board in Person; Ballot must be Mailed to Applicant.

September 26, 1947

MR. T. E. BRANNOCK, *Chairman*,
Electoral Board of Grayson County,
Independence, Virginia.

My dear Mr. Brannock:

This is in reply to your letter of September 23, 1947, in which you ask several questions relating to the absent voters' law.

Your first question is whether or not the lists required to be kept by the registrars and the electoral board under sections 205 and 211 of the Code are public records and open to inspection by any interested parties.

I have previously expressed the opinion that, since the statute requires the posting of copies of these lists in a conspicuous place at the polling place in the proper precincts, thus providing a specific method of making public this information, there is no duty on the registrars or the electoral boards to permit public inspection of these records prior to the time they are posted.

You next ask whether or not the registrars should mail an application for an absentee ballot to the secretary of the electoral board or whether the registrar may certify the application and then permit same to be delivered in person by the voter or the third party to the electoral board.

Section 205 of the Code provides that the registrar upon receipt of the application for a ballot shall, if the applicant is duly registered in his precinct, "forward the application with the required affidavit attached, to the secretary of the electoral board, noting thereon that the applicant is a registered voter of his precinct." Since the statute does not provide any specific method by which the registrar shall forward the application, it is my opinion that any of the methods suggested by you is permissible under the law. The responsibility of seeing that the application is delivered to the secretary of the board is upon the registrar and it is for him to determine what means shall be used in forwarding the application.

You also ask if it is legal for a member of the electoral board to deliver a ballot in person to the voter under the absent voters' law or should all ballots be sent to the voters by registered mail.

Section 205 of the Code provides that "the electoral board shall send to the applicant by registered mail" the ballot and other related papers. In view

of this mandatory provision, I am of the opinion that they may not be delivered to the applicant in person.

With best wishes, I am

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Ballots in General Election not to Include Party Designation of Candidates.

June 8, 1948.

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

My dear Mr. Davis:

This is in reply to your letter of June 2, in which you request my opinion on whether the ballot for November 1948 General Election should contain the party designation of the candidates for United States Senator.

Section 28 of the Constitution and sections 153 and 155 of the Code pertain to form and content of the ballot. Section 28 of the Constitution reads as follows:

"The General Assembly shall provide for ballots without any distinguishing mark or symbol, for the use in all State, county, city and other elections by the people, and the form thereof shall be the same in all places where any such election is held. All ballots shall contain the names of the candidates, and of the offices to be filled, in clear print and in due and orderly succession; but any voter may erase any name and insert another." Pursuant to this constitutional provision, the General Assembly has provided for ballots for general elections by sections 153 and 155 of the Code. Section 153 provides as follows:

"Every elector shall vote by ballot, and each person offering to vote shall deliver a single ballot to one of the judges of election, in the presence of the other two judges. The ballot shall be a white paper ticket, without any distinguishing mark or symbol, and containing on one side the names of the candidates, and offices to be filled, in clear print and due and orderly succession, and the names of all persons voted for by an elector shall be on one ballot, and the form thereof shall be the same in all places when the same person shall be voted for the same offices; but any voter may erase any name on the ballot voted by him and insert another."

Section 155 imposes upon the electoral boards of the several counties and cities the duty of having the ballots printed for the county or city. This section indicates that the ballot shall contain the name of the candidates for such office or offices and a small square to the left of the name of each candidate.

An examination of the foregoing sections does not reveal any legislative authorization for the inclusion on the ballot of the party designation of the candidates for United States Senator to be filled in the November election.

With best wishes, I am

Very truly yours,

J. LINDSAY ALMOND, JR.,
Attorney General.

ELECTIONS—If Party Authorities fail to Suggest Names for Judges of Election, then Electoral Board may Appoint any Persons Available.

June 17, 1948.

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

My dear Mr. Harper:

This in reply to your letter of June 13, in which you make inquiry regarding the appointment of Republican judges for the coming Republican primary. It appears that in at least one district in your county there are not enough Republicans to provide three Republican judges at each precinct. You ask what is the proper action for you to take in such a situation.

Section 224 of the Virginia Code provides, in part, as follows:

"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 such manner as may be provided by the party plan of such party or parties, * * *"

Under this section it appears that the duty of appointing primary judges is on the electoral board of the county or city. In the situation presented by you, and in consideration of the above quoted portion of section 224, it appears to me that the proper procedure would be for the electoral board to notify the duly constituted authorities of the Republican party that it is unable to find sufficient Republicans to act as primary judges in the primary, and request that they suggest members of their party who might be available for these positions. If the party authorities then fail to suggest sufficient Republicans as judges, it appears to me that it would be proper for the electoral board to appoint any persons available.

With best wishes, I am

Very truly yours,

J. LINDSAY ALMOND, JR.,
Attorney General.

ELECTIONS—Member of Democratic Party not Barred from Participating in Primary on Account of his Vote.

April 24, 1948.

HONORABLE EDWARD T. HAYNES,
Member of the House of Delegates,
Mutual Building,
Richmond, Virginia.

My dear Mr. Haynes:

This is in reply to your letter of April 15, in which you request my official opinion upon the two questions stated herein.

1. Does a Democrat lose his standing in the Party by voting for those

electors in the November election who appear under the name of the Democratic nominee for President of the United States as chosen by the National Convention of the Democratic Party?

By the expression "lose his standing in the party", I assume you mean can he vote in subsequent Democratic primaries. Section 228 of the Virginia Code sets forth the qualifications of voters in primary elections. That section provides, in part, that

"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; * * *."

This section has been in the Code in its present form since 1924, and the Democratic Party plan, as adopted in 1932, uses similar language in defining the members of the Party.

In 1929 the State Democratic Executive Committee asked the then Attorney General, the late Honorable John R. Saunders, to express an official opinion as to the party status of those Democrats in Virginia who voted for the Republican presidential electors in 1928. I quote below, in full, the reply of Colonel Saunders:

Richmond, Va., January 31 1929.

TO THE STATE DEMOCRATIC EXECUTIVE COMMITTEE,
Richmond, Virginia.

Gentlemen:

I am just this moment in receipt of a resolution adopted by you today, which is as follows:

'Whereas there appears to be in the minds of some people a question as to the party status of those Democrats in Virginia who did not support the Democratic nominee for president in the 1928 election but who voted for Mr. Hoover and

'Whereas it is desired that this question be settled and all doubts removed and

'Whereas it is felt that an opinion of the Attorney General on the question is the proper and best way to determine the same

'Therefore Be It Resolved that the Chairman of this Committee be and he is hereby directed to respectfully ask the Attorney General of the State for an official opinion thereon.'

The resolution states that there is a question in the minds of some people as to the 'party status of those Democrats in Virginia who did not support the Democratic nominee for president in the 1928 general election, but who voted for Mr. Hoover.' I construe the words 'party status' to mean as to what will be the standing of such Democrats in the coming August Primary, namely, whether or not they will be permitted to participate therein.

I have carefully examined chapter 15 of the Code of Virginia, entitled, 'Primary Elections'. I do not deem it necessary for the purposes of this opinion to quote many of the sections contained in this chapter, but will only quote such portions of those sections which bear directly upon the question at issue.

The first sentence contained in section 222 reads as follows:

'This chapter shall apply to the nomination of candidates for such offices as shall be nominated by a direct primary and to no other nominations.'

The first sentence in section 226 is as follows:

'This chapter shall not apply to the nominations of presidential electors, nor to the nominations of candidates to fill vacancies, unless the candidates for nomination to fill vacancies are to be voted for on the date set by this chapter for regular primaries.'

After a careful reading of those portions of sections 222 and 226 above quoted, and other provisions contained in the primary law, I am of the opinion that the right of a Democrat to participate in the August 1929 primary is not to be tested by the vote of such person for presidential electors in the 1928 presidential election, and Democrats who voted against the Democratic electors in the 1928 election, if otherwise qualified, are entitled to vote in the August 1929 primary election.

Respectfully submitted,

JOHN R. SAUNDERS,
Attorney General."

While Colonel Saunders made no specific reference to section 228, that section is included in the same Code Chapter as sections 222 and 226 relied upon him.

Again in 1939 a similar question was presented to the Honorable Abram P. Staples, at that time Attorney General. While I am enclosing a copy of Judge Staples' opinion, I quote below that portion of it most pertinent to the present inquiry. After pointing out that five sessions of the General Assembly had been held since the interpretation by Colonel Saunders, and the Code sections involved had not been amended, Judge Staples expressed the following view:

"This official definition of the meaning of the words 'nominees of the party' was acquiesced in and adopted by the Democratic Party authorities in conducting the 1929 primaries, and must be deemed to be the sense and meaning which the party itself attributes to said words. Three years after this official interpretation, at the 1932 Norfolk convention, the Democratic Party adopted a primary plan which provided that no person should be permitted to vote in any Democratic primary unless he voted for all of the 'nominees of the Democratic Party' at the last preceding general election in which he voted and in which they had opposition, and also that the name of no candidate shall be printed upon any official primary ballot unless such person files with his declaration of candidacy a statement in writing to the effect that he voted for all the 'nominees of the Democratic Party' at the last preceding general election in which he voted and in which they had opposition.

"It will be observed that in drafting the foregoing provisions the party convention employed the identical words which had been construed previously by Colonel Saunders as having no application whatever to presidential electors. I can see no escape from the conclusion that these words were intended to have the same meaning when used in the party plan as was then being attributed to them by the party authorities. If it had been the intention to include presidential electors within the term 'nominees of the party', undoubtedly the language employed would have expressly so provided because at the time the convention adopted the plan these words, standing alone, were not considered to embrace such electors. I am of the opinion, therefore, that the fact that these same words were employed by the party authorities, without expressly including the electors compels the conclusion that it was intended that they should have the same meaning then being attributed to them in the conduct of the party primaries.

* * *

There have been no changes in the applicable sections of the Code since these opinions, nor has there been any change in the pertinent portion of the Democratic party plan since the opinion of Judge Staples.

It is, therefore, my opinion, based upon the earlier rulings of this office, and upon my own examination and interpretation of the statutes, that the Presidential electors are not "nominees of the party" within the meaning of the Democratic Party plan and section 228 of the Code.

It follows that no Democrat is barred from participating in Democratic primaries after the 1948 Presidential election regardless of what Presidential electors he may cast his ballot for in that election.

2. Is a candidate in the August Democratic Primary who, by the Party plan, pledges to support and vote for all of the nominees of the Party in the general election in November required to vote for the electors under the name of the Presidential candidate chosen by the National Democratic Convention, or must he, under the Party's pledge, support the electors of the Presidential nominee chosen by the Virginia State Convention?

The declaration of candidacy required by Code section 229 of all primary candidates, does not require that such candidate pledge himself to support and vote for the nominees of the party in the succeeding general election. However, section 229 does provide that the candidate comply with the rules and regulations of the proper committee of his party. The declaration of candidacy required by the Democratic Party plan includes the pledge that the candidate " * * * shall support and vote for all of the nominees of said party in the next ensuing general election."

As indicated in answer to your first question, the words "nominees of said party" do not include Presidential electors. It is, therefore, my opinion that a candidate in the August Democratic primary may vote for any set of Presidential electors without violating the pledge required by the Democratic Party plan.

Yours very truly,

J. LINDSAY ALMOND, JR.,
Attorney General.

ELECTIONS—Names of Candidates Should be Printed on Ballot if Political Party Nominee Dies before General Election.

September 8, 1947.

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

Dear Mr. Davis:

This is in reply to your letter of September 5, 1947, in which you state that the Chairman of the Augusta County Democratic Committee had certified to your office the name of John D. White for the Commonwealth's Attorney in the general election to be held on November 4, but that on August 28 Mr. White died. You further state that Mr. W. Edward Moore and Mr. Forest T. Taylor have now filed with you their declarations of candidacy and petitions for the office of Commonwealth's Attorney of Augusta County and that they have also filed copies of the same with the Clerk of the Circuit Court of said county.

You ask if, in the event that the two candidates named have properly filed under the provisions of section 154-a of the Code, it is in order for the Electoral Board to have their names printed on the official ballots of the general election to be held November 4.

Section 3 of Chapter 415 of the Acts of Assembly of 1942 (section 154-a of Michie's Code) reads in part as follows:

"Whenever any candidate of a political party who has been nominated in any primary election or convention, or by any other lawful means, dies or withdraws as a candidate at a time when it is too late under the present general statutes for a candidate for the office involved to qualify to have his name printed on the official ballot for the general election, it shall be permissible for any person who is otherwise qualified to file the required notice or petition for his candidacy, or both if required by general law, and, if same be filed with the proper official at least twenty days before the day on which the election is to be held, the electoral board or boards having charge of the printing of the ballots for such election shall either (1) cause to be printed thereon the name of every person so qualifying as provided in this section, or (2) if ballots for said election have already been printed and contain the names of candidates for other offices to be voted on at such election, any such electoral board may in its discretion cause to be stricken therefrom the title of the office involved, and the names of all candidates qualifying for such office appearing thereon, and cause separate ballots to be printed for such office on which shall be printed the names of all candidates qualifying under the provisions of this section."

In view of this provisions, it is my opinion that the Electoral Board should print on the ballots the names of all qualified persons who file their notice of candidacy and petition with the proper officials at least twenty days before the general election.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Names of Local Candidates Should not be Certified to State Board of Elections.

August 13, 1947.

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

Dear Mr. Davis:

In your letter of August 13 you inquire whether or not there is any duty imposed upon or authority vested in the State Board of Elections or the Secretary of the Commonwealth to certify to the various electoral boards of the counties and cities of the State the names of candidates who have been qualified to have said names printed upon the official ballots, if any to be printed by the Secretary of the Commonwealth for distribution among non-resident members of the armed forces. The candidates referred to are for the offices of Senate and House of Delegates, and the various local county offices.

In my opinion, the answer to your question should be in the negative. Section 4 of Chapter 2 of the Acts of the Extra Session of 1945 requires the Secretary of the Commonwealth to certify the names of all qualified candidates to local electoral boards "*when required by law*". The "law" on this subject is contained in section 154 of the Code. By that section, persons desiring to qualify for State or national offices to be elected from the State at large or a Congressional District are required to file their notices or certifications with

the State Board of Elections, and in these cases the State Board of Elections is required to notify the various local electoral boards. All other candidates, including all candidates for the State Senate and House of Delegates, and local offices, are required to have their notices or certifications of candidacy filed with the clerk or clerks of the circuit or corporation courts in each county or city within their respective districts. These respective clerks are required to notify their several electoral boards of the names of candidates so qualifying.

It is my opinion, therefore, that the various electoral boards should be governed by the certification from their several clerks, and that no names of local candidates, and candidates for the General Assembly, should be certified to them by the State Board of Elections or the Secretary of the Commonwealth.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Notice of Candidacy Must be Filed within Seven Days After the First Tuesday in August.

August 20, 1947.

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

Dear Mr. Whitehead:

In your letter of August 16, you request my opinion upon the question whether or not a candidate for a member of the General Assembly, or any county office, at the next November election may qualify to have his name printed upon the official ballot if he files his petition by September 4, 1947.

I have heretofore ruled that the provision of section 154 of the Code, relating to the time of filing notices of candidacy, has been modified by the provisions of Chapter 2 of the Acts of the Extra Session of 1945, as section 3 has been amended by Chapter 1 of the Acts of 1946. This Act is generally known as the War Voters Act and is intended to provide for the printing of ballots at such time in advance of the election as will permit the sending of absentee ballots to members of the armed forces. Section 3 provides as follows:

"All candidates for said offices shall file their notices of candidacy and petitions, if same are required by section one hundred fifty-four of the Code of Virginia, within seven days after the first Tuesday in August * * * with the Secretary of the Commonwealth, and also with the clerk or other officer, when same is required by law, The name of no candidate for any State or local office whose name is not so certified, or whose notice of candidacy, if the filing of such notice is required by said Code section one hundred fifty-four, is not filed within the time required by this section, shall be printed on any official ballot for said election."

In my opinion, the foregoing provisions supersede the general provisions of section 154 as to the time of qualifying, and August 12 is the last day on which a person could file notice of candidacy and qualify to have his name printed on the official ballot for the November election.

With my best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**ELECTIONS—Once Application for Ballot has Been Certified by Registrar,
Secretary of Electoral Board may Mail Ballot.**

September 4, 1947.

HONORABLE HERBERT J. RASNICK, *Secretary*,
Electoral Board of Dickenson County,
Clintwood, Virginia.

Dear Mr. Rasnick:

I have your letter of August 30, which I quote in full as follows:

"Please advise me under the VIRGINIA ABSENT VOTERS LAWS AS AMENDED BY ACTS OF 1946 if upon receipt of an application of a mail ballot by the Secretary of the Electoral Board can the Secretary mail the ballot to the applicant, or does the Electoral Board have to meet and pass on the Application?"

It is my opinion that, after the registrar has certified to the electoral board that the applicant for the ballot is duly qualified to vote, the act of mailing the ballot is a ministerial act and may be performed by the secretary of the board if such general authority is conferred upon him by the board itself. Of course, if the board prefers to do so, it is entitled to pass upon each applicant.

With best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Party Chairman Must Certify Names of Nominees to Electoral Board in Prescribed Time after Primary.

SENATOR R. C. VADEN,
Gretna, Virginia.

August 7, 1947.

My dear Senator Vaden:

This is in reply to your telephone request for advice concerning the certification of the names of party primary nominees for the General Assembly and local offices.

Section 3 of chapter 2 of the Acts of Assembly, Extra Session 1945, as amended, provided in part as follows:

" * * * all political parties desiring to nominate candidates for members of the General Assembly, Governor, Lieutenant Governor, Attorney General, and all county and city officers except mayor and councilmen, shall make and complete their nominations in the manner provided by law on or before the first Tuesday in August, and for mayor and members of councils in cities on or before the first Tuesday in April, and the proper authorities of each political party shall certify the names of its candidates to the chairman of the electoral boards, if required, and to the Secretary of the Commonwealth within seven days after said day. All candidates for said offices shall file their notices of candidacy and petitions, if same are required by section one hundred fifty-four of the Code of Virginia, within seven days after the first Tuesday in August, or the first Tuesday in April,

as the case may be, with the Secretary of the Commonwealth, and also with the clerk or other officer, when same is required by law. The name of no candidate for any State or local office whose name is not so certified, or whose notice of candidacy, if the filing of such a notice is required by said Code section one hundred fifty-four, is not filed within the time required by this section, shall be printed on any official ballot for said election."

It is my opinion that under this section the local party chairman should certify the names of its nominees to the State Board of Elections, which now performs the function of the Secretary of the Commonwealth in election matters, and to the clerk of the proper court and also to the chairman of the Electoral Board within seven days after the primary, that is, August 12, 1947. You will note that this provision requires candidates to file their notices of candidacy and petition only if required to do so by section 154 of the Code. This last mentioned section provides that the name of any candidate for office who has been nominated by his party, either by convention, primary, or by being declared the nominee of the party when no primary has been held, shall be certified by the chairman of the party to the State Board of Elections and to the clerks of the proper courts, and no further notice of candidacy or petition shall be required. In view of this provision, the quoted provision of the war voters legislation as to the filing of notices of candidacy and petitions by the candidates themselves is applicable only to independent candidates.

With best wishes, I am

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Person Convicted of Felony While infant is not Eligible to Register to Vote.

October 30, 1947.

MR. LEE STANLEY, *Deputy Clerk*
Circuit Court Dickenson County,
Clintwood, Virginia.

My dear Mr. Stanley:

This is in reply to your letter of October 27, 1947, in which you ask the following question:

"Where a person is convicted of a felony while an infant under the age of twenty one years, is he or she upon reaching his or her majority eligible to register and vote, or is he or she disqualified by reason of such conviction while an infant?"

Section 23 of the Constitution of Virginia reads as follows: "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 any felony, * * *." It is my opinion that the word "person" as used in this Section includes infants, and, therefore, anyone convicted of a felony, even though he or she may have been under the age of twenty-one years, is excluded of registering and voting under this Section.

Very truly yours,

HARVEY B. APPERSON,
Attorney General.

ELECTIONS—Persons in the Armed Forces Serving in time of War are Exempt from the Payment of Poll Taxes During that Time.

December 1, 1947.

HONORABLE ERNEST GOODRICH,
Commonwealth's Attorney for Surry County,
Surry, Virginia.

My dear Mr. Goodrich:

This is in reply to your letter of November 24, 1947, in which you ask if certain persons in the armed services during 1947 are entitled to an exemption from the payment of the State poll tax.

As article XVII of the Amendments of the Constitution covers the questions raised by you, I shall quote the pertinent portion of that Article before setting out and answering the specific questions raised by you.

"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 existing World War II has been, a member of the armed forces of the United States in active service, are hereby canceled and annulled.

"And, also, all poll taxes 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 also 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 said service during all of said years, are hereby canceled and annulled. Members of the armed forces of the United States in active service in time of war shall be exempt from future assessments of poll taxes by this State for all years during a part of which they are hereafter engaged in such service."

World War II never yet having been officially declared ended, this Article remains in full effect.

You ask the following questions:

1. Are persons who entered the service prior to September 1945, and who are still in the service entitled to an exemption from the poll tax?

The above quoted portion of Article XVII clearly exempts such persons from the payment of any poll tax for the years 1945, 1946 and 1947.

2. Are persons who entered the service in either 1946 or 1947 and who are still in the service exempt from the payment of the poll tax?

Such persons are exempt from any poll tax for 1947, and if they entered the service in 1946, are exempt from any poll tax for that year. Whether such persons would be liable for the payment of the 1945 poll tax would depend upon when they are discharged. You will note that the above quoted Article cancels the poll tax " * * * for the three years next preceding such persons discharged from said active service * * *."

3. Are persons who have served some part of the year 1947, but who are no longer in the service entitled to an exemption from the poll tax?

Such persons, assuming that their discharge is not dishonorable, would be exempt from the poll tax for the year 1947 and for the three years immediately preceding such discharge.

With best wishes, I am

Very truly yours,

HARVEY B. APPERSON,
Attorney General.

ELECTIONS—Residents in Annexed Territory May Vote in the City in the Next General Election.

December 16, 1947.

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

My dear Mr. Crowle:

In your letter of December 10, 1947, you ask the question of how residents in territory to be annexed by Staunton from the county of Augusta can vote in future elections in the City of Staunton.

This matter is covered by section 2964 of the Code, which provides that whenever a city annexes territory the council of the city shall organize the annexed territory into a new ward or wards. A city council then selects the proper number of councilmen from the residents and qualified voters of such new ward, which councilmen shall serve until the next general election. The council may, if it desires, attach the new ward to any existing wards.

The voters who reside in the newly annexed territory are entitled to transfers to the proper poll books in the city without registering again. Any person who resides in the annexed territory and who is not registered in that territory, shall be entitled to register in the city, if he would have been entitled to register and vote in the next election to be held in the county.

I trust this answers the question presented by you in your letter.

With best wishes, I am

Yours very truly,

HARVEY B. APPERSON,
Attorney General.

ELECTIONS—Registrar of Former District May Issue Transfer of Voter Whose Name has been Stricken from Registration Books.

July 11, 1947.

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

My dear Mr. Whitehead:

This is in reply to your letter of July 7, 1947, which was received in Mr. Staples's absence on his vacation. In your letter you state:

"I have before me a situation in which a person now a resident of Nelson County, Virginia, formerly a resident of Albemarle County, Virginia, applied to the registrar of his former precinct in Albemarle for a transfer and was informed by the registrar that in view of his removal, his name had been stricken from the registration books of that precinct and for that reason he could not grant a transfer.

"The question presented is how this voter can get his name on the registration books of the precinct in Nelson County whereof he is now a resident. The registrar of his former precinct refuses to grant him a transfer and the registrar of his present precinct is confronted with the

provision of the law that the voter having previously registered in Virginia, it is questionable whether he should be allowed to register again." Section 100 of the Code of Virginia provides in part as follows:

"* * * whenever a registered voter changes his place of residence from one county or city to another county or city, it shall be lawful for him to apply to the registrar of his former election district, at any time up to and including the regular days of registration, in person or in writing, to furnish a certificate that he was duly registered, and that his name, since his change of residence and removal, has been erased from the registration books of said election district, which certificate, shall be delivered to the the registrar of the election district in which he resides and offers to be registered in the county or city to which he has removed, and will entitle him to be registered in said district, on its appearing to the satisfaction of said registrar that he has resided, or will have resided prior to the next election, in the county or city to which he has removed, for six months, and the name of every such person shall be entered at any time, up to and including the regular days of registration by the registrar, on the registration books of the election district in which said person resides, and no voter who has been heretofore registered at any election district in this State shall be entitled to be registered in any other election district, unless he shall deliver to the registrar of the district in which he offers to be registered said certificate, which shall be kept on file by said registrar."

The fact that, prior to his application for a certificate of transfer, a voter's name had already been stricken from the registration books of one district because of his removal therefrom, would not, in my opinion, prevent the registrar of that district from issuing a certificate of transfer. In fact, the language "that his name, since his change of residence and removal, has been erased from the registration books of said election district" seems to contemplate that this may have already been done and that the certificate should be issued in such case as well as when his name is erased at the time he applies for the transfer.

It is my opinion, therefore, that the registrar of his former district may issue the transfer if he is satisfied that the voter was registered and that his name was erased because of his removal to another county. Of course, the lapse of time may in some cases be so great that the registrar of the former district may not be satisfied on this point. In this connection, I call your attention to an opinion rendered by this office on September 16, 1935, to Mr. G. B. Sanders. Report of the Attorney General 1935-1936, page 78, in which the view was expressed that in such case, the person may be treated as any other new resident and may registrar as though his name had never been on the registration books, provided he is qualified in other respects.

I call your attention to the fact that the application for a transfer and the entry of the voter's name on the books of his new district, must in the type of case you mention, be made on or before the regular days of registration. It may be that, at this particular time, the only relief of the person denied registration would be by appeal as provided by section 103.

With best wishes, I am

Very truly yours,

WALTER E. ROGERS,
Assistant Attorney General.

ELECTIONS—Registrar Must Close Registration Books Thirty Days Prior to the Day Fixed by Law for Primary Elections Even though No Such Election is in Fact Held.

August 26, 1947.

HONORABLE LEVIN NOCK DAVIS, *Secretary*,
State Board of Elections,
State Capitol,
Richmond 12, Virginia.

My dear Mr. Davis:

This is in reply to your letter of August 25, in which you ask whether or not a registrar is required to close the registration books thirty days prior to the primary election when no primary election is being held in a county or city.

The pertinent part of section 98 of the Code (Michie's, 1946 Supplement) dealing with the closing of registration books, is 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. * * *"

It is my opinion, therefore, that is immaterial whether or not the primary election is actually held, for it can be seen from the above section that the day *fixed by law* for the primary election governs the closing of the registration books and not whether an election is in fact held.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Term Residence Used in Statute as a Prerequisite to Vote is Synonymous with Domicile.

December 2, 1947.

MR. W. M. FLEET,
Judge of Elections,
West Point, Virginia.

Dear Mr. Fleet:

This is in reply to your letter of November 13, 1947. As you will note from a letter from this office of November 14, I was out of town when your letter was received and, therefore, this answer has been delayed.

In your letter you raise the question as to the eligibility of certain voters to vote in general elections or town elections held in West Point. The voters mentioned by you apparently lived in West Point at one time, but now actually reside outside the town limits, even though they still own property and work in West Point. Whether these voters can vote in West Point depends upon whether they are residents of that town within the meaning of section 82 of the Virginia Code. This office has previously held that the word residence in this section is synonymous with domicile. A person's domicile is a question of fact, and once he has established a domicile he retains that domicile, even though he may subsequently move to another place, if he retains the intention of returning

at some future date. Whether the people mentioned in your letter have retained their domicile in West Point would depend upon where they intend to reside in the future. If they have permanently changed their residence with no intention of returning to West Point, then they would not be residents of West Point. Whether this is their intention or not is a matter which cannot be decided by this office.

In regard to the second matter raised by you, that is whether persons who vote in purely town elections must actually reside in the town, this office has previously held that all qualified voters of a town may vote in that town, even though they may not actually reside there at all times. In other words, if a person was once qualified to vote in West Point and has since moved to another county, but retains the intention of returning to West Point, it is my opinion that he can vote in all elections held in West Point, both general elections and town elections.

I am enclosing a copy of one of our previous opinions dealing with this matter.

With best wishes, I am

Very truly yours,

HARVEY B. APPERSON,
Attorney General.

**ELECTIONS—Voters Can be Transferred to New Precinct at Any Time
up to and Including Day of Election.**

MR. H. J. AMOS, *Secretary*,
County Electoral Board,
Chatham, Va.

July 11, 1947.

My dear Mr. Amos:

In your letter of July 9, 1947, which was received in Mr. Staples's absence on his vacation, you state that by order of the Circuit Court of Pittsylvania County, a new voting precinct known as Stokesland, which is a part of the precinct known as Schoolfield, was created. You ask how the voters should be transferred from the registration book at Schoolfield precinct to Stokesland and whether this can be done now since the thirty-day period is up.

I call your attention to Section 102 of the Code which reads as follows:

"When a re-arrangement of existing election districts is made, the registrars thereof shall make out, certified, and deliver to each other, lists of the registered voters in their respective districts whose voting places are changed by the re-arrangement; or when a new election district is created out of one or more already existing, the registrar of the old district or districts shall make out, certify and deliver to the registrar of the new district, a list of the registered voters who have been placed by the change in the new district. The registrars to whom said lists are delivered, shall forthwith enter the names of the persons contained in said lists in their respective registration books; and the said persons shall at once acquire the right to vote in the districts, respectively, to which they are so transferred. The names thus transferred shall be stricken, by the registrars transferring them, from their registration books; and when a new district is created as aforesaid, the registrar of the old district shall, after making such transfers, make out new registration books for his district. For such services as may be rendered by the registrars, under this section, the board of supervisors of the county or the council of the city, as the case may be, shall make proper allowance."

This would not be an original registration of new voters and would not, in my opinion, be prohibited by the statute which forbids the registration of new voters during the thirty-day period the registration books are closed prior to an election. It is more in the nature of a transfer of a voter who moves from one election district to another in the same county, and this office has uniformly ruled that under section 100 of the Code such transfers can be made at any time up to and including the day of the election.

With best wishes, I am

Very truly yours,

WALTER E. ROGERS,
Assistant Attorney General.

ELECTIONS—Voters of an Annexed Area are Qualified to Vote in the Town Election Immediately Upon Annexation.

December 3, 1947.

MR. HENRY H. ELSWICK,
Local Registrar for Maiden Springs District,
Richlands, Virginia.

My dear Mr. Elswick:

This is in reply to your letter of November 29, 1947, in which you ask the following question:

"The Town of Richlands, Virginia is planning to annex the corporation, and the question has come up as to whether the voters in the annexed section or that or now out of town would have a vote in the coming June election, or would it apply to those that were qualified as of December 1947."

It is not clear to me whether the town of Richlands is planning to annex part of the adjoining county or whether it is annexing or consolidating with an adjoining town, but in either event the question of the right of electors in the annexed area to vote in the coming June election will be answered the same way.

Section 2964 of the Code provides for electors in the counties when a county is annexed by a town. That section of the Code states as follows: " * * * All electors residing in such annexed territory shall be entitled to transfers to the proper poll books in said city or town without again registering therein. Any person residing in said territory who shall not have registered shall be entitled to register in said city or town if he would have been entitled to register and vote at the next succeeding election in said county or town."

This office has previously held that persons transferred to the new registration books upon annexation, in pursuance to the provisions of this statute, shall at once acquire the right to vote in the town or city to which the territory is annexed.

If Richlands is annexing or consolidating with an adjoining town, then section 2971(12) of the Code would cover the question raised by you. That section says in part:

"No new registration shall be necessary in case of such consolidation, but all electors of both municipalities shall be transferred to the proper registration books of the consolidated municipality, and new registrations shall be made as provided by law, just as if no consolidation had taken place."

It is, therefore, my opinion that whether Richlands is consolidating with another town or is annexing part of a county, that the voters in the annexed areas will be qualified to vote in the town election in June of 1948, assuming they have complied with other provisions of the election laws.

Yours very truly,
HARVEY B. APPERSON,
Attorney General.

ELECTIONS—War Voters Act—Candidates for Council shall File Notices and Petitions Within Seven Days after the First Tuesday in April.

April 21, 1948.

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

Norfolk, Virginia.
My dear Mr. Prieur:

This is in reply to your letter of April 19, 1948, in which you asked what was the last day on which candidates in the coming election for members of the City Council for the City of Norfolk could file their notices of candidacy and petitions.

As you point out in your letter, the Honorable Abram P. Staples, then Attorney General, in an opinion rendered to you on January 8, 1946, held that Chapter 2 of the Acts of Assembly, Extra Session of 1945, known as the "War Voters' Act", took precedence over any provision in the charter of the City of Norfolk and governed the filing of notices of candidacy and petitions in elections for members of the Council of the City of Norfolk. I concur fully with the views expressed in that opinion and, since by the terms of the War Voters' Act is to be effective until July 1, 1948, it is my opinion that it is still controlling. This Act, as amended by Chapter 1 of the Acts of Assembly of 1946, provides that all candidates for the office of member of councils in cities shall file their notices of candidacy and petitions within seven days after the first Tuesday in April. Therefore, the last day upon which such notices of candidacy could have been filed for the coming election was April 13, 1948, and it is my opinion that the clerk should not receive any notices offered to be filed after said date.

Very sincerely yours,

J. LINDSAY ALMOND, JR.,
Attorney General.

EMBALMERS AND FUNERAL DIRECTORS—Only those that are Licensed in Virginia can Advertise.

July 2, 1947.

MR. F. C. STOVER, *Secretary*,
State Board of Embalmers and Funeral Directors,
P. O. Drawer 109,
Strasburg, Virginia.

Dear Mr. Stover:

In your letter of July 1, 1947, which has been received while Mr. Staples is away on vacation, you ask if out-of-state funeral directors can advertise in

publications such as telephone directories that list Virginia telephones only and are circulated only in Virginia. With your letter you inclose pages taken from a telephone directory that is printed in Arlington, Virginia, only and contains advertisements of Washington, D. C. funeral directors.

Section 1720-c of the Code of Virginia provides that "no person, except a licensed funeral director or licensed embalmer, shall advertise on any bill-head, sign or card, or orally, or in any other manner, that he is competent, willing or desirous to arrange for or to conduct funerals." In view of this provision, it is my opinion that only those persons who have been licensed by the Virginia State Board of Embalmers and Funeral Directors may advertise that they are able and willing to perform the services of a funeral director in Virginia, and that unless the Board has issued to such out-of-state funeral directors a regular license or a reciprocal license, which may be issued to those licensed in other jurisdictions having requirements similar to those of this State, it is unlawful for them to advertise that they are willing to perform their services in this State.

I am returning herewith the correspondence which you enclosed with your

Very sincerely yours,

letter of July 1.

WALTER E. ROGERS,
Assistant Attorney General.

**EPILEPTICS, INEBRIATES AND FEEBLYE-MINDED PERSONS—
Records of Proceedings Should be Recorded in all Cases, even where
Person is Found to be Sane.**

March 31, 1948.

MR. E. G. KYLE,
Justice of the Peace,
Hogshead Building,
Staunton, Virginia.

Dear Mr. Kyle:

Due to the fact that Judge Almond has not yet qualified as Attorney General, I am acknowledging your letter of March 15 in regard to commitment papers.

You desire to know whether the records of the proceedings before a Commission to ascertain insanity should be filed with the clerk of a court, regardless of whether the person examined is found to be insane or sane. You also state that the clerk of your court believes that the papers should be destroyed if the person charged is found to be sane.

It is my opinion that the proceedings should be filed with the clerk of the court, whether the person is found sane or insane, and should be properly indexed in the "record book of insane, epileptic, inebriate and feeble-minded persons" as provided by section 1019 of the Code.

Since fees are allowed the physicians and the justice of the peace under section 1021 of the Code, whether the person is found sane or insane, it can be seen that, if the papers were destroyed, there would be no record upon which to base such fees and expenses.

Very sincerely yours,

WALTER E. ROGERS,
Attorney General.

FEDERAL RESERVATIONS—Whether Persons Residing Thereon are Residents of Virginia Depends on Type of Grant to United States.

July 30, 1947.

HONORABLE HAROLD M. GOULDMAN, JR.,
Trial Justice for King George County,
King George, Virginia.

My dear Mr. Gouldman:

This is in reply to your letter of July 25, 1947, in which you inquire as to whether persons residing at the Naval Proving Grounds, Dahlgren, Virginia, are entitled to purchase a resident hunting license and to qualify for registration to vote in King George County.

The answer to both of your questions will depend upon whether or not the Commonwealth of Virginia ceded exclusive jurisdiction over the land comprising the Naval Proving Grounds at Dahlgren. If exclusive jurisdiction has been ceded to the Federal Government, then civilians living on the reservation would not be residents of Virginia so as to render them eligible to vote. Neither would they be residents of Virginia so as to entitle them to purchase a resident hunting license.

Whether the federal Government has exclusive jurisdiction over the land in question may be dependent upon the time at which the property was acquired. Prior to 1936, under section 19a of the Code, Virginia did cede land to the Federal Government, granting exclusive jurisdiction, and, if the land in question was so ceded, then Virginia retains no jurisdiction. Section 19 of the Code of 1942, to which you refer, would have no effect upon a grant made prior to 1935 under 19a of the 1936 Code.

Since 1940, under section 19e of the Code, the Governor and Attorney General have been authorized to convey additional jurisdiction in certain cases upon the request of the appropriate Federal agency. By an Act of Congress of October 9, 1940, the mere enactment of a statute conferring jurisdiction of any kind upon the United States over lands acquired by it is not effective until the head of the governmental agency having of such property accepts jurisdiction.

As you can see from the foregoing, there is no uniform rule applicable to these cases with respect to the various properties owned by the government. Each particular situation must be examined and the actual facts ascertained.

However, it is my opinion that, if persons residing on the Naval Proving Grounds have been allowed to vote as citizens of King George County since October 9, 1940, they are still entitled to vote in that county unless a deed has been executed by the Governor and the Attorney General conveying exclusive jurisdiction to the United States over such land. If a person is entitled to vote, he is entitled to purchase a resident hunting license.

With best wishes, I am

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

FEEBLE-MINDED PERSONS—Cannot be Committed as Misdemeanants Under an Indeterminate Sentence.

July 11, 1947.

HONORABLE WILLIAM R. McCRAW, *Superintendent*,
Bland Correctional Farm,
White Gate, Virginia.

My dear Mr. McCraw:

I have your letter of July 3, 1947, in which you inquire as to how long you may hold prisoners committed to your institution under section 5058(8) of the Code of Virginia.

This Section provides that whenever a Judge has before him a person then under sentence for a misdemeanor and has reason to believe that such person is mentally deficient, and has previously been convicted of a misdemeanor three or more times, the Judge may proceed under section 1079 of the Code to determine the mentality of such person. If such person be found to be mentally deficient, the Judge may commit him directly to the State Farm.

It is my opinion that this Section of the Code does not give the Judge any authority to commit a misdemeanor to your institution under an indeterminate sentence. If it is the desire of the Judge to commit this individual for feeble-mindedness he should proceed under section 1085. Under section 1085, a person suspected of being mentally deficient may be examined by the order of court and sent to the Colony for mental deficient.

To allow persons committed to your institution under section 5058(8) to be held there for feeble-mindedness for an indeterminate time would be to place them in a penal institution which is not equipped to provide the proper care and treatment for their mental disease. I would suggest that at the end of the sentence which these persons are serving that they be returned to the court which sentenced them in order that the court may proceed under section 1085 if it sees fit.

With best wishes, I am

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

FEES—For Serving Garnishee and Attachment Proceedings; Summoning Witnesses.

August 8, 1947.

MR. J. T. WOODWARD,
Sheriff of Washington County,
Abingdon, Virginia.

My dear Mr. Woodward:

This is in reply to your letter of August 2, from which I quote in part:
“ * * * I have been referred to section 3487 of the Code as amended in 1946, paragraphs second and third. As it seems to some of the attorneys, paragraph second ought to apply to service of process to commence a suit and similar papers, while paragraph third ought to apply to the summoning of witnesses and garnishees. You will see that the charges are different in the two paragraphs. Will you kindly let me have your opinion on this question?”

The pertinent part of section 3487 of the Code as amended in 1946 is as follows:

"Second: For service on any person, * * * a summons, * * * and making return thereof, the sum of seventy-five cents; * * * except where service of the foregoing is directed to more than three defendants, *or witnesses*, a fee of fifty cents shall be charged for said service on each additional defendant *or witness* in excess of the number of three.

"Third: For summoning a witness or garnishee *on an attachment* seventy-five cents * * * ; except where service of the foregoing is directed to more than one witness or garnishee, in which event a fee of fifty cents shall be charged for each additional witness or garnishee in excess of the number of one." (*Italics supplied*)

In my opinion it is clear that paragraph "Second" applies to defendants and witnesses alike and is in no way limited in application to the service of process to commence a suit.

Paragraph "Third" applies only to witnesses and garnishees *on an attachment* and thereby fixes the fees to be charged in attachment proceedings.

Verv sincerely yours,

ABRAM P. STAPLES,
Attorney General.

FINES—Clerk's Fee should be Assessed as Part of Cost in all Cases Including Those Tried in Juvenile and Domestic Relations Court.

April 7, 1948.

MR. J. GORDEN BENNETT,
Auditor of Public Accounts,
Richmond 10, Virginia.

Dear Mr. Bennett:

This is in reply to your letter of March 23rd, 1948, in which you ask if the one dollar fee provided for by Section 2566 of the Code should be assessed as a part of the costs when a fine is imposed by a trial justice in a juvenile and domestic relations case.

Code Sections 2550 and following, found in Chapter 102 dealing with recovery of fines, require every justice to report all fines imposed by him to the Clerk of the Circuit Court and impose certain duties upon the Clerk with respect to such reports and fines. Section 2566 provides that:

"For the services of the Clerk under the three preceding sections his fee shall be one dollar upon every such fine, which fee shall be included in the execution for cost or be retained by him when collected."

The Statutes make no distinction between fines imposed in juvenile and domestic relation cases and fines imposed in other cases. It is my opinion, therefore, that the one dollar fee should be assessed in such cases also.

Yours very truly,

WALTER E. ROGERS,
Assistant Attorney General.

FINES—Disposition of Depends on Character of Warrant Upon Which Accused is Tried.

November 28, 1947.

HONORABLE H. G. POTTS,
Trial Justice for Clarke County,
Berryville, Virginia.

My dear Mr. Potts:

This is in reply to your letter of November 18, 1947, asking what disposition should be made of fines collected for offenses occurring beyond the corporate limits of the town of Berryville, but within one mile of the corporate limits.

Section 4987n(d) provides that " * * * Fines collected for violations of city, town or county ordinances shall be paid promptly into the treasury of the city, town or county whose ordinance has been violated. All fines collected for violations of the laws of the Commonwealth shall be paid promptly to the clerk of the circuit court, who shall pay the same in the Treasury of the State."

It is, therefore, my opinion that the disposition of fines depends entirely upon whether the warrant shows a violation of a town ordinance or the violation of a State law.

With best wishes, I am

Very sincerely yours,

HARVEY B. APPERSON,
Attorney General.

GAME INLAND FISH AND DOG CODE—Claims Against Dog Fund can be Carried Over from One Calendar Year to the Next if Fund is Insufficient.

September 3, 1947.

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

Dear Mr. Baldwin:

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

"I am anxious to obtain an expression of opinion from you with respect to a matter of interest to Dave Robertson, our local Game Warden. Under Section 80 of Chapter 247, Acts of 1930, the Game, Inland Fish and Dog Code, the Warden files claims with the City of Norfolk for the destruction and disposition of dogs at \$2.50 per dog. Some question has arisen in the Office of the City Attorney as to whether or not claims for the disposition of dogs, as well as other claims, can be carried over from one calendar year to the next in the event there are insufficient funds in the Dog Fund to take care of these claims.

"It appears to me from reading the section that the fund for claims are continuous in effect and that all claims could be carried over from year to year when the Dog Fund is inadequate until such time as the collection from Dog Licenses amounts to enough to pay the accumulated claims. I shall appreciate very much your giving me an expression of opinion as to the operation of this fund in the above respect."

I concur in the views you express with reference to the interpretation of this statute. Section 71 of said Code imposes upon the game wardens in cities the mandatory duty to kill certain dogs found running at large. This section also provides that *in cities* the game warden shall receive two dollars and fifty cents for each dog killed. It further provides that every bill shall be verified under oath of the warden presenting same, and when it shall appear that the account is correct the same shall be forthwith ordered paid from the dog license fund of such city. This section also authorizes a different contract to be entered into with respect to this compensation, but no such contract has been made in Norfolk.

Some confusion has arisen from the provisions of section 80, which provides that a dog fund of the county or city shall first be used to pay treatment of persons for rabies, advertising notices, freight and express or postage, and if the remainder is sufficient all damages to livestock or poultry. It provides that the governing body of a *county* may make an allowance to the game warden for services. It further provides that, in the event the remainder is not sufficient to pay the damages suffered, the claim shall be filed and paid in the order of presentation out of the first available money coming into the fund. This provision clearly shows that the fund is a continuing one, and is not one which is terminated and renewed annually. This is further borne out by the provision that any funds in excess of two hundred fifty dollars remaining in the hands of the local treasurer on December 31 may be transferred into certain other funds as provided. The fact that the two hundred fifty dollars is left in the fund shows that it is a continuing one.

While section 80 provides that counties may make an allowance to game wardens, it contains no provision whatsoever with respect to paying the dog fees to city game wardens as provided in section 71. If, therefore, this section should be literally construed, such city game wardens could never receive any compensation at all.

It seems to me clear that section 80 has no application to the compensation of game wardens for killing dogs in cities because it contains no provision with respect to same. Nor can I find any provisions in the statutes which, in my opinion, would justify refusal to pay the fees fixed by law for game wardens for killing dogs in cities out of funds received during the subsequent calendar year. I think it would require very clear and mandatory language to justify a conclusion that the game wardens must either fail to perform the duty of killing dogs imposed on him by section 71, or else do this work without compensation in cases where the dog fund is exhausted before the end of the year.

With best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

GOVERNOR—Has Authority to Appoint Member of Parole Board as Director of Department of Welfare and Institutions.

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

June 11, 1948.

Dear Governor Tuck:

On June 10th by telephone you submitted the following inquiry:
Does the Governor have authority to appoint a present member of the

Virginia Parole Board to the position of Director, or Acting Director of the Department of Welfare and Institutions, and may such appointee serve in both positions?

I find no constitutional or statutory prohibition against such an appointment or dual service thereunder.

Title 63-3 of the Reorganization Provisions of the Code of Virginia provides that the Director shall hold office at the pleasure of the Governor for a term coincident with that of each Governor making the appointment. No provision is made for the appointment of an Acting Director.

I can find no legal impediment to the appointment of a member of the Virginia Parole Board to serve simultaneously with his service on such Board as Director of the Department of Welfare and Institutions.

Inasmuch as such appointee holds office at the pleasure of the Governor it would seem that a practical solution would be to make the appointment with the understanding that the tenure of service would terminate if and when the Governor decided upon another appointee to serve the remainder of the term coincident with that of the Governor.

The logic of such action is further fortified by the fact that the Parole Board is continued to function as a part of the Department of Welfare and Institutions. It seems apparent that the functions of the two positions can be correlated without conflict.

Sincerely yours,

J. LINDSAY ALMOND, JR.,
Attorney General.

GRANDVIEW STATE PARK COMMISSION—Transfer of Park to be Made to Virginia Conservation Commission Only After Full Settlement of all Obligations is Effected; Virginia Conservation Commission Assumes no Obligations.

February 12, 1948.

HONORABLE GEORGE B. COLONNA, *Chairman*
Grandview State Park Commission,
Hampton, Virginia.

My dear Mr. Colonna:

.. Due to the untimely death of the Attorney General, I am acknowledging your letter of January 28, in which you desire an interpretation of section 14 of Chapter 173, Acts of Assembly of 1946 in connection with the following questions:

"1. Does Section 14 of said Act contemplate that when the State Conservation Commission takes title to the park when completed, said State Conservation Commission shall thereupon pay (1) all obligations of our Commission then existing and also (2) repay all funds our Commission shall have received, such as proceeds from sale of bonds issued by the various governmental bodies or grants made by such bodies?"

The pertinent part of section 14 of the above mentioned Act is as follows:

"On completion of the park according to the plans and specifications mutually approved for its construction, and upon full settlement of any revenue or funds of any nature received by the Commission during its tenure of office, full accounting of which shall have been made previously, the Commission shall transfer the park completed under the regulations of this act, together with all the facilities, assets and accounts, to the State Conservation Commission for operation and maintenance by it as a State Park. * * *." (Italics supplied)

It can be seen that completion of the park and full settlement of any revenue or funds received by the Grandview State Park Commission are necessary before transfer is made pursuant to the above section. It is my opinion, therefore, that your questions must be answered in the negative, and that the transfer of the Park should be made only after your Commission has made full settlement of all obligations.

Very truly yours,

WALTER E. ROGERS,
Assistant Attorney General.

GUARDIAN—May be Appointed for Delinquent Committed to Care of Department of Public Welfare.

July 29, 1947.

HONORABLE ARTHUR W. JAMES, *Commissioner*,
Department of Public Welfare,
Travelers Building,
Richmond, Virginia.

My dear Mr. James:

This is in reply to your letter of June 21, 1947, in which you inquire as to the proper steps you should take to appoint a guardian to take care of the proceeds of an insurance policy, of which a female delinquent committed to your care is the beneficiary.

I am in agreement with you that the authority of your department over delinquent wards committed to your care does not carry the status of guardian of property. Chapter 216 of the Code provides a method for the appointment of guardians, and before a person is authorized to handle the property of a minor as a guardian, he must be appointed in that method.

I am of the opinion that you should proceed, in the manner set forth in sections 5316 and 5317 of the Code, to have a guardian appointed. These sections of the Code are as follows:

"Section 5316. What courts or clerks may appoint guardians. The circuit Court of any county or the circuit or corporation court of any city, except the city of Richmond, or the clerk of such court or judge thereof in vacation, in which any minor resides, or, if he be a resident out of the State, in which he has any estate, may appoint a guardian for him, unless he have a guardian appointed as aforesaid by his father or mother. In the city of Richmond the chancery court and hustings court, part two, of said city within their respective territorial jurisdictions as defined by law and the judges thereof in vacation, and the clerks of said courts, and the duly qualified deputies of such clerks, shall have such power."

"Section 5317. How appointment made. If the minor is under the age of fourteen years, the court or judge or clerk of the circuit court, or corporation court, may nominate and appoint his guardian; if he is above that age, he may, in the presence of the court or judge or such clerk, or in writing, acknowledged before any officer qualified to take acknowledgments, nominate his own guardian, who, if approved by the court or judge, or such clerk, shall be appointed accordingly; and if the guardian nominated by such minor shall not be appointed by the court or judge, or such clerk, or if the minor reside without the State, or if, after being summoned by the judge or court, or such clerk, he shall neglect to nominate a suitable person, the court or judge or such clerk may nominate and appoint

the guardian in the same manner as if the minor was under the age of fourteen years."

It will be necessary, of course, that the guardian appointed give proper bond and otherwise comply with the provisions of Chapter 216.

With best wishes, I am

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**HIGHWAYS—STATE DEPARTMENT OF—Has Authority to Construct
Limited Access By-Passes Around Certain Cities.**

October 21, 1947.

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

My dear Mr. Gibson:

This is to acknowledge receipt of your letter of October 17, 1947, in which you desire my opinion on the following:

"I wish to have an opinion as to the legality of the action taken by the State Highway Commission in declaring the U. S. Route No. 1 by-pass at Fredericksburg a limited access by-pass."

You are correct in stating that the Acts of the General Assembly of 1942, Chapter 155, page 199, gave the Department of Highways authority to construct and improve by-passes and that this Act was amended and re-enacted by the General Assembly of 1946, Chapter 198, page 338. Upon examination of the original Senate bill No. 102, to which you refer, I find that you are also correct in stating that the language "limited access or express highways" was eliminated in the final passage of the Act. It appears that the only change made by the amended and re-enacted Act of 1946 was to insert new language after the word *by-passes* in the fourth line of the second paragraph, as follows:

"* * * or extensions and connections of the Primary Highway System."

The purpose of the 1942 Act was to authorize the Department of Highways to construct and improve by-passes through or around cities and incorporated towns; provided the respective cities and incorporated towns of 3,500 population, or more, paid fifty per centum of all costs, including costs of right of way on the portion of the by-pass located in such city or town. The 1946 Act simply enlarged the authority to include "extensions and connections of the Primary System."

You refer to the Acts of 1942, Chapter 78, page 99, which is entitled

"An act to provide for and authorize The State Highway Commission to designate, construct, maintain and improve limited access highways in the State of Virginia."

This act expressly gives the Highway Commission power to establish limited access highways and vests in it

"* * * all other additional authority and power relative to such limited access highways as is vested in it relative to highways, which shall include

the authority and power to acquire by purchase, eminent domain, grant, or dedication, title to such lands or rights of way for such limited access highways."

Section 3 of this act authorizes the Highway Commission to designate an existing highway as a limited access highway.

I am unable to find any language in the Act of 1946, hereinbefore referred to, which either expressly or by implication modifies or repeals the limited access provisions of the Acts of 1942.

In view of the plain terms of the Act authorizing the Highway Commission to designate limited access highways, I am of the opinion that the action of the State Highway Commission in declaring U. S. Route No. 1 by-pass at Fredericksburg a limited access highway was within the authority granted by the aforesaid Act.

With kindest regards, I am

Sincerely yours,

HARVEY B. APPERSON,
Attorney General.

**HOSPITAL LICENSING AND INSPECTION ACT—Not a Tax Statute;
Municipalities and Counties Not Exempt from Paying License Fees
Thereunder.**

January 21, 1948

DR. L. J. ROPER, *Commissioner*
Department of Health,
Richmond, Virginia.

My dear Doctor: Roper:

This is in reply to your letter of January 12, 1948, in which you ask if the license fee provisions of the Virginia Hospital Licensing and Inspection Act apply to the Hospital Authority of the City of Lynchburg. The Act provides that each application for a license to operate a hospital shall be accompanied by a service charge which is determined by the number of beds available for patients. The Administrator for the Hospital Authority for the City of Lynchburg has raised the question whether this license is a tax from which the Hospital Authority, as a public corporation and political subdivision of the Commonwealth, would be exempt.

Section 183 of the Constitution provides that property owned directly or indirectly by the Commonwealth or any political subdivision thereof shall be exempt from taxation. It is my opinion that the fees provided for by this Act are not taxes from which public corporations or political subdivisions would be exempt. A licensing enactment is a tax when revenue is the main purpose for which it is imposed. This license fee is imposed as a service charge, and all monies collected as service charges are appropriated to the Department of Health and are deemed, in the words of the Act, "a reimbursement to the State of the expense of operation and services imposed by this Act."

The Act also provides that it shall apply to any hospital operated or maintained by any person, and person is defined to include "municipality, county, and local governmental agencies."

It is, therefore, my opinion that the Hospital Authority of the City of

Lynchburg must pay this license fee in order to operate a hospital in accordance with the Virginia Hospital Licensing and Inspection Act.

With best wishes, I am

Yours very truly,

HARVEY B. APPERSON,
Attorney General.

**HOSPITAL LICENSING AND INSPECTION LAW—County Alms
Houses Rendering Medical and Nursing Facilities Must be Duly Licensed.**
January 16, 1948

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

My dear Mr. Dovel:

This is in reply to your letter of January 13, 1948, in which you ask if the Virginia Hospital Licensing and Inspection law applies to county alms houses. This Hospital Licensing and Inspection law was passed at the 1947 session of the General Assembly, and is carried on page 51 through 56 of the Acts of Assembly for 1947.

The Act provides for the regulation of hospitals by the State Board of Health, and requires that any person operating a hospital obtain a license as required by the Act. The Act defines a "person" as including a county, and, in section 1514-a2, defines a hospital in these words:

" * * * any institution, place, building or agency by or in which facilities for any accommodation are maintained, furnished, conducted, operated or offered for the hospitalization of two (2) or more non-related mentally or physically sick or injured persons, or for the care of two (2) or more non-related persons requiring or receiving medical or nursing attention or service as chronics, convalescents, aged, disabled or crippled, * * *."

It is my opinion that, if the county alms house of any county furnishes facilities for the hospitalization of two or more persons as indicated above, or furnishes facilities for medical or nursing attention for two or more persons as indicated above, then such county alms house comes within the provisions of this Act.

Whether or not the county alms house with which you are concerned furnishes such facilities is a matter as to which I am not advised.

Yours very truly,

HARVEY B. APPERSON,
Attorney General.

HOSPITALIZATION PROGRAM—State Board of Health may be Paid State's Share of Expense After Expiration of Period before Unused Funds are Reallocated.

August 4, 1947.

My dear Dr. Roper:
State Health Commissioner,
Richmond, Virginia.

My dear Dr. Roper:

This is in reply to your letter of July 29, 1947, regarding a certain locality which misunderstood the effect of an allocation made to it by the State Board of Health under the State and Local Hospitalization Program for Indigents as provided by Chapter 197, Acts of Assembly of 1946, as amended. You state that the Board advised the locality of the amount of State funds that had been allocated to it for the use during the fiscal year which ended June 30, 1947, and that the locality erroneously interpreted this as the total amount it could expend under this program from both State and *local* funds and, therefore, made claim upon the Board for only *one-half* of the amount actually allocated to it. Thereafter it hospitalized many patients entirely from local funds. You ask if the locality can now submit claims for the State's share of the cost of hospitalizing such patients and have the same charged to the allocation made to it for the fiscal year ending June 30, 1947.

While the Act provides for the reallocation of all unused funds at the end of each six months period, it does not, in my opinion, require a strict accounting as of the exact date of the expiration of such period. If shortly after the expiration of the six months period the Board is advised that a locality actually incurred hospitalization charges during that period, it is my opinion that the locality may be paid the State's proportionate part of such expense and have the same charged to the allocation made to the locality for the earlier period. This, of course, should be done before the unused funds for the earlier period have been reallocated.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

HOUSING AND RENT ACT—State Owned Institution has no Right to Evict Tenants in Property Purchased for Expansion.

July 8, 1947.

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

My dear Dr. Hibbs:

This is in reply to your letter of July 3, 1947, regarding the effect of the Housing and Rent Act of 1947 on the right of your institution to secure possession of two buildings in which tenants now live, which you bought for the purpose of remodeling and converting into college dormitories.

As you know, this Act provides that no action shall be brought for the purpose of evicting tenants except in certain specified cases. You refer to section 209(a), sub-paragraph (2), which authorizes such action where "the landlord seeks in good faith to recover possession of such housing accommodations for his immediate and personal use and occupancy as housing accommodations."

You will note that this provision is applicable only where the landlord seeks to recover possession for his personal use as housing accommodations. In my opinion, this would not be applicable where the college is attempting to secure possession for the purpose of renting the accommodations to students for dormitory purposes, since this would not be the personal use of the landlord.

You also refer to section 209(b), which reads as follows:

"Notwithstanding any other provision of this Act, the United States or any State or local public agency may maintain an action or proceeding to recover possession of any housing accommodations operated by it where such action or proceeding is authorized by the statute or regulations under which such accommodations are administered: *Provided*, That nothing in this subsection shall be deemed to authorize the maintenance of any such action or proceeding upon the ground that the income of the occupants of the housing accommodations exceeds the allowable maximum unless such income, less any amounts paid to such occupants by the Veterans' Administration on account of service-connected disability or disabilities, exceeds the allowable maximum."

This provision was apparently intended to apply to public housing projects where the agency administering the same is authorized to recover possession whenever the income of the occupant exceeds a certain allowable maximum. In my opinion, it is doubtful whether the courts would hold that this provision authorized the recovery of possession in the instances with which you are concerned.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

INSURANCE—Department of State Police is without Authority to Expend Appropriated Funds to Purchase Insurance Policy to Cover State Employees Riding in Airplanes, Over and Above Benefits Under Workmen's Compensation Act.

March 16, 1948.

SGT. R. F. BYRAM
Property and Finance Officer,
Department of State Police,
Richmond, Virginia.

Dear Sergeant Byram:

I have your letter of March 4 in which you state that the Police Department is operating four airplanes, with a seating capacity of ten persons. You state, in part:

"Will you please inform us if the Department can legally expend from funds appropriated for the operation of the Department sufficient money to provide adequate insurance coverage for members of the Department. By adequate coverage, we mean in an amount which added to the benefits of the Workmen's Compensation will provide equal coverage with a passenger who is not a member of the Department."

I am unable to find any specific reference in the statutes to the ownership and operation of planes by the State, nor did I find any specific appropriation

for this purpose. However, I take it that the funds are appropriated for the purpose of maintaining these planes as a necessary incident to the functions of the State Police Department.

Your attention is invited to Section 2 of the Workmen's Compensation Act, Chapter 400, Acts of 1918, found in Michie's Code as Section 1887(2). Part of that section reads as follows:

"(a) 'Employers' shall include the State * * * *

(b) * * * the term 'employee' shall include the officers and members of the national guard, and all officers and employees of the State, except only such as are elected by the people, or by the general assembly, or appointed by the governor either with or without the confirmation of the senate; * * * "

It is clear from the language contained in the Workmen's Compensation Act and the long practice thereunder that it is the policy of the State to offer protection to its employees for injuries received in the line of duty. The primary purpose of the Workmen's Compensation Act is to insure that the employees are protected in industrial accidents, that is, those accidents which occur by reason of somewhat hazardous work performed by the employee. As an employer, the State is compelled to abide by the provisions of this Act and appropriations are made from public revenue to pay for injuries and death incurred by its personnel.

Although I can well appreciate the feasibility of having insurance which would give the State employee additional coverage over and above that provided for by the Workmen's Compensation Act as it could readily be a distinct inducement or aid in the securing personnel to operate the planes, it would hardly seem probable that the State could adopt a policy to cover certain classes of employees with insurance, thus giving them greater benefits than to other State employees, solely because the work they pursue is more hazardous. In other words, the work of a police officer is much more hazardous than that of a file clerk, and that of a person handling high explosives is much more hazardous than that of a State Police Officer. Yet, State employees are required to perform duties of this character and under the Workmen's Compensation Act, they are all covered to the same degree.

I am, therefore, of the opinion that you would be without authority to expend public funds to purchase such a policy of insurance as would cover the employees of the State Police who operate these planes as pilots, over and above the benefits accrued to them under the Workmen's Compensation Act.

Your attention is invited to the excerpt in the foregoing provisions of the Workmen's Compensation Act quoted above. You will notice that those public officials that are elected and those appointed by the Governor are not covered by the Workmen's Compensation Act and, therefore, such an insurance policy as described by you could be acquired for the purpose of covering such individuals while traveling in or operating the planes. Furthermore, it would seem to me that if you cannot secure the services of pilots by paying the regular compensation provided for members of the State Police, you would be justified in paying them a greater compensation, but of course that is a matter for the Director of State personnel and yourself to determine and not this office.

Yours very truly,

D. GARDINER TYLER, JR.,
Assistant Attorney General.

JAIL AND PRISONERS—Prisoners in County Jail for Violation of Town Ordinance May be Worked by County.

July 17, 1947.

HONORABLE JULIUS GOODMAN,
Commonwealth's Attorney,
Christiansburg, Virginia.

My dear Mr. Goodman:

I am in receipt of your letter of July 12, in which you ask if the officials of the County of Montgomery have any right to work any prisoners confined in the county jail because of the violation of a town ordinance where the town does not have a jail of its own and the cost of keeping the prisoners is paid for by the town.

Section 2856 of the Virginia Code provides that where a town has no jail of its own, it shall have the use of the county jail. This section makes no provision for the working of town prisoners by county officials.

It is my opinion that the matter is governed by sections 3061 and 2075 of the Code. Section 3061 provides that towns may establish chain gangs for the working of persons convicted of the violation of any ordinance of such town. These chain gangs are to be used in working on public property owned or operated by the town. If the ordinance of the Town of Christiansburg establishes such a chain gang, then the town will have the first priority as to the working of town prisoners.

Section 3061 also provides that if a town does not maintain a chain gang, then section 2075 shall apply. Among other things, section 2075 states that prisoners convicted of violating town or county ordinances are primarily liable to work upon public works or chain gangs within such town or county, upon the request of the proper authorities. This section also contains a provision under which the board of supervisors of a county may request the proper court to require town prisoners to work upon public works of the county in which such town is located. Neither of these sections makes any reference to whether confinement is in a county or town jail, and it is my opinion that the place of confinement has nothing to do with the working of the prisoners.

The conclusion which I reach is that if the town keeps town prisoners working either by the maintenance of a chain gang as contemplated by section 3061, or under the provisions of section 2075, the county has nothing to do with such prisoners. If the town prisoners are idle, then it is my opinion that the county officials may proceed under section 2075 to request the use of such prisoners for county work.

With best wishes, I am

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

JURISDICTION—Washington National Airport; State does not Have Right to Enforce Criminal Law Thereon.

October 21, 1947.

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

My dear Colonel Woodson:

This is to acknowledge receipt of your letter of October 16, 1947, which I quote as follows:

"Please advise what jurisdiction, if any, members of our Department have in enforcing the criminal laws (gambling—numbers racket) at the Washington National Airport which is located between Alexandria, Virginia, and Washington, D. C."

By an act approved February 19, 1946, carried in the 1946 Acts of Assembly as Chapter 26, page 47, the boundary line between the District of Columbia and the Commonwealth of Virginia was established subject to certain reservations and conditions, exclusive jurisdiction over the Washington National Airport being retained in the United States. Section 107 of the Act sets forth certain conditions upon which the consent for jurisdiction of the United States was given, the first being that the Commonwealth of Virginia reserved the jurisdiction and power to levy tax on the sale of oil, gasoline, and all other motor fuels and lubricants for use in over-the-road vehicles, such as trucks, busses, and automobiles, except sales to the United States; and second, from which I quote:

" * * * there is hereby expressly reserved in the Commonwealth of Virginia the jurisdiction and power to serve criminal and civil process on the Washington National Airport."

In view of the fact that jurisdiction is limited to serving criminal and civil process, I am of the opinion that your Department does not have jurisdiction to enforce the criminal laws such as gambling and numbers racket, at the Washington National Airport, located between Alexandria, Virginia, and Washington, D. C. Authority may be found in the case of *United States v. Meagher* (C. C. Tex. 1888) 37 F. 875.

With kindest regards, I am

Sincerely yours,

HARVEY B. APPERSON,
Attorney General.

JURISDICTION—Criminal Vested in Commonwealth Over Lands Embraced in Camp Peary Naval Reservation.

October 24, 1947.

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

My dear Mr. Wright:

This is in reply to your letter of October 15, in which you wish to know whether the Commonwealth has criminal jurisdiction over Camp Peary since the title is still vested in the Federal Government.

Section 19 of the Code provides that the Federal Government shall have concurrent jurisdiction over all lands acquired by or leased or conveyed to the United States by any individual, firm, or corporation. Also, the statute expressly reserves the Commonwealth's criminal jurisdiction over such lands.

In the event the United States desires additional jurisdiction, section 19e of the Code provides that the Governor and the Attorney General are authorized on the part of the Commonwealth to cede by deed such additional jurisdiction as may be agreed upon.

Therefore, it can be seen that the Commonwealth has criminal jurisdiction over Camp Peary unless a deed was executed to the contrary. It has been the usual practice in the past for the Commonwealth to retain criminal jurisdiction, even though a deed granting the United States additional jurisdiction was executed. This office does not have a record of whether a deed was executed with respect to the Camp Peary land and the Secretary of the Commonwealth has been unable to find a copy of such a deed in her files. Therefore, I would suggest that your office check the records of the Circuit Court of York County. If no deed is found, the Commonwealth, of course, has retained its criminal jurisdiction under section 19 of the Code.

The agreement enclosed with your letter is herewith returned.

With best wishes, I am

Very sincerely yours,

HARVEY B. APPERSON,
Attorney General.

JURISDICTION OVER FEDERAL RESERVATIONS—Commonwealth of Virginia Retains Criminal Jurisdiction Over Such Reservations Until Same Are Surrendered as Provided by Law.

December 22, 1947.

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

Dear Senator Wright:

You have requested that I give some further consideration to the question presented in your letter to me of October 15th, 1947, and my reply of October 24th, 1947, wherein I discussed the question of the extent to which the Commonwealth of Virginia has criminal jurisdiction over Camp Peary.

You call attention to the fact that it has been suggested that possibly Article 1, Section 8, Sub-section 18 of the Constitution of the United States has an application which might change the opinion expressed in my letter of October 24th, 1947. This Section of the Constitution of the United States defines the powers of Congress as to the matters and things referred to therein. Sub-section 17, of Section 8 provides:

"To exercise exclusive legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Session of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings."

You will observe that the consent of the Legislature of the State is contemplated in connection with the places which may be purchased pursuant to

this Section. While Section 19, of the Code of Virginia, referred to in my previous opinion, cedes to the United States concurrent jurisdiction as to the matters therein referred to, it likewise reserves to itself concurrent jurisdiction as to enforcement of its criminal laws. Also the first sentence of this Section says: "*The conditional consent of the Commonwealth of Virginia is hereby given to the acquisition by the United States, etc.*" This reserved jurisdiction continues to be vested in the Commonwealth, unless it is relinquished in the manner provided by law. In the former opinion it was pointed out that this office was not advised that any deed had been made granting additional jurisdiction to the United States, nor had the Commonwealth taken any other action which would be indicative of its intention to cede further jurisdiction or relinquish any of the jurisdiction which it had reserved.

In our further discussion of this problem you showed me letters from Mr. J. C. Pugh, dated November 13th, 1947 to Capt. J. E. Reinburg USN (Ret); Peter S. Twitty to Mr. J. C. Pugh, dated November 5th, 1947, and from N. W. Martinsen, to the District Legal Officer, Fifth Naval District, Norfolk, Virginia. The general purport of these letters is to the effect that the Commonwealth of Virginia was never requested to waive jurisdiction over the lands involved, nor did the United States accept jurisdiction over the property. It appears to me that these letters buttress the views expressed here, and in the former opinion.

I assure you that I indeed appreciate the interest which Judge Armistead has shown in the questions here involved. If he will be good enough to give further consideration to the question, I believe it would be well to furnish him copies of the letters above referred to, and possibly the foregoing remarks to the Constitution of the United States may be of interest to him.

In any event if this office can be of further service in this connection, please do not hesitate to advise us.

Sincerely yours,

HARVEY B. APPERSON,
Attorney General.

JURISDICTION—State has Criminal Jurisdiction over Navigable Waters Within Her Boundaries.

May 6, 1948.

HONORABLE HUNTER MILLER, *Chairman*,
Virginia Alcoholic Beverage Control Board,
Richmond 11, Virginia.

My dear Mr. Miller:

This will acknowledge your letter of April 27, in which you state that you desire an opinion from me concerning the following inquiry received by your Board from the Norfolk and Washington Steamboat Company:

"* * *will you be so kind to advise if it is your contention that Chesapeake Bay from Old Point Comfort to Smith's Point is in *Virginia* rather than *Federal* waters, and that the State of Virginia has jurisdiction over the waters of Chesapeake Bay?"

The Commonwealth of Virginia has criminal jurisdiction over all the waters within her boundaries and section 14 of the Code of Virginia, which fixed the boundary between Maryland and Virginia, shows that the waters between Old Point Comfort and Smith's Point are within the boundaries of this Commonwealth.

The fact that the Federal government has control over navigation does not deprive the States of their criminal jurisdiction over navigable waters within

their boundaries. It is my opinion, therefore, that the Alcoholic Beverage Control laws of this Commonwealth are in full force in that part of the Chesapeake Bay not ceded to Maryland in the compact set forth in section 14 of the Code.

Very sincerely yours,

J. LINDSAY ALMOND, JR.,
Attorney General.

JURY—Statute Limiting Jury Service to Male Citizens Does not Violate Federal Constitution.

January 21, 1948.

HONORABLE TED DALTON,
State Senate,
Richmond 3, Virginia.

My dear Senator Dalton:

This in reply to your letter of January 16, in which you ask my opinion as to whether the provision of section 5984 of the Code limiting jury service to male citizens violates the 14th Amendment of the Federal Constitution in view of recent decisions of the Supreme Court of the United States.

In 1880 the Supreme Court of the United States declared, in *Strander v. West Virginia*, 100 U. S. 303, 25 L. Ed. 664, that the 14th Amendment of the Constitution of the United States did not prohibit the several States from denying to women the right to serve on juries.

In 1943 the above dictum was cited with approval in the case of *United States v Roemig*, 52 Fed. Supp. 857.

Since I am aware of no decision that has overruled the cases cited herein, it is my opinion that the provision limiting jury service to male citizens is not unconstitutional.

If you have in mind a specific decision of the Supreme Court of the United States, I will be glad to consider its effect on the constitutionality of the section in question.

Very sincerely yours,
HARVEY B. APPERSON,
Attorney General.

JUVENILES—Can be Punished Under the Juvenile Statute or Driving Drunk Statute Dependent Upon the Circumstances in Each Particular Case.

February 6, 1948.

HONORABLE HANSEL FLEMING,
Commonwealth's Attorney,
Clintwood, Virginia.

Dear Mr. Fleming:

Due to the untimely death of the Attorney General, I am acknowledging your letter of January 28, from which I quote as follows:

"A boy, aged 17 years, is convicted of driving while intoxicated. He has a good record otherwise. Should his punishment be determined under section 4722a or section 1918, or other statute?"

The answer to your inquiry depends upon how the seventeen year old boy is proceeded against. Of course, if he is proceeded against as a delinquent in the Juvenile Court, his punishment may be determined in accordance with section 1918 of the Code. On the other hand, if it has been found, upon investigation, that the boy cannot be made to lead a correct life and cannot be properly disciplined under the juvenile statute, it would be proper to proceed against him as if he were over the age of eighteen and punish him under the drunken drivers' statute (section 4722a of the Code).

Very sincerely yours,

WALTER E. ROGERS,
Assistant Attorney General.

JUVENILE AND DOMESTIC RELATIONS COURT—Has Jurisdiction to Commit Delinquent Dependent and Destitute Children to County Poor Farm without Prior Approval of Board of Supervisors.

August 4, 1947.

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

My dear Mr. Davis:

This is in reply to your letter of August 1, 1947, from which I quote:

"Mrs. Ruby Leake, a resident of Rappahannock County, Virginia, who is on relief from the State Welfare Department, is the mother of nine children. Her husband has been dead for six years. Her two oldest boys are now serving time at the Industrial School in Richmond and her oldest daughter has been placed in a private home by the Welfare Board. The remaining six children range in ages from fifteen months to thirteen years. The mother owns no property and has no visible means of support for herself and children. On April 28, 1947, the children were declared dependent and neglected by the Juvenile and Domestic Relations Court and committed to the State Department of Public Welfare. The Welfare Board has found it impossible to place these children in private homes or in any other approved institution for such children. Since their commission to the Welfare Department, five men have been indicted for statutory rape on the thirteen year old daughter. The mother has been sterilized.

"The Question: Is it within the jurisdiction of the Juvenile and Domestic Relations Court to order the Superintendent of the County Poor Farm to receive the mother and six children? Is it necessary to have the approval of the Board of Supervisors before the court may sentence them to the County Poor Farm? * * *

Section 2810a of the Code of Virginia (Michie, 1942) provides as follows:

"Any person who is a vagrant as defined by the laws of the State of Virginia, or who is physically incapable of supporting himself or herself, and in destitute circumstances, may, in the discretion of the justice or court before whom the case may be tried, be committed to the county or city poorhouse, alms house, or like institution."

In view of the above statute and the board powers conferred upon juvenile and domestic relations courts over delinquent, dependent and destitute children by section 1910 of the Code, it is my opinion that the juvenile and domestic relations court would have jurisdiction to commit the children to the County Poor Farm and to do without the prior approval of the Board of Supervisors.

In my opinion the mother may also be committed to the Poor Farm if she is found to be a vagrant as defined by the statute. She should probably be committed by the justice in his capacity as trial justice, since section 2809 provides that proceedings against vagrants shall be before the justice having jurisdiction of misdemeanors within the county. Juvenile and domestic relations courts have jurisdiction over parents who desert or willfully fail to provide for the support of their children, but the statutes dealing with this offense provide for commitment to County Work House or to the State convict road force.

With best wishes, I am

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**JUVENILE AND DOMESTIC RELATION COURTS—Proposed Bill
Imposing Exclusive Jurisdiction in Dealing with Minors and Providing
No Trial By Jury is of Doubtful Validity from a Constitutional Stand-
point.**

December 26, 1947.

HONORABLE MOSBY G. PERROW, JR.,
Virginia Legislative Council,
State Capitol Building,
Richmond, Virginia.

My dear Senator:

Reference is made to your letter of December 8, concerning a constitutional feature of a proposed Juvenile Court Act being considered by a subcommittee of the Virginia Advisory Legislative Council, of which subcommittee you are chairman. In your letter you state that:

"The question involved is whether the constitutional right of trial by jury should be incorporated in any procedure pertaining to juveniles. The proposed law of the subcommittee omits the right to trial by jury on the theory that a juvenile is a ward of the State and is not a criminal."

In addition to your letter, we received from the Honorable Herbert G. Cochran, Judge of the Juvenile and Domestic Relations Court, Norfolk, Virginia, copy of "A Standard Juvenile Court Act" drawn and revised in 1943 by the National Probation Association. I understand that the draft submitted by Judge Cochran is being substantially followed by your Committee in drafting the proposed Virginia Act.

As we construe the proposed Act, the proposed Juvenile Court would have exclusive jurisdiction in dealing with minors who are alleged to have violated, while under the age of eighteen years, any State law or municipal ordinance (Section 3(1) (e) of the draft as submitted).

In making a study of this subject, we find that courts in the various jurisdictions have considered different questions which have arisen on account of the juvenile statutes, but not all of the cases seem to deal directly with the question of the right to trial by jury. The authorities appear to be divided on the particular point under consideration, but it is clear that there is, to some extent, a variance in the language of the constitutional and statutory provisions in the different states.

The leading case upholding the constitutionality of a statute vesting a Juvenile Court with the power to exclusively deal with all minors, without the right to trial by jury, is *Commonwealth v. Fisher*, 213 Penn. 48. This case, as

well as the case of *People v. Lewis*, 260 N. Y. 171, and other cases not herein cited, give much weight to, and apparently are controlled by, the fact that offenses committed by minors are not defined as crimes within the juvenile statutes under consideration, and hence the proceedings are not regarded as criminal in nature, but merely protective in that the State considers the child the ward of the State. However, in a strong dissenting opinion in the New York case (*People v. Lewis*) the dissenting Judge raises the question as to whether a child may be "incarcerated and deprived of his liberty in a public institution by calling that which is a crime by some other name". The case of *Ex Parte Mei* (New Jersey) 192 Atlantic, 80, decided in 1937, seems to hold that the constitutional guaranties cannot be taken away from a minor by the expediency of definitions taking certain offenses out of the category of a crime when committed by a minor.

We are unable to find where the Virginia Court of Appeals has considered and passed upon the precise question submitted by you, but by reference to the recent case of *Mickens v. Commonwealth*, 178 Va. 273, we find that the Court has indicated strongly that any statute which would deprive a minor of the right to a trial by jury would be in conflict with the provisions of Section 8 of the Virginia Constitution. There, the Court made this statement:

"But the provisions contained in these statutes (referring to the present Chapter 78 of the Virginia Code dealing with juveniles) clearly show that the legislature recognized that children who have committed grave offenses could not be properly dealt with according to the methods and procedure established by such legislation. For this reason the regular criminal procedure and the original jurisdiction of circuit courts in felony cases of an aggravated nature are retained."

"Any other construction of the statutes involved would be in conflict with sec 8 of the Virginia Constitution which, in part, provides: A person 'shall not be deprived of life or liberty, except by the law of the land or the judgement of his peers.'"

"Laws may be enacted providing for the trial of offenses not felonious by a justice of the peace or other inferior tribunal without a jury, preserving the right of the accused to an appeal to and a trial by jury in some courts of record having original criminal jurisdiction."

The constitutionality of the provision suggested by you is of such grave doubt that it would seem to be advisable to preserve the right of trial by jury in any act revising the powers of the Juvenile Courts.

Cordially yours,

HARVEY B. APPERSON,
Attorney General.

LABOR LAWS—Rules and Regulations Promulgated by Chief Mine Inspector not Applicable to Landowner who Works Mine Himself and Does Not Employ Anyone.

July 8, 1947.

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

My dear Mr. Hall:

This is in reply to your letter of July 1, in which you enclosed a copy of a letter to you from the Chief Mine Inspector. It is as follows:

"The mining laws do not cover the minimum number of men allowed underground, in any one mine, but we consider that there should be at least two men present as one might suffer an injury, that ordinarily would not prove serious but the resulting shock and inattention might result in a fatality. Therefore, I have ruled, under authority granted to me in section 1887-Q, that no mine shall be allowed to operate unless there are, at least, two men employed underground. We have always been able to enforce this ruling until now a defiance has been registered. An operator, who owns the land and coal but who mines the coal for sale, refuses to obey our instructions. He contends that he has the right to work on his own property without interference from the mine inspectors.

"I will appreciate it if you will get the Attorney General to rule on this question and advise us whether we are to allow this man to continue to operate without the presence of the second party underground to help him in case of an accident."

Under section 1887-Q of the Code the Chief Mine Inspector has the authority to make rules and regulations for the protection of persons employed in mines. Therefore, the rule that "no mine shall be allowed to operate unless there are, at least, two men employed underground" is valid as applied to coal operators who employ miners, but it is my opinion that the rule would not apply to a person who owns a coal mine and works it alone *without employing anyone*. Such a person is not affected by Chapter 76 of the 1940 Acts of the General Assembly, which was passed, as you have pointed out, for the purpose of safety of persons *employed* within mines and for the protection of mine property.

I am further of the opinion that an amendment to the act making it unlawful for a landowner to operate a mine on his own land without assistance would be of doubtful constitutionality.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

LABOR LAWS—Contract Subject to Modification as to Wage Rates Does Not Subject Parties to Right—To—Work Act.

November 13, 1947.

HONORABLE JOHN HOPKINS HALL, *Commissioner*,
State Department of Labor and Industry,
Richmond, Virginia.

My dear Mr. Hall:

This is in reply to your letter of November 7, in which you enclosed a copy of a contract entered into prior to the effective date of the so-called Right-to-Work Bill, enacted as Chapter 2, Acts of Assembly, Extra Session 1947. The contract contains a provision that either party has the right to open the question of hourly wage rates. You ask whether a modification of such wage rates would be construed as creating a new contract, thus invalidating the union shop provisions of the contract.

Since the contract in question was expressly subject to a modification as to wage rates, the exercise of the right to open that question and make changes in such rates would certainly not destroy the agreement nor have the effect of creating a new one.

Therefore, it is my opinion that the modification of wage rates is not such a change as to create a new contract, thereby subjecting the parties to the provisions of Chapter 2, Acts of Assembly, Extra Session 1947.

Very sincerely yours,

HARVEY B. APPERSON,
Attorney General.

LABOR LAWS—Protection of Employees—Sanitary Facilities do Not Have to be Actually Located Within the Establishment.

January 16, 1948.

HONORABLE JOHN HOPKINS HALL, JR.,
Commissioner of Labor,
Richmond 6, Virginia.

My dear Mr. Hall:

This is in reply to your letter of January 14, in which you request my opinion regarding the interpretation of the following provision of section 1822 of the Code, dealing with sanitary facilities in certain establishments:

"Every establishment * * * shall be provided with a sufficient number of water closets * * * and reasonable access shall be afforded thereto; * * *"

You desire to know specifically whether or not the above provision carries with it the implication that the operator of the establishment must own the sanitary facilities and whether or not such facilities must be located within the four walls of the establishment.

It is my opinion that the words "shall be provided" do not imply ownership and, if the operator of the establishment "controls" the facilities in question, he has sufficiently complied with the statute.

In answering your second question, I am of the opinion that the sanitary facilities do not necessarily have to be located "within the four walls" of the establishment. Since the above section requires only that "a reasonable access shall be afforded thereto", it can be seen that the location of the said facilities would depend largely upon the facts and circumstances surrounding each establishment in question.

Very sincerely yours,

HARVEY B. APPERSON,
Attorney General.

LABOR LAWS—Statute does not Limit Right to Picket to Immediate Employees of Person Being Picketed.

June 28, 1948.

HONORABLE JAMES E. GARDNER,
16 North 7th Street
Richmond 19, Virginia.

Dear Senator Gardner:

This is in reply to your request for an opinion as to the constitutionality of Section 3 of Chapter 229 of the Acts of Assembly of Virginia of 1946.

This office has rendered no previous opinion as to the validity of this Act, though we did conclude that it did not apply in the case referred to by you. The statute in question reads as follows:

"Section 3. It shall be unlawful for any person who is not, or immediately prior to the time of the commencement of any strike was not, a bona fide employee of the business or industry being picketed to participate in picketing or any picketing activity with respect to such strike or such business or industry."

There have been a number of cases decided by the Supreme Court of the United States concerning the right to picket and the validity of restrictions imposed upon this form of activity in industrial disputes. The decisions on this matter are not in complete harmony.

In *Thornhill v. Alabama*, 310 U. S. 88, 60 S. Ct. 736 and *Carlson v. California* 310 U. S. 106, 60 S. Ct. 746, the Court held invalid statutes that entirely prohibited peaceful picketing. The Court held that freedom of the speech was among the liberties secured by the Fourteenth Amendment against abridgment by a state and that dissemination of information concerning the facts of a labor dispute by peaceful picketing was within the area of free discussion guaranteed by the Constitution. In *American Federation of Labor v. Swing*, 312 U. S. 321, 61 S. Ct. 568 a union of those engaged in beauty work unsuccessfully tried to unionize Swing's beauty shop and picketing of the shop followed. An injunction was allowed by the lower court on the ground that the picketers were not employees of Swing. The Court held that such a ban was inconsistent with the guarantee of freedom of speech saying:

"A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition so small as to contain only an employer and those directly employed by him. The independence of economic interest of all engaged in the same industry has become a commonplace."

In the case of *Carpenter and Joiners Union, etc. v. Ritters Cafe*, 315 U. S. 722, 62 S. Ct. 807 the Supreme Court sustained an injunction prohibiting peaceful picketing in the following circumstances. Ritter had a contract with a contractor named Plaster for the construction of a building. A carpenters union, for the purpose of compelling Ritter to require the contractor to employ union men in the construction of the building, picketed a restaurant owned by Ritter at a separate location which had nothing to do with the new building and concerning which there was no dispute. The Court pointed out that economic disputes between employers and employees were subject to proper control by the states, and said that the circumstance that a labor dispute is the occasion of exercising freedom of expression does not give that freedom any greater constitutional sanction or render it completely inviolable. The Court held that, since the restaurant business, as a business, had no nexus with the building dispute, the state could prohibit picketing against the restaurant in a dispute between the building workers union and the contractor who simply had a contract with the owner of the restaurant. The court said:

"It is true that by peaceful picketing workingmen communicate their grievances. As a means of communicating the facts of a labor dispute peaceful picketing may be a phase of the constitutional right of free utterance. But recognition of peaceful picketing as an exercise of free speech does not imply that the states must be without power to confine the sphere of communication to that directly related to the dispute. Restriction of picketing to the area of the industry within which a labor dispute arises leaves open to the disputants other traditional modes of communication. To deny to the states the power to draw this line is to write into the Constitution

the notion that every instance of peaceful picketing—anywhere and under any circumstances—is necessarily a phase of the controversy which provoked the picketing. Such a view of the Due Process Clause would compel the states to allow the disputants in a particular industrial episode to conscript neutrals *having no relation to either the dispute or the industry in which it arose*.

"In forbidding such conscription of neutrals in the circumstances of the case before us, Texas represents the prevailing, and probably the unanimous policy of the states. We hold that the Constitution does not forbid Texas to draw the line which has been drawn here." (*Italics supplied*)

It is to be noted that the Virginia statute does not forbid a person to picket just because he was not directly employed by the owner of the establishment being picketed, which type of restriction was held invalid in the *Swing Case*, *supra*. Since statutes should be construed in such a way as to uphold their constitutionality, if possible, I do not think that the Virginia statute should be construed as limiting the right to picket to the immediate employees of the person picketed, particularly when its language does not so require. It refers to persons employed in the "business or *industry*" being picketed. It appears to be intended to prevent such secondary picketing as was before the Court in the *Ritters Cafe Case*, *supra*, and in my opinion should be so construed. Thus applied, the statute would have the effect of limiting the right to picket to those engaged in the type of business or industry giving rise to the labor dispute and would prohibit only the picketing of other businesses having no relation to either the dispute or the industry in which it arose. So construed, the statute would be a legitimate effort to confine the area of the industrial dispute such as was upheld in the *Ritter's Cafe Case*.

Very truly yours,

J. LINDSAY ALMOND, JR.,
Attorney General.

LOTTERIES—Cannot be Legalized by Statute as Same are Prohibited by the Constitution.

January 30, 1948.

HONORABLE FRANK P. MONCURE,
House of Delegates,
Richmond, Virginia.

My dear Mr. Moncure:

Your letter of January 28, requested my opinion as to the constitutionality of an amendment to section 4693 of the Code, which would permit certain non-profit associations to hold lotteries.

Section 60 of the Constitution prohibits lotteries and the sale of lottery tickets and is as follows:

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

It is my opinion that the amendment in question would not be valid, for it can be seen from the above constitution provision that, *without exception*, no lottery can be held in this State.

Yours very truly,

HARVEY B. APPERSON,
Attorney General.

MINORS—Emancipation depends on circumstances and conduct in each particular case.

PHYSICIANS—Not liable to spouse if person who is competent consents to operation.

June 30, 1948.

MR. C. P. CARDWELL, JR., *Director*
Hospital Division,
Medical College of Virginia,
1200 East Broad Street,
Richmond, Virginia.

Dear Mr. Cardwell:

I am in receipt of your letter of June 22nd and will endeavor to answer your questions in the order in which they are asked.

"1. What constitutes an emancipated minor?"

First of all, emancipation means the freeing of a minor from the care, custody and control of a parent. For example, a valid marriage emancipates a minor. It also has been generally held that emancipation may be by agreement in writing, by parole or by implication arising from the circumstances and conduct in a particular case.

In the case of *Buxton v. Bishop*, 185 Va. 1, 37 S. E. (2d) 755, 165 A. L. R. 719 a doctor, operating a hospital, instituted suit against a parent for hospital services rendered the deceased son who was a minor. The evidence disclosed that the son was twenty years of age, supported himself for three years away from his home, drew his own wages and spent them as he desired and actually paid the hospital from his own hospital insurance fund. The Court held that the youth was an emancipated minor.

Therefore, in the absence of an express written or oral agreement it can be seen that the question of whether or not a minor has been emancipated would depend upon whether the circumstances and conduct in each particular case would justify the implication.

"2. Is it legal for a man to sign an operative permit or other such permit, for his wife if she is of legal age and mentally competent to sign for herself?"

It appears clear from the authorities reviewed that a physician is not liable for failure to procure the consent of a husband to a surgical operation upon his wife, if the wife herself consents to it. It would follow, therefore, that an operative permit signed by a husband for his wife would have no legal effect upon the liability of a physician since consent must be given by the patient when she is mentally competent.

"3. Can a permit for sterilization be accepted signed only by one party, when the whereabouts of the other party involved, the spouse of the patient, is unknown?"

The general rule is that a married person in full possession of his faculties has the power, without the consent of his spouse, to submit to a surgical operation upon himself. I have been able to find no cases that indicate a contrary rule when the operation to be performed is for the purpose of sterilization.

"4. What is the liability of volunteer drivers when carrying patients to and from the hospital?"

As to the individual liability of a volunteer driver, I do not think it proper

for this office to express an opinion other than to say that such liability would depend upon the facts of each case. Of course, you understand that since the hospital is a State institution it would not be liable in any event.

Very truly yours,

J. LINDSAY ALMOND, JR.,
Attorney General.

MOTOR VEHICLE CARRIERS—Operation of Vehicle on Highway Without Virginia License Plates is Prima Facie Evidence of Unlawful Operation.

January 16, 1948.

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

Dear Judge Peery:

This is to acknowledge receipt of your letter of January 10 in which you ask the opinion of this office concerning an interpretation of Section 5 of Chapter 360, Acts of 1932, as amended. You state that the enforcement officers in your area from time to time issue warrants against the interstate carriers charging those carriers with operating vehicles which are not properly licensed. You further state that these carriers transport passengers and hold franchises as common carriers under the Virginia law: furthermore, the carriers operate in other states and have a proportionate part of their vehicles licensed in those states. You ask whether or not such a carrier can lawfully operate a bus on the highways of Virginia and not carry Virginia plates on those vehicles when it is shown that particular bus is used in an emergency.

I refer you to Section 5 of Chapter 360, Acts of 1932, as amended, which reads in part as follows:

"No motor vehicle carrier holding a certificate shall change its route or schedule without first having obtained an order from the commission authorizing such change, a copy of which shall be filed with the director before said route or schedule is changed, *but nothing in this act shall be construed to prevent a motor vehicle carrier in an emergency from making occasional departures from its regular route or from replacing licensed vehicles by substitute vehicles in order to maintain an approved schedule.*" (Italics supplied)

It would seem that in order to give any meaning to the phrase "from replacing licensed vehicles by substitute vehicles in order to maintain an approved schedule", we would have to consider that the term "substitute vehicles" means a vehicle not properly licensed in Virginia to operate as a common carrier vehicle which is under the control of the carrier at the time it is used in an emergency.

It is the opinion of this office that the operation of a vehicle used by a common carrier of passengers on the highways of Virginia, not bearing a Virginia license tag, is prima facie evidence of the unlawful operation and, therefore, the burden is on the carrier to show that the reason for the use of this substitute vehicle is that an emergency exists. What constitutes an emergency must be determined by the Court in each instance.

Also this interpretation of this statute is not to be considered as relieving carriers of the necessity of reasonably anticipating the requirements of their

schedules to the end that a sufficient number of licensed vehicles will be available. In my opinion failure to use reasonable care and foresight in the anticipation of such requirements would not serve as a valid defense, on the grounds that an emergency had arisen.

Your file is herewith returned.

Very sincerely yours,

HARVEY B. APPERSON,
Attorney General.

MOTOR VEHICLE CODE—Authority of State Police to Regulate Equipment Standards Does Not Include Power to Force Owner of Vehicle to Remove Equipment Not in Use.

October 2, 1947.

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

Dear Governor Tuck:

I am in receipt of your request for an opinion from me which is as follows: "Subsection (h) of section 94 of the Motor Vehicle Code of Virginia prohibits any motor vehicle from being equipped with more than one spotlight.

"It seems that, apparently in ignorance of this statute, the Chrysler Motor Company shipped into Virginia a few vehicles equipped with two spotlights or lamps. However, shipments of cars so equipped were discontinued when the company was advised of the existence of the above provisions of the Code.

"The question has arisen whether or not the general power or authority of the Department of State Police to prescribe and regulate equipment standards of automobiles would extend to a requirement that persons who purchased cars so equipped with two spotlights must remove one of the lights; or whether the owner of such a car would be within his legal rights in retaining both lamps upon his car in the positions occupied by them when the car was received, so as to counterbalance the corresponding lamp on the other side for decorative purposes, provided one of the lamps is fully and completely disconnected from the battery and is thereby converted into a dummy light only. Objection has been made to such action on the part of the owners of these cars because of the fact that it will increase the inspection difficulties of the State Police Officers in their efforts to ascertain whether a car is equipped with more than one spotlight.

"I will appreciate it if you will let me have your opinion on this question."

In my opinion, if the severance of connection between the lamp and the battery is so complete that it cannot be reconnected by the owner, or by anyone other than an electrician or mechanic, the objection urged to the continuation in its original position of the second lamp as a dummy for decorative purposes is not well taken.

It is my view that the authority of said Department to prescribe and regulate equipment standards is restricted to the general field of safety of operation, and it would be beyond a reasonable exercise of that power to put the owner of such a vehicle to the expense of removing the dummy lamp or spot-

light and thereby perhaps disfigure the car. The owner, in my opinion may retain on his car the dummy lamp so disconnected without violating the law.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**MOTOR VEHICLE LAWS—Driving after Privilege has been Revoked
—Punishment is Dependent upon the Statute under which Person is
Charged and Convicted.**

May 27, 1948.

HONORABLE W. CARRINGTON THOMPSON,
Commonwealth's Attorney, Pittsylvania County,
Chatham, Virginia.

Dear Mr. Thompson:

This is to acknowledge receipt of your letter of May 21st, in which you state in part:

"This is to request your opinion as to what is the applicable punishment for a defendant who has been convicted of drunk driving as a result of which his operator's license is revoked and while revocation is in effect, he is convicted of operating a motor vehicle after his license has been revoked."

The applicable punishment would be dependent upon the violation of the statute of which the accused is charged. Confusion would be obviated by designation of the statute in the warrant. A person convicted of drunk driving who thereafter drives a motor vehicle upon the highways of Virginia is guilty of violating Chapter 87, Acts of 1940 (Section 4722a, Michie's Code 1942), as amended by Chapter 193 Acts of 1948, commonly known as the "Drunk Driving Act." If such a person had his driving permit and driving privileges revoked by the Commissioner of the Division of Motor Vehicles pursuant to Chapter 384, Acts of 1944, commonly known as the "Virginia Motor Vehicle Safety Responsibility Act", he can be charged with the violation of Section 87 thereof (Section 2154(a87) Michie's Code), and punished accordingly.

Inasmuch as the Motor Vehicle Safety Responsibility Act supercedes the Virginia Operators' and Chauffeurs' License Act, Chapter 385, Acts of 1932, as amended, the Commissioner of Motor Vehicles no longer revokes driving permits and driving privileges in accordance with Section 17 of that Act.

It is, therefore, the opinion of this office that a person who has heretofore been convicted of driving drunk and thereafter operates a motor vehicle upon the highways of Virginia during the prohibitory period can be prosecuted under Chapter 87, Acts of 1940, as amended by Chapter 193 of the Acts of 1948, and if the Commissioner of the Division of Motor Vehicles has acted and entered an order revoking his driving permit or driving privileges, he can likewise be prosecuted under the provisions of Chapter 384, Acts of 1944, and the punishment set forth in Section 87 thereof can be applied. However, there can be but one prosecution.

I call your attention to the fact that a person cannot be prosecuted under Chapter 193, Acts of 1948, until after the effective date of that Act.

Very truly yours,

J. LINDSAY ALMOND, JR.,
Attorney General.

MOTOR VEHICLE LAWS—Conviction for Drunk Driving after Conviction of Hit and Run does not Constitute Second Offense.

June 5, 1947

HONORABLE W. CLYDE DENNIS,
Trial Justice,
Grundy, Virginia.

My dear Mr. Dennis:

In your letter of May 27, you present this question. A person is convicted upon the charge of Hit and Run driving and his license revoked. Before the license is restored, he is convicted upon the charge of driving while intoxicated. You ask if this should constitute a second offense.

Section 4722a of Michie's Code of 1942 provides, in part:

"If any person has heretofore been convicted of violating any similar act of this State and thereafter is convicted of violating the provisions of subsection (a) of this section, such conviction . . . shall be a subsequent offense."

In *Commonwealth v. Ellett*, 174 Va. 403, the Court of Appeals discussed this quoted section of the Code. They held that "any similar act" was intended to mean any former drunken driving act. In 1930 the repeal of the Act of 1924 left no statute against drunken driving on the books. When the omission was discovered, section 4722 was enacted for the purpose of permitting convictions under the former Act to be considered in determining the nature of prosecutions under the new Act.

This being the purpose of the words "any similar act," I do not think a conviction of Hit and Run driving can be considered a conviction under "any similar act". It follows that the conviction of driving while intoxicated, in the situation presented by you, does not constitute a second offense under section 4722a.

With best wishes, I am

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

MOTOR VEHICLE CODE—Licensing Vehicle for a Certain Capacity Does Not Permit Owner to Exceed Axle Load Limits as Prescribed by Statute.

November 25, 1947.

HONORABLE W. CLYDE DENNIS, *Judge*,
Trial Justice Court of Buchanan County,
Grundy, Virginia.

Dear Judge Dennis:

This is to acknowledge receipt of your letter of November 21 in which you ask my opinion concerning an interpretation of Section 113 of the Motor Vehicle Laws of Virginia (section 2154(159) Michie's Code), in relation to certain cases that are now pending in your Court.

You are advised that it is not the policy of this office to render official opinions relating to pending litigation. Be that as it may, I am letting you have the benefit of my views concerning this statute as they may be of benefit to you in prosecution thereunder in the future.

You state in your letter, in part:

"There are pending before me three cases against operators of trucks. Case 1. Is a truck properly licensed to carry 24,000 pounds but on the date that it was checked by a member of the State Police force the axle weight was 20,500 and the actual gross at the time was 24,200 pounds.

Case 2, was a truck licensed to carry a gross weight of 24,000 pounds, the axle weight 17,500 and actual gross 21,300 pounds.

Case 3, was a truck licensed for gross weight of 24,000 with axle weight 19,600 and actual gross weight 23,100 pounds.

Each of these cases were the dual-wheel type and were being operated on route 460 upon which a truck may be permitted to carry 40,000 pounds if properly licensed.

I am frank to state that I do not know how to construe the section above referred to. As it would appear that the axle weight was in violation of the law and the actual gross weight except in one of the cases was not in violation of the law. I would like to have your opinion on this, for which I will be grateful."

In addition to Section 113 of the Motor Vehicle Code, I call your attention to Section 113-a of the said Code, which reads in part as follows:

"The State Highway Commission may, by general or special order, which may be amended or rescinded from time to time, increase the maximum weight permitted on the road surface through any one axle of any vehicle to not exceeding eighteen thousand (18,000) pounds, and the maximum gross weight permitted for any six wheel vehicle or combination of vehicles to not exceeding forty thousand (40,000) pounds, on such highways, or parts thereof, as in the opinion of the Commission are capable, from the standpoint of construction and maintenance, of carrying such increased weights.

(b) The State Highway Commission shall cause every highway or part thereof on which the maximum weight per axle and the maximum gross weight have been increased as provided in subsection (a) of this section, to be marked with appropriate signs indicating the respective weight limits permitted. On every highway or part thereof so marked it shall be lawful to operate a six wheel vehicle, or a combination of vehicles, in conformity with other applicable provisions of law and so loaded as not to exceed the respective weight limits thus indicated notwithstanding that the weight transmitted through any axle of such vehicle, or combination, or the gross weight thereof, or both, exceed the weight limits prescribed by section one hundred and thirteen; * * *."

You have stated in your letter that these particular cases arose from operation upon Route 460 which route has been marked by the Highway Department to permit the maximum weights as set forth in Section 113-a, supra. This information is not correct as I am advised by the Highway Department that there are no roads in Buchanan County which have been so designated by that Department. Hence, Section 113 of the Motor Vehicle Code is applicable in these cases and similar cases. As you know, the purpose of these statutes is to protect the highways.

If the axle load exceeds that of 16,000 pounds on all roads except those specifically designated by the Highway Department, then it is a violation of the law. If the axle load exceeds 18,000 pounds on any designated road, then it is a violation. The mere fact that the truck owner has his truck licensed for a certain capacity does not permit him to overload his axles so as to carry the load for which his vehicle is licensed. In order to carry the maximum load as permitted under Sections 113 and 113-a, a truck owner can place additional axles, at least forty inches apart, on his trucks thereby distributing the weight.

Under Section 35-a of the Motor Vehicle Code, section 2154(82a) Michie's Code, owners of trucks pay a registration fee based on each one hundred pounds gross weight or major fraction thereof.

For your information, I am enclosing herewith a pamphlet issued by the Department of State Police concerning the weight limitations. This pamphlet sets forth the administrative practices concerning this subject.

With high regards, I am

Very truly yours,

HARVEY B. APPERSON,
Attorney General.

MOTOR VEHICLE CODE—State Police do Not Have Authority to have Vehicle Towed to Garage after Lawfully Lifting License Plates Therefrom.

November 5, 1947.

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

My dear Colonel Woodson:

This is to acknowledge receipt of your letter dated October 29, 1947, from which I quote as follows:

"The question has now arisen as to whether or not, after invoking the provisions of Section 33 (a)—that is, lifting the license plates from an unsafe vehicle, our men have authority to call a wrecker and have such vehicle towed to a garage for repairs or for safe keeping or perhaps to the home of the individual owner. The question has also been raised as to whether or not the State would be liable for the payment of such wrecker service and/or for payment of storage on a vehicle so towed in and left at a public garage."

Sections 33(a) and 34(a) to which you refer are carried in Michie's Code of 1942, as Sections 2154(79)a and 2154(81)a, respectively.

Section 2154(79)a makes it mandatory for the Commissioner to revoke, rescind and cancel the registration of any motor vehicle, trailer or semi-trailer which the division shall determine is unsafe or unfit to be operated or is not equipped with certain mechanical devices as therein enumerated.

Section 2154(81)a provides, in substance, that whenever any motor vehicle, etc., is abandoned or found on the paved or improved surface of any highway or adjacent thereto, unaccompanied by the owner or operator, and it constitutes a hazard, peace officers are charged with the duty to have it removed to the nearest storage garage. If the owner, when located, refuses to pay the storage and/or other costs, the vehicle may be sold and the funds distributed as provided. This section does not apply to your question unless the motor vehicle is subsequently found on the highway abandoned or unoccupied by the owner or operator. You state that you have been unable to find any other provisions that could be construed to give your department authority for towing such vehicles when it is not authorized by the owner or operator. I, too, have been unable to find any such statutory authority.

It therefore follows that I am of the opinion that your department does not have authority to call a wrecker and have such motor vehicle towed to a garage for repairs or for safe keeping or to the home of the owner without the consent of the owner or operator. However, I am of the opinion that you may act under the police powers of the Commonwealth to remove a motor ve-

hicle from the highway if such vehicle is so obstructing traffic as to endanger the welfare and safety of the traveling public and the owner or operator refuses to do so.

With reference to your second question, I wish to advise that a State police or other peace officer does not have express or implied authority to pledge the credit of the Commonwealth for the payment of wrecker service and/or for payment of storage on a vehicle towed in and left at a public garage or elsewhere.

With kindest regards,

Very truly yours,

HARVEY B. APPERSON,
Attorney General.

MOTOR VEHICLE LAWS—Motor Vehicle Division Does Not Have Authority to Charge Fee for Accepting Dealer's Reassignment Form.

HONORABLE C. F. JOYNER, JR.,
Commissioner of Motor Vehicles,
Richmond, Virginia.

January 9, 1948.

Dear Mr. Joyner:

I am in receipt of your letter of January 9, in which you state:

"In administering the provisions of Section 28 of the Motor Vehicle Code which deals with the transfer of titles or interest in automobiles, the Division of Motor Vehicles has made a practice of charging a dealer a fee of \$1.00 where such dealer presents a certificate of title issued by a foreign state, together with an executed dealer's re-assignment form No. 20 (which form is of course prepared by this office). At the same time, the purchaser from the dealer submits an application for a title and the certificate of title is issued to the purchaser, who pays the required fee of \$1.00.

Where the motor vehicle is titled in Virginia, the dealer executes a like certificate, the form of which is found on the reverse side of the Virginia title certificate. At the same time, the purchaser from the dealer makes application for a title and a certificate of title is issued to the purchaser at a cost of \$1.00. No fee is charged the dealer in this instance.

Please advise me whether the Division can charge the dealer the fee of \$1.00 under the circumstances narrated in the first instance above."

I refer you to Section 28(c) of the Motor Vehicle Code, which was last re-enacted by chapter 385, Acts of 1944, which reads as follows:

"When the transferee of the motor vehicle, trailer or semi-trailer is a dealer who holds same for resale and operates same only for sales purposes under a dealer's license plate or when the transferee does not drive the motor vehicle, trailer or semi-trailer nor permit it to be driven upon the highways, the transferee shall not be required to register it nor forward the certificate of title to the Division, as provided in the preceding paragraph, but such transferee upon transferring his title or interest to another person shall give notice of the transfer to the Division and shall endorse and acknowledge an assignment and warranty of title upon the certificate and deliver it to the person to whom the transfer is made."

I also refer you to Section 17 (b $\frac{1}{2}$) of the Motor Vehicle Code, last amended by Chapter 42, Acts of 1940, which reads as follows:

"The fee to be paid to the division for the issuance of each certificate of title shall be one (\$1.00) dollar."

I am unable to find any authority in the Motor Vehicle Code or elsewhere to justify your Division collecting a fee for the action taken by the dealer under the above section of the Code, be the vehicle titled in Virginia or titled in a foreign state. The only fee that is permissible to charge is that under Section 17(b $\frac{1}{2}$) and that is only chargeable when the Division issues a certificate of title.

Very sincerely yours,

HARVEY B. APPERSON,
Attorney General.

MOTOR VEHICLES LAWS—Owner of Vehicle who was Not Riding in Vehicle is Not Guilty of Any Offense upon the Conviction of Driver for Careless and Reckless Driving.

December 29, 1947.

MR. A. SIDNEY JOHNSON,
Assistant Civil and Police Justice,
Radford, Virginia.

Dear Mr. Johnson:

This is in reply to your letter of December 15, 1947, from which I quote: "I am addressing this communication to ascertain if your good offices will be kind enough to give me an opinion construing section 2154 (195) of the Code of Virginia in connection with the criminal responsibility of an owner of a motor vehicle where the driver is not apprehended; and, it is clearly shown that the operator of said vehicle is guilty of the *criminal charge of reckless driving.*"

Section 2154 (195) of Michie's Code of Virginia, which is section 27 of chapter 385, Acts of 1932, known as the Virginia Operators' and Chauffeurs' License Act, reads as follows:

"No person shall authorize or knowingly permit a motor vehicle owned by him or under his control to be driven by any person who has no legal right to do so or in violation of any of the provisions of this act."

The Operators' and Chauffeurs' License Act is an Act which regulates the licensing of motor vehicle operators and sets forth the grounds for which the license can be revoked. This Act does not provide for the punishment of the offense of reckless driving, which is dealt with in section 61 of the Motor Vehicle Code, Chapter 342, Acts of 1932 (Michie's Code, 2154 (108)). Since the Motor Vehicle Code is an entirely separate Act from the Operators' and Chauffeurs' License Act, the offense of reckless driving would not be a violation of a provision of the Operators' and Chauffeurs' License Act, and, therefore, is not included in the language of section 27 of said Act, which reads "in violation of any of the provisions of this Act."

I judge from your letter that the driver of the vehicle was duly licensed to operate a motor vehicle under the Operators' and Chauffeurs' license Act, and had a legal right to drive the automobile, and that his only violation of law was the offense of reckless driving. Assuming this to be the case, it is my opinion that the owner of the vehicle who authorized the driver to operate the same is not guilty of a violation of section 27 of chapter 385, Acts of 1932. Of

course, if the owner was riding in the automobile and acquiesced in the reckless operation of the same, he may be guilty of aiding and abetting the commission of this separate offense. See *James v. Commonwealth*, 178 Va. 28.

Very sincerely yours,

HARVEY B. APPERSON,
Attorney General.

MOTOR VEHICLE LAWS—Revocation of Driving Privileges Commences on the Date Action is Taken by Motor Vehicle Commissioner.

October 8, 1947.

HONORABLE HUBERT D. BENNETT,
Trial Justice for Pittsylvania County,
Chatham, Virginia.

My dear Mr. Bennett:

This is in reply to your letter of October 4, 1947, addressed to the Honorable Abram P. Staples, in which you refer to section 16 of the Virginia Motor Vehicle Safety Responsibility Act (section 2145 (a16) of Michie's Code of Virginia) which reads in part as follows:

"The Commissioner shall forthwith revoke, and not thereafter reissue during the period of one year, the license of any person, resident or non-resident, upon receiving a record of his conviction of any of the following crimes, * * *"

You ask whether the period of revocation would start on the date the defendant is convicted or at the time the record of his conviction is actually received by the Commissioner.

This office, in construing section 17 of the Virginia Operators' and Chauffeurs' License Act, which contains similar language, has previously held that, since a person's license is not automatically revoked upon his conviction of the specified offence, the period of revocation dates from the time action is taken by the Division of Motor Vehicles and not from the date of the conviction. It is my opinion, therefore, that the defendant would be entitled to operate his vehicle between the time of his actual conviction and the time of his receipt of the order of revocation of his license from the Commissioner. This would be true even though there was some delay on the part of the clerk in reporting such conviction.

While section 16 of the Motor Vehicle Safety Responsibility Act refers to a conviction for driving a vehicle while intoxicated, I call your attention to section 4722a of the Code of Virginia, which provides that a conviction of such offence shall of itself operate to deprive the person convicted of the right to drive or operate any motor vehicle. In this instance the period of revocation begins with the actual date of conviction.

With best wishes, I am

Very sincerely yours,

HARVEY B. APPERSON,
Attorney General.

MOTOR VEHICLE LAWS—Person Found in an Intoxicated Condition Guiding Motor Vehicle Being Parked on Public Highway is Amenable to Drunk Driving Statute.

May 11, 1948.

HONORABLE J. MELVIN LOVELACE,
Attorney for the Commonwealth,
Suffolk, Virginia.

Dear Mr. Lovelace:

I am in receipt of your letter of May 6, requesting my opinion relative to the sufficiency of certain facts and circumstances, stated by you, to support a conviction under Section 4722a on a charge of operating a motor vehicle while under the influence of intoxicants.

The factual situation submitted by you is as follows:

The accused had been seen by one of the officers several hours prior to arrest. At that time he was operating the car, but there is no evidence that he was under the influence of intoxicants. At the time of arrest the accused was under the wheel in the driver's position guiding the car over and along the highway with a truck pushing the car from the rear, but the motor of the car was not running. At that time the accused was under the influence of intoxicants.

Giving vitality to the spirit and purpose of Section 4722a, in the light of the danger it is designed to suppress and considering its broad scope as reflected by the language "drive or operate", it is my opinion that the facts stated are sufficient to support a conviction under this Section.

The accused was in control of the direction of a moving car propelled not by the motor of the car he was driving, but by the motor of a truck pushing the car along and upon the highway. The fact that the motor was not operating would, in my judgement, be analogous to a driver of an automobile coasting down grade with the ignition switch cut off. In either event, he would be driving an automobile, car or motor vehicle.

Very sincerely yours,

J. LINDSAY ALMOND, JR.,
Attorney General.

MOTOR VEHICLE CODE—Road Machinery used for Highway Purposes Exempted from Registration.

July 7, 1947.

GENERAL JAMES A. ANDERSON,
State Highway Commissioner,
Richmond, Virginia.

My dear General Anderson:

I am in receipt of your letter of July 1, 1947, which I quote as follows:

"Section 13, Page 18 of the Motor Vehicle Code of Virginia reads as follows:

"When registration not required.—(a) Farm tractors, road rollers and road machinery used for highway purposes need not be registered under this Act."

"There have recently become increasingly used what are known as moto-cranes. These vehicles consist of a regular crane mounted on a truck chassis. A cut of such vehicle is attached. They are used for loading and unloading material, in a great many cases stone and sand for Highway work. They are self-propelled and run up and down our highways. Because they are over-length, they could not secure a license tag even if they had to be registered.

"The question is, whether under the Section of Act above quoted, such vehicles are exempt from paying the 10c per mile fee required of unlicensed vehicles operating on our highways.

"There is some difference of opinion between the personnel in both the Highway Department and the Division of Motor Vehicles as to whether or not these vehicles should be exempt. Personally, I do not feel the intent of the Act is to exempt this type of vehicle but I would like to have your official opinion."

The section to which you refer in your letter, "When registration not required", is carried in Michie's 1942 Code of Virginia as section 2154(60) paragraph a. The provisions of this statute expressly exempt from registration, among other things, road machinery used for highway purposes. Such machines as you describe in your letter known as "moto-cranes" could be, and undoubtedly are, used for other purposes in addition to highway work. This being true, it is necessary to refer to the provisions of section 2154(71) of Michie's 1942 Code of Virginia as amended by the General Assembly in 1944 entitled "When Commissioner may grant temporary registration or permit". I quote as follows such part of this section as is here material:

"The Commissioner may, if in his opinion it is equitable, grant a special temporary registration or permit for the operation of tractors, tractor-trucks, trucks and heavy duty trailers for the transportation of heavy construction equipment, cranes, well-digging apparatus, and other heavy equipment upon the highways of this State from one point to another within this State, or from this State to a point or points without this State, or from without this State to a point or points within this State.

* * * * *

"For such special temporary registration or permit the applicant shall pay a fee based upon the sum of ten cents per mile for each and every mile to be traveled by the tractor, tractor-truck, truck, heavy duty trailer, crane, well-digging apparatus, or other heavy equipment."

Since "moto-cranes" are machines which may be used as road machines for highway purposes and also for other purposes not connected with highway work, I am of the opinion that such machines are exempt from registration when they are actually engaged in road work upon the State highways, but that such machines are not exempt from registration when otherwise engaged. I am also of the opinion that when these machines travel the State highways and are not engaged in road work they are subject to the provisions of section 2154(71) and are required to obtain from the Commissioner a temporary registration or permit and to pay the fee prescribed by the statute.

With best regards, I am

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

MOTOR VEHICLE LAWS—Superintendent of State Police Can Issue Permits to Private Individuals, Members of a Volunteer Fire Department, Authorizing Them to Use of Warning Devices on Their Vehicles.

February 25, 1948.

HONORABLE JAMES C. GODWIN,
Commonwealth's Attorney,
Clifton Forge, Virginia.

Dear Mr. Godwin:

This is to acknowledge receipt of your letter of February 18, 1948 in which you say part:

In Clifton Forge we have a volunteer fire company. Recently members of the fire company have applied for and obtained permits, issued by Colonel Woodson, to install sirens on their private automobiles which are to be used only in answering emergency calls. As the section of the code referred to above excepts only emergency vehicles, I do not understand by what authority Colonel Woodson issued the permits to the owners of these private vehicles. As I remember, that section does not give the director or anyone in his department the authority to issue the same."

Section 101 of the Motor Vehicle Code—Section 2145 (148). Michie's Code, reads in part as follows:

"(b) Every police and fire department vehicle and every ambulance used for emergency calls shall be equipped with a siren or exhaust whistle of a type not prohibited by the director. (Now Superintendent of State Police)

(c) It shall be unlawful to possess with intent to sell, or to sell or offer for sale any horn or warning device that is not of a type that has been approved by the director. And the director is hereby authorized to *adopt* and enforce *rules* and *regulations* and uniform specifications relating to construction, mounting, *use* and number of warning devices for which an approval fee shall be made as hereinafter provided." (Italics supplied)

We are advised by the Superintendent of State Police that in enforcing the provisions of this section, he has adopted a rule to the effect that vehicles used by members of volunteer fire departments can be equipped with a siren. Furthermore, that before the Superintendent approves such use, the owner and vehicle are designated in a memorandum which is countersigned by the chief of the volunteer fire company

I am of the opinion that in order to carry out the intent of the law, that the rule adopted by the Superintendent of State Police is a reasonable and proper one; and, therefore, that members of your local volunteer fire company can lawfully install upon their vehicles sirens of such a type as are specifically approved by the Superintendent for use on such vehicles and when used in the manner prescribed and permitted by the Superintendent of State Police.

Yours very truly,

D. GARDINER TYLER, JR.,
Assistant Attorney General.

MOTOR VEHICLE CODE—Superintendent State Police has Authority to Issue Permits for Use of Equipment by Volunteer Firemen.

March 4, 1948.

HONORABLE R. E. DYCHE,
Trial Justice for Alleghany County,
Covington, Virginia.

My dear Mr. Dyche:

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

"Does the Superintendent of State Police have the authority to issue a permit to a volunteer fireman to install a siren on his private automobile. This automobile is used for the fireman's own private use except when he is called to a fire. If it is a violation of the law, can the siren be confiscated by the court?"

The pertinent part of section 101 of the Motor Vehicle Code (found as subsections (b) and (c) of section 2154(148) of Michie's Code, 1942) is as follows:

"(b) Every police and fire department vehicle and every ambulance used for emergency calls shall be equipped with a siren or exhaust whistle of a type not prohibited by the director.

"(c) It shall be unlawful to possess with intent to sell, or to sell or offer for sale any horn or warning device that is not of a type that has been approved by the director. *And the director is hereby authorized to adopt and enforce rules and regulations and uniform specifications relating to construction, mounting, use and number of warning devices for which an approval fee shall be made as hereinafter provided.*" (Italics Supplied)

The "director" referred to above is the Superintendent of State Police (see section 585(71a) of Michie's Code, 1942); therefore, it can be seen that, since he has authority to adopt and enforce rules and regulations concerning the use of sirens, he may issue a permit to a volunteer fireman to install a siren on his private automobile, assuming that the automobile is used as a fire department vehicle when so needed.

It is my understanding that the Superintendent issues the permits in question on the request of fire departments upon condition that the siren be used only when the volunteer fireman is actually answering a fire alarm. Undoubtedly the Superintendent will correct any abuse in the use of such permits if it is called to his attention.

Very sincerely yours,

WALTER E. ROGERS,
Assistant Attorney General.

MOTOR VEHICLES LAWS—Truck Leased to U. S. Post Office Department Must be Properly Licensed by Municipal and State Authorities.

December 30, 1947.

HONORABLE G. GARLAND WILSON, JR., *Judge*,
Civil and Police Justice Court,
Radford, Virginia

Dear Sir:

This is to acknowledge receipt of your letter of December 19, in which you stated in part:

"There is a case pending in this court where the owner of a truck leases the same on an annual basis to the Post Office Department in connection with the delivery of mail in this City. In view of the fact that the truck is leased from year to year to the Post Office, the owner contends that he is not required to purchase City tags for said truck as provided by Sections 1, 2, and 11 of Ordinance No. 360 of the City of Radford, which is as follows:

"SECTION 1: It shall be unlawful for any person or persons, firm or corporation except in accordance with the provisions of this ordinance, to run, drive or operate any automobile, motorcycle, motor bicycle, motor tri-cycle or any vehicle of any kind, the motive power of which shall be electricity, steam, gas, gasoline, or any other motive power except animal power and which said vehicles shall hereafter be called machines in this ordinance, on or along or across any public road, street, alley, highway, avenue or turnpike of the City of Radford, except and until such person shall comply with all the provisions of this ordinance.

"SECTION 2: Every owner of a machine on or before the 30th day of April in each year, or before he shall commence to operate his machine shall register and obtain license to operate the same by making application to the City Manager or his designated agent for a certificate of registration and license to operate. The application shall contain the name and address of the applicant, the name and factory number of the machine, a brief description showing the style of machine, source of power, number of cylinders and horsepower.

"SECTION 11: This ordinance shall not apply to tourists, or other persons driving through or remaining in the City for a period of less than thirty days. It shall apply, however, in full to every person, firm or corporation owning or operating motor vehicles for hire, such as taxicabs, trucks, or other motor vehicles over the streets of the City of Radford and whose place of business or residence is within one mile of the City limits of the City of Radford"

Section 12 of the Motor Vehicle Code, 2154 Subsection 59 Michie's Code, makes it obligatory upon the owner of any motor vehicle to register the same. Section 35-e of the Virginia Code, Section 2154, (82-e) Michie's Code, empowers cities and towns to impose license fees upon motor vehicles. The fact that a truck may be leased to the Post Office Department by the owner, does not relieve that owner from complying with a valid city or town ordinance requiring registration. Of course, if the vehicle is owned by the Post Office Department, it is not subject to registration under the Motor Vehicle Code or any municipal ordinance; but so long as it is privately owned, it is subject to registration provisions of the State and municipal laws.

Very sincerely yours,

HARVEY B. APPERSON,
Attorney General.

**MOTOR VEHICLE LAWS—When and under what Circumstances
Certain Provisions of the Virginia Safety Responsibility Act are Ap-
plicable.**

May 24, 1948.

HONORABLE C. F. JOYNER, JR., *Commissioner*,
Division of Motor Vehicles,
2220 West Broad Street,
Richmond, Virginia.

Dear Mr. Joyner:

This is to acknowledge receipt of your letter of May 10, in which you make inquiry as to the meaning of certain amendments enacted during the 1948 Session of the General Assembly to the Virginia Safety Responsibility Act. I will answer your questions seriatim:

"(1) Section 32 was amended in such way as to apply only to the operator of the vehicle and not to the owner, as heretofore. In those cases or instances where the accident occurred prior to the effective date of the amendment (June 29, 1948), should the Division act in accordance with the new law or in accordance with the provisions of the law at the time the accident took place?"

Ans. I am of the opinion that in those cases which have not been acted upon by the Commissioner prior to June 29, 1948, the provisions of the new law apply even though the accident upon which the action of the Commissioner is predicated occurred prior to June 29, 1948.

"(2) The other amendment to section 32 is in the following language: 'and it shall be his duty to make a finding of fact when so requested by any person affected and for this purpose he shall consider the report of the investigating officer, if any, the accident reports and any affidavits of persons having knowledge of the facts.'

Please advise me what duty is placed upon the Commissioner by this amendment. Is there any time limit in which the request must be made? Is there any duty upon the Commissioner to determine whether or not an operator or chauffeur is free from any blame for such accident unless a request is made, or is the proceeding clause "... provided that the Commissioner shall dispense with the foregoing requirements on the part of any owner, operator or chauffeur whom he finds to be free from any blame for such accident" controlling, even though no request is made, in those instances where it is plainly evident that the person involved in the accident is free from any blame?"

Ans. The amendment to which you refer is part of Section 32, Chapter 384, Acts of 1944, as amended by Chapter 469, Acts of 1948, which reads as follows:

"Not less than thirty or more than ninety days after receipt by him of the report or notice of an accident which has resulted in bodily injury or death, or in damage to the property of any person to the extent of fifty dollars (\$50.00) or more, the Commissioner shall forthwith suspend the operating license and all registration certificates and plates of any person operating any motor vehicle in any manner involved in the accident unless or until the operator or chauffeur has previously furnished or immediately furnishes security, sufficient in the judgement of the Commissioner, to satisfy any judgment or judgments for damages resulting from the accident as may be recovered against the opera-

tor or chauffeur by or on behalf of any person aggrieved or his legal representative, and unless and until the operator or chauffeur shall immediately furnish and thereafter maintain proof of financial responsibility in the future, provided that the Commissioner shall dispense with the foregoing requirements on the part of any operator or chauffeur whom he finds to be free from any blame for such accident, *and it shall be his duty to make a finding of fact when so requested by any person affected and for this purpose he shall consider the report of the investigating officer, if any, the accident reports and any affidavits of persons having knowledge of the facts.*" (Italics denote 1948 amendment.)

This statute makes it mandatory on the part of the Commissioner to act within not less than thirty nor more than ninety days after receipt by him of the report of the accident and prohibits him from acting any time thereafter. Therefore, I believe that the intent of the Legislature in adopting this amendment is to require that the request be made by the person affected within ninety days after the receipt by the Commissioner of the report or notice of the accident. The Commissioner must make his determination whether the requirements are to be dispensed with within the time specified. Public policy demands that the cases be acted on as promptly as possible; hence, they should not be re-opened after the determination is once made, unless the request is made for a finding of fact *within said ninety days*. I am further of the opinion that it is the duty of the Commissioner to dispense with the requirements when he finds an operator or chauffeur free of blame although no request is made for a finding of fact.

"(3) Section 56 of this Act sets forth certain conditions for the continuance of the suspension or revocation made under Section 32. Among these conditions is the continuing of the furnishing of security unless the party concerned furnishes the Commissioner with a release in his favor from the injured party. The amendment made is in the following language:

'It is further provided that the Commissioner in cases of undue hardship in obtaining said release may suspend the requirement with reference to the obtaining of the same as is hereinbefore provided.' (As amended by Chapter 469, Acts of 1948.)

Please advise me what is the meaning of the term "hardship". Is there any connection between the applicability of this amendment and that portion of Section 32 which empowers the Commissioner to dispense with the requirements when he finds an operator or chauffeur free of blame for the accident?"

Ans. As I understand it, the obtaining of a release is in lieu of the requirement of depositing security under Sections 32 and 56. The security must be filed with the Commissioner for a period of a year, after which, if an action has not been instituted by the interested party or parties, the security is refunded to the depositor, Inasmuch as Chapter 384, Act of 1944 (Safety Responsibility Act) repealed and superceded the provisions of Chapter 272, Acts of 1932, I am inclined to think that the person injured or whose property is damaged in an accident has very definite rights under the provisions of this act. In other words, security is deposited for his benefit. It would be very strange and unreasonable to think that the Legislature intended to nullify those provisions of the Safety Responsibility Act requiring deposits to be made, just on the whim or caprice of a person who claims that a hardship exists in obtaining a release. Hence, the Legislature has inserted the word "undue" before "hardship". "Undue has been defined by Black's Law Dictionary to be: "More than necessary; not proper; illegal," and by Webster's Dictionary as: "Not right; not lawful or legal; violating legal equitable rights; improper".

In order to obtain a release, a person must give or render some type of consideration. It would follow that the hardship in obtaining this release would not be based upon the merits of the controversy between the parties, but would be caused by an act of the other party, such as making himself unavailable for negotiations. This would arise in the case of a person who left the scene of the accident without giving the other party his name or address or otherwise concealing himself either within or without this State, or arbitrarily refusing to execute a release.

I do not think there is any connection between the applicability of this amendment and that portion of Section 32 which allows the Commissioner to dispense with the requirements when he finds an operator or chauffeur free of blame for the accident. As I understand it, the Commissioner first acts under Section 32 and his acts thereunder can be dispensed with if he finds a person free of blame after making a finding of fact in that respect. Section 56 states the suspension made under Section 32 continues unless certain conditions are fulfilled, one of which being the obtaining of a release in lieu of furnishing security.

Your attention is invited to the fact that this amendment provides for a suspension of the requirement in reference to obtaining a release. The term "suspend" is defined in Black's Law Dictionary as follows:

"To interrupt; to cause to cease for a time; to stay, delay or hinder; *to discontinue temporarily, but with an expectation or purpose of resumption.*" (Italics supplied)

The Commissioner, in cases where he feels an undue hardship exists, should suspend his order for a limited period of time; the extent of that time being governed by the circumstances in each particular case. As the party affected is only required to deposit security for a period of twelve months from the date of the accident, at which time the security is returned to him under certain conditions, the Commissioner should not suspend for such a period as would extend over this twelve-months' period, thus defeating the purposes of other sections of the Act.

Very truly yours,

J. LINDSAY ALMOND, JR.,
Attorney General.

NOTARIES PUBLIC—For Cities have the Authority to Act in Counties Contiguous Thereto.

July 11, 1947.

MISS HELEN S. REAMS,
J.H. Wheeler & Company,
Newport News, Virginia.

Dear Miss Reams:

I am in receipt of your letter of July 9, and for your information will quote in part from section 2850 of the Code. It is as follows:

" * * * A notary for a city shall also have authority to act as such in counties contiguous thereto. And a notary for a county shall also have authority to act as such in cities contiguous thereto. * * * "

It is plain, therefore, that a Notary Public for Newport News has the authority to act in Elizabeth City and Warwick Counties.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

NOTARIES PUBLIC—Persons must be Resident of State for One Year Next Preceding his Appointment to be Eligible for Appointment as Notary Public.

January 9, 1948.

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

My dear Governor Tuck:

At your request, I am writing you concerning the question of resident qualifications for notaries public.

Section 32 of the Constitution deals with qualifications of officers and notaries public and is as follows:

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

"Persons eighteen years of age shall be eligible to the office of notary public and qualified to execute the bonds required of them in that capacity."

It is seen that the above section declares, with three exceptions that are not pertinent to the question under consideration, that a person must possess all the qualifications to vote before he is eligible for an office in this State.

Section 82 of the Code lists the necessary qualifications for voters, one of which is that a person must have been a resident of the State one year next preceding the election. Therefore, it is my opinion that a person, to become eligible for appointment to the office of notary public, must be a resident of the State for one year preceding his appointment.

With kindest regards,

Sincerely yours,

HARVEY B. APPERSON,
Attorney General.

NOTARIES PUBLIC—Under Age of Eighteen Years are Notaries de Facto and Acknowledgments Taken by them are Valid.

September 30, 1947.

HONORABLE B. B. ROANE, *Clerk*,
Circuit Court of Gloucester County,
Gloucester, Virginia.

Dear Mr. Roane:

This is in reply to your letter of September 24, 1947, in which you ask as to the validity of certain deeds acknowledged by a young lady who was appointed a notary public for the county of Gloucester, it now appearing that she was not eighteen years of age as required by section 2851 of the Code of Virginia.

Generally, a person acting as a notary public under color of authority and

with public acquiescence is held to be a notary de facto, and the acts of such de facto officer are valid. It is my opinion that the party mentioned in your letter was a notary de facto, therefore, the acknowledgments of the deeds by her are valid acknowledgments.

With best wishes, I am

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

ORDINANCES—Adopted by Boards of Supervisors must be Published in Newspaper. Failure to do so Invalidates Ordinance.
BOARDS OF SUPERVISORS—May adopt Ordinances Imposing Tax on Carnivals; Must be Published in Newspaper.

June 23, 1948.

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

My dear Mr. Parsons:

This is in reply to your letter of June 15, in which you request my opinion as to the validity of an ordinance amendment adopted by the Board of Supervisors of Wythe County. It appears that on August 5, 1940, the Board of Supervisors passed an ordinance to the effect that every person exhibiting a carnival or similar show shall pay a license tax of \$10.00 for the first day's performance, and \$100 for each day's performance in excess of one. On June 14, 1948, the Board amended this ordinance by providing that any carnival consisting wholly of riding devices shall pay a license tax of \$5.00 per ride per week, rather than the license tax imposed in the original ordinance.

You ask if this action of the Board is valid because of the fact that a different license fee is required for different kinds of carnivals, and also by reason of the fact that the ordinance was adopted without publication for two weeks in a local newspaper.

Section 153a of the Tax Code authorizes the governing bodies of counties to impose a license upon every person who exhibits a carnival or any other show, exhibition or similar performance. That section defines a carnival as follows:

"For the purpose of this section a carnival shall mean an aggregation of shows, amusements, concessions, eating places and riding devices, or any of them operated together on one parcel of ground, streets or roads, moving from place to place, whether the same are owned and actually operated by separate persons, firms, or corporations, or not."

It is my opinion that under this section an aggregation of rides can be termed a carnival. This being so, it is my opinion that the amendment to the ordinance is not invalid because a different license fee is required for different kinds of carnivals. This section of the Tax Code does not require that the same license fee be imposed upon each carnival, circus or other show, regardless of the nature or size of the show. The governing body of a municipal corporation or county may make the difference in method and character of the business the basis of classification for taxation purposes, and so long as the classification is reasonable it is valid. I cannot say, as a matter of law, that the classification effected by this ordinance is an unreasonable one.

You also point out that this amendment was adopted without publication in a local newspaper. Section 2743 of the Code provides that no ordinance or by-law:

" * * * shall be passed until after notice of an intention to propose the same for passage shall have been published once a week for two successive weeks prior to its passage in some newspaper published in the county, and if there be none such, in some newspaper published in an adjoining county or a nearby city and having a general circulation in the county of said board, and no such ordinance or by-laws shall become effective until after it shall have been published in full once a week for two successive weeks in a like newspaper."

It is my opinion that this requirement is mandatory and that the failure to publish the notice of the intention to pass this amendment to the ordinance invalidates the amendment. I refer you generally on this subject to 51 Am. Jur. page 92, and Volume 2 of McQuillin on Municipal Corporations at page 810.

With best wishes, I am

Very truly yours,

J. LINDSAY ALMOND, JR.,
Attorney General

PARDON, PROBATION AND PAROLE—Pardon Does Not have the Effect of Restoring Driving Privileges or Waving Requirements Incidental to Restoration.

March 3, 1948.

COLONEL R. W. COPELAND, *Chairman*,
Parole Board,
Corrections Building,
Richmond, Virginia.

Dear Colonel Copeland:

Several days ago you requested our advise on the following question:

An individual who has been found guilty of an offense for which his driver's license has been revoked by the Motor Vehicle Commissioner seeks a pardon in order to have his driving rights restored. Does the pardon have the effect of restoring such rights?

This precise question was decided in the case of *Prichard v. Battle*, 178 Va. 455, in 1941. In that case, Prichard had been found guilty of a "hit and run" charge and Battle, the Director, had proceeded under the provisions of the Virginia Operators' and Chauffeurs' license Act—Chapter 385 of the Acts of 1932, and revoked his driving privileges. Prichard secured a pardon from the Governor and sought by mandamus to require Battle to restore his driving license. The Supreme Court refused the relief sought.

Therefore, it is my opinion that the pardon for an offense for which the driving privileges of a person have been revoked would not have the effect of restoring such driving privileges or waiving the requirements incidental to the restoration.

Sincerely yours,

D. GARDINER TYLER, JR.,
Assistant Attorney General

PARDON, PROBATION and PAROLE—Pardon does not Restore Driving Privileges or Waive Requirements for Restoration.

GOVERNOR—Has no Authority to Restore the Right to Operate a Motor Vehicle after Same has been Lawfully Revoked by Commissioner of Motor Vehicles.

June 10, 1948.

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

My dear Governor:

This is in reply to your recent request for my opinion as to your authority, as Governor of Virginia, to:

(1) Relieve an individual who has been convicted of operating an automobile while under the influence of intoxicants so as to restore to him his right to drive upon the highways of which he has been deprived by the Provisions of Section 4722a(c) of the Code, as amended, and

(2) Restore the right to operate a motor vehicle after the Commissioner of Motor Vehicles has revoked a license under the authority vested in him.

As you know Chapter 73 of the Acts of Assembly of 1945, Extra Session, created the "Virginia Board of Pardons and Reprieves" and vested in it, among other things, the exclusive power to grant reprieves or pardons in misdemeanor cases. The "Board", however, is abolished by section 53-228 of the Reorganization Provisions of the Code of Virginia, effective July 1, 1948, and its powers transferred to you as Governor. Therefore, the conclusions to be reached in this opinion refer to the powers of the "Board" until July 1, 1948, at which time the "pardoning powers" will vest in you.

Chapter 144 of the Acts of Assembly of 1934, as amended (found as section 4722-a of Michie's Code) provides for the punishment of persons driving automobiles while intoxicated. The pertinent part of section 3 of the Act is as follows:

"The judgment of conviction, * * *, shall of itself operate to deprive the person convicted of the right to drive, * * *."

Section 4 then provides that the Director of the Division of Motor Vehicles shall be notified of the conviction and furnished with the name, address, etc. of the convicted person and preserve a record thereof in his office.

Section 16 of the "Virginia Motor Vehicle Safety Responsibility Act" (found in section 2154 (a16) of Michie's Supp. of 1946) provides that the Commissioner of Motor Vehicles "shall forthwith revoke" the license of any person upon receipt of notice of his conviction of the following crimes:

(1) Voluntary or involuntary manslaughter resulting from the operation of a motor vehicle;

(2) Driving a vehicle while intoxicated or under the influence of intoxicating liquor or narcotic drugs;

(3) Perjury or the making of a false affidavit to the division under this act or any other law of this State requiring the registration of motor vehicles or regulating their operation on highways or the making of a false statement to the Division on any application for an operator's or chauffeur's license;

(4) Any crime punishable as a felony under the motor vehicle laws of this State or any other felony in the commission of which a motor vehicle is used;

(5) Two charges of reckless driving, or forfeiture of bail upon two charges of reckless driving, within the preceding twelve months;

(6) Failure to stop and disclose his identity at the scene of the accident, on the part of a driver of a motor vehicle involved in an accident resulting in the death or injury of another person.

The effect of an unconditional pardon of a person convicted of the offense commonly known as "hit and run" for a failure to stop and disclose his identity at the scene of the accident, resulting in the death or injury of another person was decided by the case of *Prichard v. Battle*, 178 Va. 455 in which Mr. Justice Eggleston said:

"The revocation is no part of the punishment fixed by the jury or by the court wherein the offender is tried. *Commonwealth v. Ellett*, *supra* (174 Va. 403, 411, 4 S. E. (2d) 762, 765). Nor is it, in our opinion, an added punishment for the offense committed. It is civil and not criminal in its nature. *Commonwealth v. Funk*, 323 Pa. 390, 186 A. 65, 69, 70; *Steele v. State Road Commission*, 116 W. Va. 227, 179 S. E. 810.

The question as to whether the revocation of a license because of an act for which the licensee has been convicted or because of the conviction itself is an added punishment has frequently been before the courts. The universal holding is that such a revocation is not an added punishment, but is a finding that by reason of the commission of the act or the conviction of the licensee, the latter is no longer a fit person to hold and enjoy the privilege which the State had theretofore granted to him under its police power. The authorities agree that the purpose of the revocation is to protect the public and not to punish the licensee." (p. 462)

* * * * *

"The precise question was recently before the highest court of Kentucky in *Commonwealth v. Harris*, 278 Ky. 218, 128 S. W. (2d) 579, in which it was held that suspension of the driving license of one convicted of operating an automobile while intoxicated is not a part of the penalty of such offense, nor added punishment, but is merely the forfeiture of a conditional temporary permit for the licensee's failure to observe the conditions under which the license was issued. See also, *People v. O'Rourke*, 124 Cal. App. 752, 13 P. (2d) 989, 992." (p. 463)

* * * * *

"And so in the case before us, while the pardon granted the petitioner relieves him from the punishment or penalty which the State might have exacted of him for the offense, it does not wipe out the fact of his conviction or the fact that by reason of the act committed he is put in a class of persons regarded by the State as unfit to drive automobiles on the highways without making additional provision for the safety of others. If one who leaves the scene of an accident in which his car is involved becomes by reason of such an act unfit to exercise the privilege of driving an automobile on the highways, he is not rendered fit simply because the State's Executive has relieved him of the burden of paying a fine or serving a sentence in prison for the act done." (p. 465)

Therefore, I am of the opinion that an unconditional pardon by the "Board" or by you, as Governor does not effect the incidental requirements of the Motor Vehicle Laws and does not have the effect of restoring to an individual, convicted of driving while intoxicated, his privilege to drive upon the highways of this State.

As to your second question, it is my opinion that you do not have the authority to restore the right to operate a motor vehicle after the Commissioner has revoked a license under the authority vested in him since such a penalty is not within the meaning of section 73, as amended, of the Constitution nor within the meaning of section 2569 of the Code, which deals with the pardoning power.

In conclusion, I will state that I have been able to find no provision, constitutional or statutory, other than those already discussed, that would give you the authority to relieve an individual that has been convicted of driving a motor vehicle while intoxicated so as to restore to him his driving privilege.

Very truly yours,

J. LINDSAY ALMOND, JR.,
Attorney General.

**PILOTS—Board of Commissioners to Examine Pilot Can Not Disqualify
a Pilot Solely on the Ground of Age.**

November 28, 1947.

HONORABLE G. ALVIN MASSENBURG,
Speaker of the House of Delegates,
Water Street,
Norfolk, Virginia.

My dear Mr. Massenburg:

This is in reply to your inquiry regarding the validity of the following rule established by the Board of Commissioners to Examine Pilots:

"Every pilot granted a branch by this board shall on the first day of the year after he obtains the age of seventy-three (73) years be retired."

Section 3615 of the Code, as amended and re-enacted by Chapter 239 of the Acts of Assembly of 1928, provides that the Board shall issue a certificate to a qualified pilot and shall issue a renewal certificate every twelve months if it deems him qualified. It does not appear that the Board may arbitrarily declare that a pilot must retire at the age of 73.

While the age of a pilot would certainly be a factor in determining his physical qualifications, it would not necessarily be conclusive, and it is my opinion that the provisions of the statute are not broad enough to give the Board authority to disqualify a pilot solely on the grounds of age.

Very sincerely yours,

HARVEY B. APPERSON,
Attorney General.

**PINE SEED TREE ACT—Seed Trees Must be Left even if the Contract
for Sale Anti-dated Act.**

June 2, 1948.

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

Dear Mr. Dean:

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

"The 1948 General Assembly re-enacted the so called "Pine Seed Tree" Act, Section 549-a1. The question has arisen as to whether a person, who

purchases timber rights prior to the effective date of the Act, is required to leave seed trees at the time the timber is cut, some time after the effective date of the Act."

Chapter 498 of the Acts of 1948 (section 549-a1), which requires that certain pine seed trees be left standing when timber is cut, makes certain exceptions but does not include therein exceptions regarding pre-existing contracts for timber rights. Therefore, I am of the opinion that a person, who purchases timber rights prior to the effective date of the Act in question is required to leave seed trees when the timber is cut after the effective date of the Act.

It is noted that the old law (section 549-a of the Code) exempted contracts for cutting rights, made before the effective date of the section, if the contract expired in five years, therefore the intent of the Legislature was made clear when it did not so exempt pre-existing contracts under the provisions of the new Act.

Very truly yours,

J. LINDSAY ALMOND, JR.,
Attorney General.

POTOMAC RIVER BASIN COMMISSION—Governor Does Not Have the Authority to Accept and Adopt a Program Which Has Been Accepted and Adopted by the Governors of Other Signatory Bodies to the Compact. That Authority is Vested in Said Commission.

December 5, 1947.

HONORABLE RAYMOND V. LONG, *Chairman*,
The Potomac River Basin Commission of Virginia,
Finance Building,
Richmond, Virginia.

Dear Mr. Long:

Your letter of November 11, 1947, signed by you and the other members of the Potomac River Basin Commission of Virginia, was duly received. You desire my opinion on the questions presented in your letter, which I quote as follows:

"A. Concerning a purely interstate matter in which all signatory bodies wished to accept and adopt 'Water Quality Criteria and a program for Abatement of Pollution and Stream Improvement for the Potomac River Basin', the conditions of such program being wholly within the provisions of Public Resolution No. 93, referred to above, would the Governor of Virginia have the authority to accept and adopt such a recommended program already accepted and adopted by the Governors of the other Signatory bodies to the compact; and

B. Are the powers and duties conferred on the Potomac River Basin Commission of Virginia and the Interstate Commission on the Potomac River Basin by the above referred to Public Resolution and by Chapter 324 Acts of Assembly of 1940, in any way altered or abridged by the Water Control Act of the General Assembly, Chapter 1946 Acts."

The Acts of the General Assembly of 1940, Chapter 324, to which you refer, authorizes and directs the Governor of Virginia to execute on behalf of the Commonwealth of Virginia a compact with the States of Maryland, West Virginia, the Commonwealth of Pennsylvania, and the District of Columbia, or with such of the same as shall enact legislation with like provision to those of this act, but not with such as the same as shall not enact such legislation. This

act, which was approved by the General Assembly of Virginia March 29, 1940, adopted a compact with other signatory bodies pursuant to consent of the Congress of the United States which had been given providing for the creation of a Conservancy District to consist of the drainage basin of the Potomac River and the main and tributary streams therein, for the purpose of regulating, controlling, preventing, or otherwise rendering unobjectionable and harmless the pollution of the waters of said Potomac drainage area by sewage and industrial or other waste.

The compact provides that the Interstate Commission on the Potomac River Basin shall consist of three (3) members from each signatory body and three (3) members appointed by the President of the United States.

Article II of said compact sets forth the powers and duties of the Commission, which are briefly to coordinate, tabulate and summarize technical and other data on the pollution of the streams of the Conservancy District; to supplement existing information and data; to secure new data by investigation and analysis; to cooperate with the legislative and administrative agencies of the signatory bodies and with other interested commissions for the purpose of promoting uniform laws, rules or regulations; to disseminate to the public information on the aims and purposes of the Commission; to cooperate with other organizations engaged in fact-finding and research activities on the treatment of sewage and industrial wastes or other wastes and if needful from time to time revise and recommend to the signatory bodies reasonable minimum standards for the treatment of such waters of the various drains in the Conservancy District.

You asked "Would the Governor of Virginia have the authority to accept and adopt such a recommended program already accepted and adopted by the Governors of the other signatory bodies to the compact?"

The only express authority given to the Governor by this legislation is to execute on behalf of the Commonwealth the compact with the other signatory bodies, and from a careful study of the compact, I have been unable to find any language which indicates that the Legislature contemplated acceptance by the Governor of recommendations made by the Interstate Commission on the Potomac River Basin or by the Potomac River Basin Commission of Virginia. Paragraph F of Article II of the compact reads as follows:

"To make and, if needful from time to time, revise and to recommend to the signatory bodies, reasonable minimum standards for the treatment of sewage and industrial or other wastes now discharged or to be discharged in the future to the streams of the Conservancy District, and also, for cleanliness of the various streams in the Conservancy District."

It is seen from this language that the Commission or Commissions may recommend to the signatory bodies reasonable minimum standards for the treatment of sewage and industrial or other wastes. The language confers upon the Commission the power to make advisory recommendations to the respective signatory bodies. However, it is discretionary with such bodies whether they accept such recommendations.

The Governor, of course, may submit the recommendations to the General Assembly for their approval. I am of the opinion that the act does not by express terms confer on the Governor authority to accept and adopt such a recommended program, and it is not free from doubt whether such authority can be reasonably implied.

In your second inquiry, you desire to be advised if the powers and duties conferred on the Potomac River Basin Commission of Virginia and the Interstate Commission on the Potomac River Basin are in any way altered or abridged by the Water Control Act of the General Assembly of 1946. The State Water Control Board was created by an act of the General Assembly March 30, 1946, Chapter 399. This Board's authority pertains chiefly to intrastate waters of Virginia and penalties are provided for failing, neglecting or refus-

ing to comply with any special final order of the Board or a court. The State Water Control Board is authorized to enforce its rules and regulations in addition to the penalties imposed, by injunction and mandamus proceedings. Neither the Interstate Commission on the Potomac River Basin nor the Potomac River Basin Commission of Virginia is given such powers. The powers of the latter Commissions are confined chiefly to, as before pointed out, fact-finding and recommended procedure.

Section 1514-b 24 of the Acts of 1946, Chapter 399, pertaining to the State Water Control Board, provides in part as follows:

"This law is intended to supplement existing law and no part thereof shall be construed to repeal any existing laws specifically enacted for the protection of health or the protection of fish, shellfish and game of the State, except that the administration of any such laws pertaining to the pollution of State waters, as herein defined, shall be in accord with the purpose of this law and general policies adopted by the Board; * * *".

In view of the foregoing quoted language which expressly states that the State Water Control law is intended to be only supplementary to existing laws, I am of the opinion that this act does not in any way alter or abridge the powers and duties conferred on the Potomac River Basin Commission of Virginia and the Interstate Commission on the Potomac River Basin.

With kindest regards,

Sincerely yours,

HARVEY B. APPERSON,
Attorney General.

PRISONERS—Cost of Hospitalization of Prisoners Shot while Perpetrating a Crime Should be Paid from Appropriation of Criminal Charges.

June 17, 1948.

HONORABLE F. C. JONES, *Executive Secretary*,
State Board of Corrections,
Richmond 6 Virginia.

My dear Mr. Jones:

This is in reply to your letter of June 14, in which you request the opinion of this office as to the manner in which a bill for hospital and medical services required for prisoner after arrest, but before being confined in jail, should be handled for payment. The facts of the case, as quoted by you from the letter received by you from the Clerk of the Board of Supervisors of Wise County, are as follows:

"On April 15, 1948, one Homer Bates, after having assisted in robbing the bank at Pound, Virginia, and trying to make his escape was shot and seriously wounded by the cashier of said bank. On that said date, the said Bates was arrested; and at the time of arrest, was in very serious condition and the State Police took him to the Norton General Hospital, Norton, Virginia, for treatment. The Commonwealth's Attorney asked the Sheriff of this County to place a guard in the hospital so that Bates could not escape. Bates was confined in the hospital until the 27th day of May, 1948, before he was able to be removed to the jail. * * *

"The bill would amount to nine hundred thirty dollars and sixty-three (\$930.63) cents. Will you please advise me if it is proper to have Board of Supervisors pay this amount and bill State Board of Corrections to be refunded in accordance with subsection d of Section 3487 (9) as amended?"

It is my opinion that the expenditure should not be considered a part of the expenses of operating the jail under the provisions of Chapter 386 of the 1942 Acts of the Assembly, as amended by Chapter 226 of 1944 Acts. It appears to me that section 4960 is applicable to this situation. That section provides, in part, as follows:

"When in a criminal case an officer or any person renders any other service in the State of Virginia for which no specific compensation is provided, the court in which such case is, may allow therefor what it deems reasonable, and such allowance shall be paid out of the treasury from the appropriation for criminal charges on the certificate of the court stating the nature of the service. * * *"

I am enclosing a copy of an earlier opinion of this office on the same set of facts, in which it was held that such a charge could be properly paid out of the State treasurer under section 4960.

Very sincerely yours,

J. LINDSAY ALMOND, JR.,
Attorney General.

PROBATION AND PAROLE—Probation Officer from this State can Enter Foreign State and Apprehend Parolee; Extradition Not Necessary.

December 31, 1947.

HONORABLE J. SYDNEY SMITH, JR.,
Commonwealth's Attorney,
818 National Bank of Commerce Building,
Norfolk 10, Virginia.

My dear Mr. Smith:

Mrs. Towill, Secretary to the Governor, has requested this office to answer your letter of December 27 concerning extradition procedure. I quote your letter in part as follows:

"One Darrell A. Phillips, a white man who has been convicted of grand larceny in the Corporation Court of the City of Norfolk, Part Two, and placed on probation, is being held in the City of New York as a parole violator and it is desired that he be returned here in order that his parole may be revoked.

* * * * *

"I shall appreciate your advising me whether or not any distinction should be made in our method of procedure as to a parole violator and a usual fugitive from justice who has not been convicted, or, if convicted, not placed on probation, and if it is not necessary to secure the usual extradition papers, what authority is used as a substitute therefor, in order to permit the return of such parole violators."

Section 4788-a of the Code, to which you refer, and which is entitled "Uniformed Act for Out-of-State Parolee Supervision", provides, among other

things, that a duly accredited officer of a sending State (Virginia in this instance) may at all times enter a receiving State (New York in this instance) and there apprehend and take any person on parole (from the sending State). It further provides that all legal requirements to obtain the extradition of a fugitive are waived and no formalities are required except to establish the authority of the officer from the sending State and to identify the parolee to be taken.

Since New York and Virginia are parties to the above compact, it is my opinion that no extradition proceedings are necessary in the instant case and that the local parole officers have only to follow the procedure set forth above.

Very sincerely yours,

HARVEY B. APPERSON,
Attorney General.

PUBLIC ASSISTANCE ACT—Consent of the Local Welfare Board or Commissioner of Public Welfare is Necessary before a Recipient of Assistance may Dispose of his Property; Board may Require Repayment upon Sale.

April 15, 1948.

MISS IRMA F. BELL, *Superintendent*
Department of Public Welfare,
Spotsylvania County,
Spotsylvania, Virginia.

My dear Miss Bell:

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

1. May a recipient of old age assistance dispose of his property without the consent of the local board of welfare?

2. Is it mandatory for the said recipient to repay the Welfare Department such money as he has received if he sells his property?

As you pointed out, section 1904(24) of the Code provides that whoever knowingly aids in buying or in any way disposing of the property of a recipient of assistance, without the consent of either the local board or commissioner, shall be guilty of a misdemeanor. It is my opinion, therefore, that the consent of the local board or commissioner is necessary before a recipient of assistance may dispose of his property.

Section 1904(17) provides that if any recipient of assistance shall become possessed of property or income in excess of the amount stated in his application for assistance, or if there occurs any changes in circumstances which affects the eligibility of such recipient, the local board may cancel or alter the amount of assistance and may recover as a debt assistance previously paid. The sale of real estate for cash may or may not so change the circumstances of the recipient as to affect his eligibility for assistance. While this section does not make it mandatory upon the recipient to repay amounts previously received as assistance upon the sale of his real estate, the local board may reduce or cancel assistance, or recover amounts previously paid if the sale has resulted in such a change of condition.

If the sale will result in such a change, it is my opinion that the board may require such repayment as a condition for its consent to the sale. Particularly

is this true since cash may be dissipated, and the recipient would no longer have title to the real estate which could be subjected upon his death to a lien for assistance paid.

With best wishes, I am

Very sincerely,

WALTER E. ROGERS,
Assistant Attorney General.

PUBLIC ASSISTANCE ACT—Local Welfare Board Can Not Assign Lien on Estate of Recipient of Old Age Assistance ; Notice of Claim Should be Filed Within a Year After Death of Recipient.

May 11, 1948.

DEANE HUNDLEY, *Esq.*,
Attorney at Law,
Dunnsville, Virginia.

My dear Mr. Hundley :

I regret the delay in replying to your letter of April 20, and I acknowledge receipt of your letter of May 6, in which you ask the opinion of this office as to whether the local Welfare Board of Essex County can assign the lien it has under section 1904(18) of the Virginia Code on the estate of recipients of old age assistance.

It is my opinion that this section gives the Board of Welfare a preference over other creditors, and this preference cannot be transferred to individuals except by express legislative sanction. I find no authority in the statute whereby the assignment of this claim can be made.

You also ask if the statute of limitations runs against the claim. The statute reads as follows:

"On the death of any recipient of assistance, the total amount paid as such assistance under this chapter shall be allowed as a claim against the estate of such recipient, prior to all other claims except prior liens and except funeral expenses not in excess of one hundred dollars, and except hospital bills, doctors' bills and medical expenses not in excess of one hundred and fifty dollars.

"The local board may require the superintendent of public welfare to execute and acknowledge, as deeds are required to be acknowledged, a notice of such claim showing the total amount paid as such assistance, which notice may be filed within one year after the death of the deceased recipient, with the clerk of the court authorized to record deeds in the county or city where the real estate of such recipient subject to such claim is situated, and when so filed the clerk shall record it in the current deed book and index it in the names both of the local board and the deceased recipient. No fees shall be charged or collected by the clerk for filing, recording or indexing any such notice. After the expiration of said period of one year, such notice, when filed, recorded and indexed as aforesaid, shall have, as to purchasers, the same effect as though a creditors' suit had been instituted and a memorandum of lis pendens duly filed and recorded.

"No such claim shall be enforced against any real estate of the estate of the recipient, however, while such real estate is occupied by the surviving spouse of the recipient so long as such spouse remains unmarried, or is occupied by any dependent infant child or children of the recipient."

While it appears to me that this is a claim of the Commonwealth, and that consequently the statute of limitations would not become a bar, in order that the local board properly protect its claim, the notice of the claim should be filed within one year as provided in the second paragraph.

I am enclosing copies of two earlier opinions of this office concerning action of the local board in making collection from the estate of the decedent, which may be of assistance to you.

With best wishes, I am

Very sincerely yours,

J. LINDSAY ALMOND, JR.,
Attorney General.

**PUBLIC HEALTH—Health Officer May Under Certain Circumstances
Require Persons to Undergo Examination for Venereal Disease.**

December 19, 1947.

HONORABLE ARCHER L. JONES,
Attorney for the Commonwealth,
Hopewell, Virginia.

My dear Mr. Jones:

In your letter of December 12th you present three problems under the provisions of Code Section 1554(e) which relates to the duties and powers of health officers with respect to persons reasonably suspected of having certain types of venereal diseases, and of persons convicted of certain immoral acts. These problems will be considered in the order presented by you.

Problem No. 1:

"Should X be arrested, tried and convicted under the aforementioned subsection (b) of any of the offenses therein enumerated, must he be held in jail without bond until he has undergone the examination therein specified?"

Subsection (b) to which you refer, is as follows:

"Owing to the prevalence of such disease amongst vagrants, prostitutes, keepers, inmates, employees, and frequenters of houses of ill-fame, prostitution, and assignation, persons 'not of good fame', persons guilty of fornication, adultery, lewd and lascivious conduct, and illicit cohabitation are to be considered and are hereby declared to be reasonably suspected of having syphilis, gonorrhea, lymphogranuloma inguinale, granuloma inguinale, or chancroid, and no person convicted of any such charges shall be released until examined for such venereal diseases by the proper health officer, his deputy or assistants, or agents."

In considering this particular matter it is observed that Section 1554(a) deals primarily with the duties and powers of health officers in the prevention of the spread of the diseases mentioned therein. Such officers, in my opinion, have the right to examine a person reasonably suspected of having any one of such diseases. One who has been convicted of any of the offenses mentioned is by the terms of the statute declared to be reasonably suspected of being infected with one of the diseases, and the provisions of subsection (b) charge the proper health officer, the deputy or assistants, or agents, with the duty of causing the person so convicted to submit to an examination before such person is released from the custody incident to the sentence of conviction. Such officer would, it seems, have ample opportunity to make such examination, or have the same made by one competent to do so, during the term prescribed by the sentence of conviction, and such procedure would appear to be within the

reasonable intent of the statute. If such officer is unable to discharge this statutory duty during the term of sentence, in my opinion, he would not have authority to keep the convicted person in jail or other custody beyond term of the sentence which was imposed upon him. The proper procedure then, it would seem, would be to proceed against such person as though he had never been convicted, and the procedure to follow in the event such person refuses to be examined or obey an order of quarantine would be the same as suggested in my comments with respect to your Problem No. 2.

Problem No. 2.

"In the event a person be reasonably suspected of being infected with one of the enumerated diseases therein set forth, then should such person be arrested and held in jail for such examination upon the order of the health officer, or Police Justice, or should such officer simply order the person suspected to undergo the test required and quarantine such person in his home pending the result of such examination?"

The question raised in this problem relates to subsection (a), which is as follows:

"All State, city, county and other health officers shall use every available means to ascertain the existence of, and to investigate all cases of syphilis, gonorrhea, lymphogranuloma inguinale, granuloma inguinale, or chancroid, within their several territorial jurisdictions, and to ascertain the sources of such infections. All health officers are hereby empowered and directed to make such examinations of persons reasonably suspected of having syphilis, gonorrhea, lymphogranuloma inguinale, granuloma inguinale, or chancroid as may be necessary for the carrying out of this act. To this end such officers may require persons so suspected of being infected with any of the foregoing diseases to submit to an examination for the purpose of ascertaining the presence or absence of the disease."

I do not think that the provision under consideration specifically authorizes a health officer to arrest and imprison a person suspected of being infected with one of the diseases mentioned. If such person refuses to submit to an examination, after being required to do so by a proper officer, or if he refuses to obey an order of quarantine he may, in either event, be charged accordingly, and, upon conviction, be punished within the limits prescribed by Section 1554(1) of the Code.

Problem No. 3:

"If a person is arrested, for instance, on a charge of larceny or forgery and is also reasonably suspected of being infected with one of the diseases enumerated in subsection (a) of the aforementioned section, should such person be held in jail and forced to undergo the examination required by subsection (b) of the aforementioned section?"

I think the question raised in this problem is covered in my comments regarding problems 1 and 2. The health officer, in my opinion, would have no greater authority over a person arrested on a charge of larceny or any other charge, than he would have with respect to any other person reasonably suspected of having one of the venereal diseases mentioned in Section 1554(e).

As pointed out herein, Section 1554(1) seems to prescribe the manner in which those who refuse to submit to the examination may be punished.

Cordially Yours,

HARVEY B. APPERSON,
Attorney General.

**PUBLIC OFFICERS—De facto Officer is not Entitled to Compensation for Services Performed.
SHERIFFS—Part-time Deputy Must Qualify before he can be Paid for Services.**

June 21, 1948.

HONORABLE JOSEPH H. POFF,
Commonwealth's Attorney,
Floyd County,
Floyd, Virginia.

My dear Mr. Poff:

This is in reply to your letter of June 14, in which you ask my opinion upon the following question:

"Under Section No. 2704 of the 1942 Code of Virginia, H. W. Farmer was appointed as a part-time Deputy Sheriff of Floyd County. He had been a former Deputy Sheriff but his term expired December 31, 1947, and on March 27, 1948, the Sheriff re-appointed Mr. Farmer, which appointment was approved by the Court and he appeared before the Clerk of this Court on the same day and gave bond, which bond recites his appointment to begin as of January 1, 1948. He has turned in a bill to the Board of Supervisors for pay for services performed during the months of January and February which the Board has refused to pay because his appointment was not effective as of that date, neither had he qualified. In your opinion, would it be legal for the Board to pay him for services rendered in 1948 prior to his qualification on March 27, 1948?"

Section 2701 provides for the appointment of deputies. That section provides, in part, that

"* * * Any such deputy, before entering upon the duties of his office, shall take and prescribe the oath now provided for county officers, which oath shall be filed with the clerk of the court in whose office the oath of his principle is filed, and such clerk shall properly label and file all such oaths in his office for preservation. * * *"

Section 3487(5) of the Code provides for the compensation of part-time deputies. That section states that each part-time deputy shall keep a record of all services performed by him, which record is to be reported to the sheriff whose deputy he is. The sheriff is required to file a monthly report with the board of supervisors each month, showing in detail all services rendered by part-time deputies. Upon the basis of this report the board of supervisors recommends to the Compensation Board what, in its judgment, is a fair compensation. It does not appear from your letter that the sheriff or Mr. Farmer has complied with this section.

As Mr. Farmer did not comply with section 2701 of the Code until March 27, 1948, it follows that he was not a de jure officer prior to that time and, therefore, is not entitled to compensation as a de jure officer.

It appears that Mr. Farmer may have been a de facto officer from January 1, 1948 through March 27, 1948. However, the law in Virginia, as stated in *Norris v. Gilmer*, 183 Va. 367, 32 S. E. (2d), is that a de facto officer is not entitled to the salary attached to his office. In that case the Court cites 43 Am. Jur. at page 237, to the effect that a de facto officer is not entitled to the salary, fees, or other emoluments attached to the office, even though he has performed the duties thereof. It is my opinion that, under this authority, Mr. Farmer is not legally entitled to compensation for the period from January 1, 1948 until March 27, 1948.

I am enclosing a copy of an earlier opinion of this office to Mr. Wilmer L. Hall of May 10, 1934, dealing with a similar situation.

With best wishes, I am

Yours very truly,

J. LINDSAY ALMOND, JR.,
Attorney General.

PUBLIC OFFICES—Compatibility: Deputy Commissioner of Revenue Cannot Serve as Registrar.

October 1, 1947.

HONORABLE CHARLES H. FUNK,
Commonwealth's Attorney for Smyth County,
Marion, Virginia.

My dear Mr. Funk:

The Honorable Harvey B. Apperson has referred to me your letter of September 25, 1947, in which you ask whether or not a deputy commissioner of the revenue is eligible to hold the office of registrar.

The last sentence of section 84 of the election laws provides that:

" * * * No person, *nor the deputy of any person*, * * * holding any elective office of profit or trust in the State, or in any county, city or town thereof, shall be appointed a member of the electoral board or a registrar or judge of election."

It seems clear, therefore, that a deputy commissioner of the revenue comes expressly within the prohibitions of this section.

With best wishes, I am

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC OFFICERS—Compatibility of—Person Cannot Serve as U. S. Commissioner and General Registrar.

August 5, 1947.

RUDOLPH BUMGARDNER, JR., *Esq.*,
General Registrar,
Staunton, Virginia.

My dear Mr. Bumgardner:

This is in reply to your letter of July 31, 1947, in which you state that you have been appointed as General Registrar of the City of Staunton. You also state that you formerly served as U. S. Commissioner for the District Court of the Western District of Virginia, and that you would like to be considered for reappointment to that position unless the laws of the State of Virginia prohibit you from holding both positions.

Section 31 of the Constitution of Virginia provides in part as follows:

"No person, nor the deputy of any person, holding any office or post of profit or emolument, under the United States government, or who is in the employment of such government, or holding any elective office of profit or trust in the State, or in any county, city or town thereof, shall be appointed a member of the electoral board, or registrar or judge of election."

In view of this provision, it is my opinion that a person cannot serve as U. S. Commissioner and also as a registrar under the laws of the State of Virginia.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC OFFICERS—Compatibility—Public School Teacher Elected to Board of Supervisors May Serve Out His Term Under Contract to Teach, as Tax Levy for that Year has been Already Made.

December 17, 1947.

HONORABLE L. A. MANESS,
Member of the Board of Supervisors,
Lee County,
Blackwater, Virginia.

My dear Mr. Maness:

In your letter of December 13, 1947, you state that you are employed as a public school teacher in Lee County, and have been elected to the Board of Supervisors of Lee County and will enter upon the duties of that office on January 1, 1948. Your contract to teach school in Lee County will expire in May 1948. You ask whether it will be legal for you to finish out your term as a teacher in the county.

There is no statutory provision prohibiting school teachers from being members of the board of supervisors. However, the board of supervisors does have to fix the tax levy in order to raise the money to pay for the operation of the schools in the county. If a school teacher was a member of the board of supervisors that would put him in the position of having to vote upon a tax levy, part of the proceeds of which would be paid to him in his position as school teacher. It is my opinion that public policy would oppose any one man holding these two positions, because of the conflicting interests involved.

As I understand your letter, you are now employed upon a contract which you accepted in September, 1947, and you are asking if you can finish out your term under that contract. As the tax levy to raise the money to pay the school expenses for 1947-1948 has already been passed by the board of supervisors and will not come before that board after you become a member, it is my opinion that you can become a member of the board of supervisors and finish out your term as a teacher in Lee County.

With best wishes, I am

Very truly yours,

HARVEY B. APPERSON,
Attorney General.

RECORDATIONS—Chattel Mortgage Covering Refrigerator Used in Farm Home Should Not be Docketed in Agricultural Chattel Deed Book.

May 13, 1948.

HONORABLE LEWIS CRAWLEY, *Clerk*,
Circuit Court of Cumberland County,
Cumberland, Virginia.

My dear Mr. Crawley:

This is in reply to your letter of April 24, in which you request the opinion of this office as to whether a chattel mortgage upon a refrigerator for a farm home should be docketed upon the Agricultural Chattel Deed of Trust Book.

Section 6454-a of the Code of Virginia provides for the recordation of deeds of trust upon " * * * livestock, poultry, farm machinery, farm equipment and upon annual and perennial crops and plant products, including fruit, either grown or growing at the time of the execution of the deed of trust or to be planted or grown within one year thereafter."

It is my opinion that a refrigerator for a farm home does not come within any of the above quoted categories, and therefore, a chattel mortgage or deed of trust upon such refrigerator should not be docketed upon the Agricultural Chattel Deed of Trust Book.

You also ask as to whether a recordation tax should be charged upon deeds of trust docketed upon the Agricultural Chattel Deed of Trust Book. I am in complete agreement with the opinion of this office on the question carried on page 125 of the Annual Report of 1946-47, referred to in your letter.

With best wishes, I am

J. LINDSAY ALMOND, JR.,
Attorney General

RENT CONTROL—Governor May Invoke the State Rent Control Law if he Determines that an Emergency Exists.

July 21, 1947.

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

My dear Mr. Baldwin:

This is in reply to your letter of July 14, in which you ask whether or not the Governor can invoke the State Rent Control Law if he so desires on March 1, 1948, at which time the current Federal Rent Control Law expires.

The pertinent part of section 4 of the Emergency Fair Rent Act, Chapter 68, Acts of Assembly, Extra Session, 1947, is as follows:

"Declaration of existence of an emergency. —The Governor shall have the power:

"(1) to declare that an emergency exists in any area with respect to which he finds that there is an acute housing shortage and that unfair, unreasonable, oppressive rents or rental agreements are being, have been, or may be exacted; and provided that such area has theretofore been declared by the appropriate Federal agency or authority having jurisdiction over the regulation and control of rents and rental agreements, as an area in which rents and rental agreements are subject to regulation; provided that the

local governing body in any political subdivision of any rent control area may declare an end to the emergency in said political subdivision and thereafter the regulations contained in this act shall not apply in such political subdivision in which the said governing body making such declaration shall have jurisdiction."

* * * * *

It can be seen from section 4 that the Governor may invoke the law when he finds that an emergency exists, subject to certain limitations set out above, and it is my opinion that, if the Governor finds that the emergency still exists when the current Federal Rent Control Law expires on March 1, 1948, he may invoke the State Rent Control Law.

As you will see from section 18 of the Act, it is effective until July 1, 1948, at which time it expires of its own limitation.

With kindest personal regards, I am

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS AND SCHOOL BOARDS—A Special District Tax Levy May be Made for Capital Expenditures—Qualified Voters of District can not Petition for Relief; Only County Voters Can.

April 9, 1948.

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

Dear Mr. Goodman:

This is in reply to your letter of March 20th, in which you ask the following questions:

"Would a levy made by the Board of Supervisors as a reserve fund for permanent capitalization for the building of school buildings be required to be laid in that particular district in which the reserve fund for new building is set up, and secondly, should the Board of Supervisors refuse to make such a levy for such reserve fund as set up in the division superintendent's budget for school purposes for that particular district, would not the voters in the particular district for which a reserve fund is sought to be set up, be the only ones who would vote on the question in accordance with Section 657, of the Code of Virginia, 1946 Supplement thereof."

Chapter 65, Acts of 1946, (found as Section 698 of Michie's Code, 1946 Supplement) provides that the governing body of any county or city *may levy* a special county tax, a *special district* tax, or a special city tax, as the case may be, *for the purpose of capital expenditures* and for the payment of indebtedness or rent, and, in effect, adds to the exceptions enumerated in Chapter 422, Acts of 1942, as amended (found as Section 653-a2 of Michie's Code, 1946 Supplement), which declares that the county shall be the unit for tax purposes with the exceptions that a district tax may be levied to provide interest and a sinking fund for a district bond issue, and that a district tax may be levied to pay an existing district indebtedness.

Therefore, I am of the opinion that while it is permissible to levy in the

particular district for capital expenditures, in accordance with Chapter 65 Acts of 1946, it is not mandatory.

Your second question, in my opinion, must also be answered in the negative. Section 657 of Michie's Code, 1946 Supplement, provides that "on a petition of not less than twenty per centum of the qualified voters of *the county or city* * * * the Circuit Court * * * may * * * order an election * * ." (Italics supplied). Nowhere in this section is it contemplated that *only* the qualified voters of a district should vote.

Yours very truly,

WALTER E. ROGERS,
Assistant Attorney General.

**SCHOOLS AND SCHOOL BOARDS—A Permanent Capitalization Fund
may be Set up in School Budget and Earmarked for Use in a Particular
District.**

March 17, 1948.

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

My dear Mr. Goodman:

This is in reply to your letter of March 16, 1948, in which you ask whether the division superintendent in preparing the budget for school purposes can set up and ask for a reserve fund for permanent capitalization to be set aside for the construction of school buildings in a particular district in the county, or whether the reserve fund pertaining to permanent capitalization so set up and asked for would have to be a general county fund for the purpose of permanent capitalization for any school buildings that might be required to be built in the future.

As you point out in your letter, this office has previously ruled in a letter dated January 27, 1944, to Dr. Walter S. Newman, then Assistant Superintendent of Public Instructions, that a permanent capitalization fund may be set up in the school budget for the purpose of constructing schools that may be needed in the future, and that the school levies could include amounts to provide for such fund. If the school authorities feel that a building program is needed in a particular district, I see no reason why the permanent capitalization fund so desired to be set up cannot be earmarked for the purpose of constructing buildings in that particular district. The funds when used would have to be used for the construction of buildings in a particular district and, if it is known where the buildings will be needed at the time the fund is set up in the budget, I can see no objection to stating this fact and having the fund set aside for this particular purpose.

With best wishes, I am

Very sincerely yours,

WALTER E. ROGERS,
Assistant Attorney General.

SCHOOLS AND SCHOOL BOARDS—Children who have Attended School for Period of Time in Foreign State Must Attend Public School in Virginia During Remainder of Present School Term.

May 6, 1948.

HONORABLE C. LACEY COMPTON,
Trial Justice for Prince William County,
Manassas, Virginia.

My dear Mr. Crompton:

This is in reply to your letter of April 26 with regard to the construction of the Virginia Compulsory School Attendance Law. You state that during the second week in April a family with five children of legal school age moved to Prince William County from the State of Mississippi where, according to the parents, there is a seven months school term. You further state that the parents take the position that, since their children have completed the school term in Mississippi, they should not be required to attend school in Virginia for the balance of the present term.

The fact that the children in question attended and completed a seven months school term in Mississippi is immaterial, for section 683 of the Code, as amended, is plain when it provides that—"Every parent * * * *in the Commonwealth*, having control or charge of any child, or children, * * * shall send such child or children, to a public school, * * *" and that the "period of compulsory attendance shall commence at the opening of the first term * * and shall continue until the close of such school for the school year * * *." (Italics supplied) Therefore, it is my opinion that these children could be required to attend school during the remainder of the present term.

Very sincerely yours,

J. LINDSAY ALMOND, JR.,
Attorney General.

SCHOOLS AND SCHOOL BOARDS—Must Abide by Regulations Promulgated by State Board of Education Fixing Minimum Age for School Attendance.

September 19, 1947.

MRS. MARY K. COOLEY, *Chairman*,
County School Board of Carroll County,
Hillsville, Virginia.

My dear Mrs. Cooley:

This is in reply to your letter of September 13, 1947, addressed to Honorable Harvey B. Apperson. Since Mr. Apperson has not yet qualified as Attorney General, I am answering your letter.

Section 682 of the Code of Virginia provides that persons six years of age may be admitted to primary grades. Since this statute is permissive rather than compulsory, it is within the discretion of the school authorities to fix a date prior to the beginning of the school session by which children must become six years of age before permitted to attend school. I understand that the State Board of Education has by regulation authorized local school boards to determine in their discretion whether children six years of age will be admitted to the primary grades, but has provided that, if such discretion is exercised, children shall be deemed six years of age for this purpose if they become six at any time before September 1.

Since the State Board of Education has authority to make rules and regulations for the management and conduct of the schools, it is my opinion that the local school boards must abide by the regulation of the State Board and, if they permit children six years of age to attend the primary grades, they must permit all those to attend who become six before September 1.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOL AND SCHOOL BOARD—Resident taxpayers Authorized to Petition School Board for Funds to Improve School Building Must be Owners of Personal or Real Property Subject to Taxation by County.

September 23, 1947.

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

My dear Mr. Shield:

This is in reply to your letter of September 16, 1947, addressed to the Honorable Harvey B. Apperson.

You refer to section 674-g of the Code, which provides that upon the petition to the county school board of one thousand resident taxpayers of any county the board may adopt a resolution reciting the expediency of borrowing money by the county and the issuance of bonds therefor, for the purpose of providing funds for school improvements. You ask whether the words "resident taxpayers" include (1) poll taxpayers, (2) personal property taxpayers, (3) income taxpayers and (4) real estate taxpayers.

While the words "resident taxpayers" taken alone would include any resident who was a taxpayer, whether Federal, State, or local, these words are followed in the statute by the words "of any county". In view of this fact and the further fact that the bonds issued pursuant to this and the following sections are to be repaid from taxes levied upon all the taxable property in the county, it is my opinion that the words "resident taxpayers of the county" should be construed to mean only those taxpayers who are liable for county taxes. Though the statute could be construed to mean any type of taxpayer residing in the county, it would certainly eliminate any question as to the validity of the bonds on these grounds if the petitioners were all owners of personal or real property subject to taxation by the county.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS AND SCHOOL BOARDS—Salary of Division Superintendents can be Adjusted to Conform to Change in School Population Brought About by Annexation.

April 29, 1948.

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

My dear Mr. Miller:

I am acknowledging your letter addressed to Mr. Rogers with reference to adjustments in the basic salaries of the Division Superintendents of Schools for Norfolk County and Portsmouth City. You state that it appears that some adjustments should be made on account of the annexation of certain Norfolk County areas by the City of Portsmouth and that the Division Superintendents have recommended that, in order to determine the proper adjustments, the school census of the annexed area be determined by multiplying the 1945 school census of Norfolk County by the ratio of the enrollment of pupils in the annexed area for the month of October, 1947, to the enrollment of all pupils in Norfolk County for the same month.

Section 615 of the Code provides, among other things, that the salaries of the Division Superintendents shall be based upon the school population as shown in the census of 1940 and in the census of each succeeding five-year period. Therefore, it can be seen that the salaries of the present Division Superintendents should be based on the 1945 school census.

There is no provision in the Code that deals with the adjustment of Division Superintendents' salaries when annexation proceedings have resulted in increasing or decreasing the population and area of school divisions. Therefore, it is my opinion that, since the parties concerned are in agreement, the plan for the adjustment of salaries as presented in your letter is a practical method by which to determine the 1945 school census for the annexed area and the salaries of the Division Superintendents that are affected thereby.

Very sincerely yours,

J. LINDSAY ALMOND, JR.,
Attorney General.

SCHOOLS AND SCHOOL BOARDS—Local Taxing Authorities have Authority to Impose County-wide Levy to Meet the Indebtedness for School Construction in Magisterial District or can Limit Levy to that District.

June 10, 1948.

HONORABLE WILLIAM ARCHER ROYALL,
Commonwealth's Attorney,
Tazewell County,
Tazewell, Virginia.

My dear Mr. Royall:

This is in reply to your letter of May 31, in which you ask whether school building construction done in one magisterial district of Tazewell County can be paid for by a levy in all magisterial districts.

The funds for school construction can be obtained by a bond issue or by a literary loan. If the funds are to be obtained by a bond issue, it appears to me that section 673 and section 698 will be applicable to your question.

Section 673 provides that whenever it is necessary for a county to provide funds for school improvements or school buildings

“ * * * it shall be lawful for the school board of such county to contract a loan for any or all of such purposes, and issue bonds, on the credit of the county, in the manner other loans are authorized to be contracted and bonds authorized to be issued by sections twenty seven hundred thirty-eight, twenty seven hundred thirty-nine, twenty seven hundred forty and twenty seven hundred forty-one of the Code of Virginia, * * * .”

It is my opinion, based upon the above quoted section, and based upon a consideration of sections 2738 through 2741, that a levy may be made throughout the county to pay for school construction done in one magisterial district. I also call your attention to section 698 which provides that:

“For capital expenditures and for the payment of indebtedness and loans the governing body of any county or city may levy a special county tax, a special district tax, or a special city tax, as the case may be, on all property subject to local taxation, * * * .”

It is true, as pointed out in your letter, that the levy may also be restricted to the magisterial district or districts in which the construction is being done. See sections 653a2 and 673. However, I do think that, in the light of the above-quoted sections, the proper authorities have a discretion as to whether the levy shall be limited to one district or districts or shall be county-wide.

In the event the construction is financed by a literary loan, other sections of the Code would be applicable. Section 638 authorizes the school board of any county to borrow from the literary fund, and section 644 provides that the Board of Supervisors shall include in its levies a fund sufficient to meet its liabilities on such loan. The Supreme Court of Appeals had occasion to construe section 644 in *Henrico v. City of Richmond*, 177 Va. 754, and what was said there is pertinent to your question. The question was whether the City of Richmond, in annexing certain sections of Henrico County, should assume a portion of the Literary Loans made by the county for certain schools, none of which were in the territory annexed. It was held that the City must assume a portion of such indebtedness equal to the percentage of assessed values of real and personal property which the county lost through annexation.

The Court declared that:

“The record discloses that Henrico county is one single county school district. And while the county school board is a body corporate for certain purposes * * * Code, section 644 * * * provides that the board of supervisors of counties in which school boards have borrowed from the literary fund, ‘shall include in the county * * * levy, or levies, or appropriate a fund sufficient, as the case may be, to meet its liabilities on such contract, * * *’ This leaves no room for doubt that the State literary loans are county obligations which must be repaid by county levies laid on a county-wide basis. Indeed, the record shows that the required levies have been laid by the county.” (177 Va. 802)

While this statement of the Court must be considered in the matter, I might point out that it appears to be in conflict with the opinion in *Board of Supervisors v. Cox*, 155 Va. 687. There, the Court’s decision authorizes the Supervisors of King and Queen County to impose an addition levy in the Buena Vista district for the purpose of repaying a literary loan made by the School Board for a school building in the Buena Vista district. The attack on the tax was on constitutional grounds, and the opinion does not indicate that any

argument was advanced to the effect that section 644 might require a county-wide levy.

With best wishes, I am

Very truly yours,

J. LINDSAY ALMOND, JR.,
Attorney General.

SCHOOL AND SCHOOL BOARDS—Temporary Loans can only be Authorized if Same is to be Paid within a Year.

June 23, 1948.

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

My dear Mr. Butler:

This is in reply to your letter of June 17, requesting my opinion on the following question which has been presented to you by the Division Superintendent of the Alleghany County Public Schools.

"The School Board has an opportunity to purchase a piece of land adjacent to the present Covington High School property. This land is needed because the present site is inadequate and will become more so when needed additions are made at the Covington High School. There is also need for additional ground for an elementary school site. The County School Budget as approved and adopted for the session 1948-49 anticipates a deficit as of June 30, 1949 in the amount of \$36,643.63. The estimated revenue from the County School Levy for 1948-49 is \$404,820.00. The purchase of the real estate referred to above would necessitate an expenditure of an additional \$41,580.00 which would increase the deficit to \$78,226.63.

"Is it legal for the School Board to borrow an additional \$14,580.00 thereby increasing the deficit to \$78,226.63 provided the Board of Supervisors grants permission to the School Board for such action?"

Section 675 of the Virginia Code provides for the making of temporary loans to county school boards with the approval of the board of supervisors. That section provides, among other things that such loans " * * * shall be repaid within one year of their date * * *." The purpose of this statute is obviously to allow the school board, with the approval of the board of supervisors, to make a temporary loan in any year in anticipation of the revenue for that year. It is my opinion that this loan is authorized under section 675, if it is to be repaid within one year. Inasmuch as the county school budget for the year 1948-49 already anticipates a deficit in excess of \$35,000.00, it appears to me that this loan can be properly made only if the board of supervisors makes some additional provision whereby it can be repaid within the year.

With best wishes, I am

Very truly yours,

J. LINDSAY ALMOND, JR.,
Attorney General.

SCHOOLS AND SCHOOL BOARD—School Board can Not Borrow Money from the Literary Fund Without Approval of Board of Supervisors.

August 27, 1947.

HONORABLE E. O. RUSSELL, *Clerk*,
Circuit Court of Loudoun County,
Leesburg, Virginia.

My dear Mr. Russell:

This is in reply to your letter of August 23, in which you ask the following question:

"Under section 642, as amended by the Virginia Assembly of 1946, page 564, can the School Board of any county borrow from the literary fund an unlimited amount provided said loan is approved by the State, without first procuring the consent or the approval by an action of the Board of Supervisors."

Section 642 of the Code (1946 Supplement to Michie's Code of 1942) empowers the State Board of Education to make a loan from the literary fund to a County School Board at its discretion, but no such loan shall exceed 100 per cent of the cost of the school house, addition thereto and site.

The State Board of Education, under section 632 of the Code, is vested with the management of the literary fund, and has established a regulation requiring the consent of the Board of Supervisors before such a loan can be made. Therefore, it is my opinion that no County School Board can borrow money from the literary fund without first procuring the approval of the Board of Supervisors.

Very sincerely yours,

ABRAM P. STAPLES,

Attorney General.

SCHOOLS AND SCHOOL BOARDS—School Board is without Authority to Borrow from a Sinking Fund Set up to Retire School Bonds.

June 26, 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 June 23, 1947, from which I quote:

"Some years ago a sinking fund was set up for Clifton Magisterial District in Alleghany County, Virginia, to retire literary bonds that were issued in 1929 for the purpose of erecting a high school building at Low Moor, Virginia. A levy was laid in said district for a number of years until the present time. At present there is eleven thousand, two hundred, sixty-four dollars and eighty-six cents (11,264.86) in said fund. On February 15, 1948, one bond in the sum of five thousand dollars (\$5,000.00) plus five hundred dollars (\$500.00) interest, making a total of fifty-five hundred dollars (\$5,500.00), will be paid out of said fund. Another bond in the sum of five thousand dollars (\$5,000.00), with interest, will be due and payable in 1949. Hence, there is sufficient money in the fund to re-

tire all outstanding bonds and leave a balance of approximately five hundred dollars (\$500.00), and no levy has been laid for the ensuing year.

"The County School Board of Alleghany County, Virginia, desires to erect an additional building in the Clifton Magisterial District at a cost of approximately fifty-six hundred dollars (\$5,600.00) and the Superintendent of Schools would like your opinion as to whether or not said School Board can legally borrow said fifty-six hundred dollars (\$5,600.00) from the aforesaid sinking fund and let the Supervisors lay another levy next year to raise enough money for said sinking fund to retire the outstanding bonds."

While you refer to the bonds issued in 1929 as "literary bonds", the interest charge appeared to be greater than that usually charged on a loan from the literary fund, so I called the State Department of Education and was informed that this was not a literary fund loan. I judge, therefore, that this was an obligation financed by a bond issue under section 673 of the Code.

I have previously ruled that funds obtained from a special levy for a specific purpose cannot be diverted to other uses. It is my opinion, therefore, that the funds derived from the special levy to finance the loan made in 1929 and set aside in a sinking fund for that purpose cannot be used to finance the construction of additional school buildings.

While section 2741a of the Code authorizes boards of supervisors to invest any part of the sinking funds of the county, or district thereof, in obligations of the county, or any district thereof, this section contemplates that the obligation in which the investment is to be made be one duly issued by the county and supported by sinking funds which have been provided and maintained in accordance with all legal requirements. Even then approval of the investment must be secured from the Circuit Court or the judge thereof in vacation.

It is my opinion, therefore, that the funds needed for the construction of the additional building should be secured in the usual manner, either by a loan from the literary fund or by the issuance of bonds as provided in section 673 of the Code.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS AND SCHOOL BOARDS—No Authority Vested in Board to Sell Water or Sewerage Rights.

April 14, 1948.

HONORABLE JOSEPH A. MASSIE, JR.
Commonwealth's Attorney, Frederick County
Winchester, Virginia.

Dear Mr. Massie:

This is to acknowledge receipt of your letter of April 9 in which you state in part:

"The question has arisen in this County concerning to whom the authority is given for the construction and maintenance of a sewer line from the city of Winchester to the proposed location of the Consolidated County High School located approximately ½ mile from the city limits. The question of authority being between the Board of Supervisors of the County and the County School Board.

Of course, the reason for this question arising is that there is some sub-division development across the road from the location of the proposed county high school, and it is quite possible that this area will be further developed and that the property owners in this area will want to connect to the sewer line in the county. Charges for this service will, of course, be made to the abutting property owners who desire such connection, and the length of the sewer line can be varied from 1,000 feet to 7,000 feet, depending on whether the gravit flow or pressure pump system is used.

I believe that the Assistant Superintendent of the State Department of Education has written a letter to one of the property owners in the County, near the location of the proposed school, informing him that it is the duty of the School Board to build this sewer line but I have not found such authority in the Code of Virginia.

Therefore, as Commonwealth's Attorney of Frederick County, it is my request that I receive a ruling as to who has the proper authority to build and maintain the sewer line to the proposed public school as I must advise the County Board of Supervisors."

I am advised by the State Department of Education that the funds for the building of this school have been made available to the School Board by the Board of Supervisors in the manner prescribed by law. Therefore, it is the responsibility and the duty of the School Board to erect the school in accordance with the plans that have been approved by the State Board of Education.

Your attention is invited to Section 656 of the Code, last amended in 1946. This section sets forth the duties and powers of the School Boards and provides in part:

"* * * to provide for the *erection*, furnishing, the equipping of necessary school buildings and *appurtenances* and *maintenance* thereof. * * *"

I am of the opinion that the School Board has the authority under this statute to provide for an adequate water and sewerage system to accommodate the school and if it is possible to connect up with an existing system, the Board has such authority.

I can find no authority, either implied or expressed, in the statutes that will permit a School Board to sell water or sewerage rights to private individuals who desire to connect up with such systems. From what you state in your letter, in all probability the adjoining property owners will desire to connect up with the sewerage system. If this contingency arises, the Board of Supervisors would then have to determine whether or not it should take over the maintenance of the sewerage lines and water system under the authority vested in such Board by section 2757 of the Code. If the Board of Supervisors does so, then it will be in position to tax the abutting property owners for the cost of such systems pursuant to section 2757a of Michie's Code.

A sanitary district can be formed in any area of the county in the procedure outlined in Sections 1560m to 1560n, Michie's Code 1942. After the sanitary district is created, then the Board of Supervisors has express powers and duties set forth in section 1560o and you will notice that one of those powers is to levy and collect annual tax upon all property subject to local taxation in order to pay for the expenses incident to the maintaining and operating of water and sewerage systems, and to contract with any municipalities in reference to making connections with any such systems now in operation.

If you have not already read the cases of Board of Supervisors v. County School Board, 182 Va. 266, and Scott County School Board v. Board of Supervisors, 169 Va. 213, I suggest that you do so as they may be of help to you in understanding the division of authority between the Boards of Supervisors

and School Boards. However, these cases are not at all in point to the question propounded in your letter.

With high regards, I am

Sincerely yours,

D. GARDINER TYLER, JR.,
Attorney General.

SCHOOLS AND SCHOOL BOARDS—School Boards Have No Authority To Provide Transportation for Students Attending Private Schools.

December 26, 1947.

HONORABLE EDWARD P. SIMPKINS, JR.,
Commonwealth's Attorney for Hanover County,
Mutual Building,
Richmond, Virginia.

My dear Mr. Simpkins:

This is in reply to your letter of December 17, 1947, in which you ask if the School Board of Hanover County can permit children going to private schools to ride upon the public school buses.

This office has previously advanced the opinion that the county school board does not have authority to provide transportation for students going to private schools. It is my opinion that the enclosed copy of a letter of May 27, 1938, to Dr. Sidney B. Hall covers the question raised by you, and, therefore, the school board of the county is not authorized to provide free transportation of children to private schools.

With best wishes, I am

Yours very truly,

HARVEY B. APPERSON,
Attorney General.

SCHOOLS AND SCHOOL BOARDS—School Boards of a City and County Cannot be consolidated.

January 28, 1948.

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

My dear Mr. Hope:

In your letter of January 19, you request my opinion of the constitutionality of a proposal to consolidate the school boards of the City of Hampton and the County of Elizabeth City, or a proposal which would consolidate the school boards of those communities with that of the town of Phoebus.

A similar proposal has been before this office in the past, and it has been held that section 133 of the Constitution prohibits such consolidation. That section provides that "The supervision of schools in each county and city shall

be vested in a school board to be composed of trustees to be selected in the manner for the term and to the number provided by law." This office has previously held that this section makes it plain that there shall be one school board for each county and city.

With best wishes, I am

Yours very truly,

HARVEY B. APPERSON,
Attorney General.

SCHOOL AND SCHOOL BOARDS—Such Boards Have no Authority to Lease School Property.

December 29, 1947.

HONORABLE WILLIAM O. FIFE,
Commonwealth's Attorney for Albemarle County,
Charlottesville, Virginia.

My dear Mr. Fife:

This is in reply to your letter of December 24, in which you ask whether the County School Board of Albemarle County has authority to lease two acres of school property. You state that the portion in question is not being used for public school purposes at this time.

Chapter 412, Acts of Assembly of 1930 amended and re-enacted section 678 of the Code and provides in part that the School Board shall have the same power to *sell real school property* as the Board of Supervisors has under section 2723 of the Code. However, I can find no statute authorizing a School Board to lease property and, therefore, must advise you that, in my opinion, the Albemarle County Board does not have the authority to lease the land in question.

Very sincerely yours,

HARVEY B. APPERSON,
Attorney General.

SHERIFFS—Salary and Expense Voucher may be Signed by Executor or Administrator of Estate of Deceased Sheriff.

December 17, 1947.

MISS CAROLINE L. BIESEN, *Executive Secretary*,
State Compensation Board,
Richmond 19, Virginia.

My dear Miss Biesen:

This is in reply to your letter of December 11, in which you ask my opinion concerning the signing of the salary and expense voucher of the Sheriff of Nottoway County, now deceased. You stated that Mr. Combs was of the opinion that the voucher should be signed by the administrator or the executor of the sheriff's estate.

Chapter 364, Acts of Assembly of 1934, as amended and re-enacted by Chapter 332, Acts of Assembly of 1940 (found as section 3477m of the Code) provides, among other things, that salaries and expenses shall be paid on the submission of satisfactory evidence. Therefore, it is my opinion that the Compensation Board may exercise its discretion as to what constitutes "satisfactory

evidence" and could require that the voucher be signed by the administrator of the sheriff's estate. In that event, the check should be drawn payable to the said administrator.

Very sincerely yours,

HARVEY B. APPERSON,
Attorney General.

SHERIFFS, SERGEANTS AND CONSTABLES—Fees and Mileage Allowances Accruing in Criminal Cases are Collected by the Clerks of the Court in which the Prosecution is Had.

March 15, 1948.

HONORABLE W. CARY CRISMOND, *Clerk*,
Circuit Court of Spotsylvania County,
Spotsylvania, Virginia.

My dear Mr. Crismond:

This is in reply to your letter of March 5, 1948, regarding the collection of certain fees due sheriffs, in which you request the opinion of this office as to whether it is mandatory for the clerk to collect the fees and pay the same to the respective counties instead of to the individual sheriffs, and whether, if the fees be paid to the county instead of to the sheriff and the sheriff refuses to serve papers without his fee accompanying the same, the clerk should be held liable in any way.

It is not clear from your letter whether you refer to fees due in criminal cases or in civil cases. Paragraph (b) of subsection 1 of Chapter 386 of the Acts of 1942 (section 3487(1), subsection (b), of Michie's Code of 1942) reads as follows:

"Every sheriff and sergeant, and every deputy of either, shall thereafter, however, continue to collect all fees and mileage allowances now or hereafter provided by law for the services of such officer, other than such as he would have been entitled to receive from the Commonwealth or from the county or city for which he is elected or appointed and the fees and mileage allowances provided for services in connection with the prosecution of any criminal matter. Such fees and mileage allowances accruing in connection with any criminal matter shall be collected by the clerk of the court in which the prosecution is had. Such fees as are collected by the clerk of the court shall be paid by him into the treasury of the county or city for which the sheriff or sergeant, on account of whose services such fees are collected, is elected or appointed. All fees collected by or for every sheriff, sergeant, and deputy of either, shall be paid into the treasury of the county or city for which he is elected or appointed, on or before the tenth day of the month next succeeding that in which the same are collected. The treasurer of each county and city shall credit one-third of such amounts to the general fund of his county or city and credit two-thirds thereof to the account of the Commonwealth to be remitted to the State Treasurer along with other funds due to the Commonwealth."

You will see from the above that the fees and mileage allowances provided for services in connection with the prosecution of any criminal matter are no longer collected by the sheriff, but are required to be collected by the clerk of the court in which the prosecution is had. The statute provides that such fees shall be paid by the clerk into the treasury of the county or city. This office has previously ruled that, while the clerk is not required to collect the sheriff's fees for services in civil cases, this may be done and when this is the case the fees should be paid into the treasury of the county or city and not to the in-

dividual sheriff. This ruling is based upon that provision of the statute which reads: "All fees collected by or for every sheriff * * * shall be paid into the treasury of the county or city for which he is elected or appointed, on or before the tenth day of the month next succeeding that in which the same are collected."

Since the statute directs the clerk to pay such fees as are collected for sheriffs directly into the treasury of the county instead of to the sheriffs, it is my opinion that the clerk will not be held liable for so doing, even though the sheriff should refuse to serve the summons.

Very sincerely yours,

WALTER E. ROGERS,
Assistant Attorney General.

SLOT MACHINE—MAY be Seized Under a Search Warrant and Destroyed.

March 4, 1948.

MR. V. W. LOVELACE, *Sheriff*,
Box 695,
Williamsburg, Virginia.

Dear Mr. Lovelace:

Due to the fact that the new Attorney General has not yet qualified, I am acknowledging your letter of February 21, in which you ask whether a search warrant is needed in order to confiscate a slot machine, capable of paying off in United States currency, which is found in a general merchandise store or other public place.

The so-called "slot machine law" is found as section 4694a of the Code (Michie, 1942) and the machine in question falls within its provisions. Subsection (d) reads as follows:

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

Therefore, it would appear that the property you describe is a public nuisance and may be seized under a search warrant and destroyed.

Also, it might be pointed out that, since subsection (c) of the above named section makes it a misdemeanor to possess the slot machine in question, you are, of course, justified in arresting the possessor without warrant and seizing the machine as evidence, under the theory that you may make an arrest without a warrant when a misdemeanor is committed in your presence. In that event, since the slot machine is illegal *per se*, it should be destroyed by order of the court.

Very sincerely yours,

WALTER E. ROGERS,
Assistant Attorney General.

STATE BOARD OF ACCOUNTANCY—Member Not Eligible for Reappointment under Certain Circumstances.

June 29, 1948.

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

Dear Governor Tuck:

I am in receipt of your inquiry relative to the eligibility of Mr. James W. Fletcher to appointment to the State Board of Accountancy for a term of five years, said appointment to take effect July 1st, 1948.

This matter is controlled by Section 566 Code of Virginia (Chapter 184, Acts of Assembly 1944, Page 257). This Act became effective at the first moment of June 24, 1944. Section 566, insofar as pertinent to this inquiry, provides:

"(b). The terms of present incumbents shall expire on June thirty 1944 and the Governor shall appoint their successors on or before July one, nineteen hundred forty-four. * * *"

"(c). Thereafter as the terms of offices respectively of the members expire by limitation the Governor shall appoint, to fill the vacancies so occasioned. * * *"

"(e). No person shall be eligible to serve for or during more than two successive terms, and incumbency during the current term when this amendment takes effect constitutes the first of the two successive terms with respect to eligibility for appointment."

I am informed that Mr. Fletcher was serving a term which began on July 1st, 1943, and was, therefore, an incumbent when the Act under consideration became effective. The Act terminated this incumbency as of June thirty, nineteen hundred forty-four, and specified that the current incumbency, so terminated, should constitute the first of the two successive terms with respect to eligibility for appointment. Pursuant thereto Mr. Fletcher was appointed for another term beginning July 1st, 1944. This appointment, in the light of the provisions of the Act, constituted the second of "the two successive terms."

Therefore, I am of the opinion that Mr. Fletcher is not eligible for appointment at the expiration of his current incumbency.

Under date of May 11th, 1948, this office rendered you an opinion relating to the eligibility for appointment of two gentlemen to the Board of Visitors of Virginia Military Institute. The situation there presented was not analogous to the instant matter. The law controlling the VMI appointments (Acts of Assembly 1946, Chapter 250, Page 414, Code Section 835) provided that the visitors in office at the time the Act took effect, were to be continued in office until the end of their respective terms, or until June thirtieth, whichever last occurred, while the Act here under consideration terminated incumbency, as of June thirty, nineteen hundred forty-four. The current terms of the VMI Visitors did not expire until June 30th, 1948, hence considering the current term as the first of the "two successive terms" the gentlemen in the VMI case were eligible for appointment to the second of the "two successive terms" to begin July 1st, 1948.

Most respectfully,

J. LINDSAY ALMOND, JR.,
Attorney General.

STATE BOARD OF EDUCATION—Certain Plan of Religious Education in Public Schools is Legal.

April 12, 1948.

MR. R. C. HAYDON,
Assistant Superintendent of Public Instruction,
State Board of Education,
Richmond 16, Virginia.

Dear Mr. Haydon:

This is in reply to your letter of March 17, in which you requested this office to advise you as to the constitutionality of various plans involving religious education in the State schools. As outlined in your letter, the plans fall into three classes, one class including those provisions in the Virginia course of study which have religious implications, and the others including the plan operated by the Virginia Council of Churches under a "released time" arrangement with the local school boards, and another "released time" system.

1. Those provisions in the Virginia course of study which have religious implications include the following:

(1) The elementary course of study designed for use of all elementary pupils attending the public schools, which contains two problems on religious education. These problems, as labeled in your letter, are: How did Churches and Schools Serve Pioneers, and How can the Church Contribute to the Quality of Our Living?

It is my opinion that a course of study which presents to the pupil a factual recital of the part played by the Churches in the growth and development of this country is not constitutionally objectionable. If these problems mentioned above are limited to the presentation of historical fact, or if they are based upon the fact that Churches do exert an influence upon the life of a community and involve a study of the relationship of Church to the various phases of community life, then I am of the opinion that they may be taught in Virginia public schools. It is to be assumed that such courses are non-sectarian and are designed to acquaint the pupil with the fact that the Church has had, and still does have, an effect upon community life.

(2) Three syllabi for courses in Bible study in Old and New Testament history and literature.

In an earlier opinion, this office commented upon this program and noted that it was based upon a course approved by the State Board of Education, though prepared by a selected committee composed of persons actively connected with the Jewish, Roman Catholic and Protestant Churches. That opinion expressed the view that a non-sectarian elective course in biblical history and literature might be taught in the public schools, and I do not think subsequent decisions have altered the soundness of that view.

(3) Religious services are conducted by many of the public schools at their opening exercises or assemblies which include reading of the Bible, prayer and talks by ministers.

The determination as to whether the reading from the Bible and the recital of prayer in the public schools violates any constitutional inhibition appears to depend upon whether such exercises merely emphasize fundamental morality, or whether they amount to religious instruction. It is my opinion that such exercises are not prohibited, unless carried so far as to emphasize the teachings of a particular sect.

11. The plan operated by the Virginia Council Churches, which is a form of "released time",

The recent Supreme Court decision in the *McCollum Case* dealt in general with "released time", and in particular with that form of "released time" which prevailed in the schools of Champaign, Illinois. By an 8-to-1 decision the Court held that the Champaign system fell squarely under the ban of the

First Amendment. Consequently, any plan of "relaxed time" which is identical with the Champaign plan is unconstitutional.

However, as is pointed out in the decision, there are substantial differences among the arrangements which are generally termed "released time", and, in the words of the four concurring Justices:

"* * * Different forms which 'released time' has taken during more than thirty years of growth include programs which, like that before us, could not withstand the test of the Constitution; others may be found unexceptionable * * *."

The Court does not say what ingredient or combination of ingredients in the Champaign plan makes that method unconstitutional. The concurring opinion of four Justices does point out that, under the Champaign plan, the teacher of religion was subject to the approval and supervision of the school superintendent, the school superintendent could determine whether or not it was practical for a particular sect to teach in the school system, the school teacher distributed the cards which the parent signed to indicate the desire that his child have religious instruction, and reports of attendance at the religious classes were submitted to the school authorities. This opinion then concludes that:

"Religious education so conducted on school time and property is patently woven into the working scheme of the school. * * *"

Your letter, in making reference to the plan operated by the Virginia Council of Churches, does not state all the details of that plan, and you will, of course, appreciate that I cannot express an opinion on any particular plan in the absence of knowledge of all the details of that plan.

On the general subject of "released time", it is my opinion that any plan which is substantially identical with the Champaign system is unconstitutional. On the other hand, the mere use of the public school building during regular school hours for non-sectarian, non-compulsory religious instruction, under a "released time" plan divorced from the type of school supervision criticized in the *Champaign Case*, would not be forbidden by the *McCullum* decision in my opinion.

III. An arrangement under which children are released from school to attend Religious Education classes in a church or some building not connected with the school.

What has been said above is equally applicable here. The fact that the classes are not held in the school building would aid in support of a conclusion that the public school system is not being utilized to aid religious groups to spread their faith, but I do not think it would be the controlling factor. Other details of the plan would have to be considered before any opinion could be given on this type of program.

With best wishes, I am,

Yours very truly,

WALTER E. ROGERS,
Assistant Attorney General.

STATE BOARD OF HEALTH—Hospitals Must Conform to Regulations of—Before Operating—No Authority of Board to Prohibit Construction of Hospitals.

October 21, 1947.

DR. L. J. ROPER,
State Health Commissioner,
Richmond 19, Virginia.

My dear Dr. Roper:

This is in reply to your letter of October 17, from which I quote as follows:

"Chapter 15, Acts of Assembly, 1947, provides that the State Board of Health shall carry out the licensing and inspection of certain kinds of hospitals within the State of Virginia.

"Section 1514-a, 3-a, of this Act reads as follows:

"After December thirty-first, nineteen hundred forty-seven, no person shall establish, conduct, maintain or operate in this State any hospital as defined in and included within the provisions of this law without having a license so to do as provided in this law, where such hospital, under regulations of the Board, is required to obtain a license."

"I understand the above to mean that the approval by the State Board of Health will be necessary before any hospital can legally operate on and after January 1, 1948. If my interpretation is correct, would this section or any other portion of Chapter 15 forbid the actual building or construction of a hospital without prior approval of the State Board of Health?"

It is my opinion that no portion of the above Act would empower the State Board of Health to prohibit the actual building or construction of a hospital, but I concur in your understanding of section 1514-a, 3a to the extent that no hospital may operate without first conforming to the reasonable regulations of the State Board of Health.

Very sincerely yours,

HARVEY B. APPERSON,
Attorney General.

STATE BOARD OF HEALTH—Not Required to make Specified Payments to the Localities—Can Adopt Any Just Administrative Method to Expend Funds.

September 24, 1947.

DR. L. J. ROPER,
State Health Commissioner,
Richmond, Virginia.

My dear Dr. Roper:

This is in reply to your letter of September 18, 1947, regarding a controversy which has arisen between the City of Charlottesville and the County of Albemarle concerning the funds which the State Board of Health allots for the support of the joint Health Department organized by the County of Albemarle, the City of Charlottesville, and the University of Virginia.

You state that in the past the State Board of Health has paid this allotment to the fiscal officer of Albemarle County in the form of reimbursement, covered by certification signed by the health officer and the fiscal officer of

Albemarle County to the effect that the funds for which reimbursement is asked have been expended for local health services. I understand that the funds from which these and similar allotments are paid are those appropriated to the State Board of Health for local health services. There are no statutes requiring the Board to make any specified payments to the localities themselves, or any of them, and it is solely for administrative purposes that arrangements have been made whereby local health services are furnished through health departments of the localities, which are then reimbursed in part for certain expenditures by the State Board of Health.

From the papers which you sent to me with your letter it appears that, in the case of the City of Charlottesville and the County of Albemarle, these two localities entered into an agreement along with the University of Virginia for the establishment of a joint Health Department, paragraph 12 of which agreement reads in part as follows:

"12. That the work of the Joint Health Department shall be financed by funds contributed annually by the contracting parties in the following proportions, that is to say, the said County of Albemarle will contribute 60.3% of said funds, the City of Charlottesville 39.7%, to create a fund of \$20,500. per annum, and the University of Virginia \$1,500. per annum, and from such other agencies as may from time to time wish to participate in the promotion of the public health in this district; * * *

Attached to the agreement is the following resolution adopted by the Board of Supervisors of Albemarle County on September 18, 1940:

"RESOLVED, that the proper officers be authorized to execute on behalf of the Board of County Supervisors of Albemarle County, an agreement dated April 24th, 1939, between this Board, the City of Charlottesville and the University of Virginia, provided it is understood that this interpretation is placed upon paragraph 12 of said agreement: 'It is understood and agreed that the amount now contributed monthly by the State of Virginia shall be credited to the proportion which is to be paid monthly by the County,' and that the County Executive be directed to transmit executed copies of said contract to the respective contracting parties with a letter setting forth the above quoted condition and interpretation."

Along with the agreement with the attached resolution you sent me a copy of a letter which you are informed was written by Mr. H. A. Haden, County Executive, to the Council of the City of Charlottesville on September 26, 1940, which reads as follows:

"I am enclosing herewith three copies of the agreement covering the operation of the Joint Health Department for the year beginning July 1, 1940, which agreement has been executed on behalf of the Board of County Supervisors of Albemarle County.

"I have been directed to call your attention to the County's interpretation of paragraph 12 of this agreement, which interpretation is set forth in a Resolution adopted by the Board of County Supervisors at the meeting held on September 18, 1940, a certified copy of which has been attached to each copy of the agreement.

"I trust that you will forward all three copies to the proper University authorities for execution after it has been executed on behalf of the City of Charlottesville."

The City of Charlottesville now contends that, since it contributes 39.7% of the \$20,500 paid annually by the county and the city together to finance the Joint Health Department, the City should receive 39.7% of the amount paid by

the State Board of Health. However, from the information you have been furnished, particularly the letter of September 16, 1940, written by Mr. Haden to the Council of the City, referring to the resolution passed by the Board of Supervisors as being attached to the agreement and requesting execution of the agreement, it appears that when the agreement was accepted by the City it was with the understanding that the amount contributed by the State was to be credited to the proportion to be paid by the County. The fact that in the past the State's contribution has been paid to the County without objection by the City further supports this conclusion.

Since there is no statute requiring the State Board of Health to make any contribution for local health services directly to any locality, and since the procedure adopted is just an administrative method by which the State expends these funds to provide such services, I do not think that the Board is required to pay the City any part of the funds contributed to the support of the joint board. Whether or not that is to be done is purely a matter of agreement between the County and the City. Since, as pointed out above, the agreement seems to be that all of the State's contribution should be paid to the County, it is my opinion that you would be justified in continuing to pay the allotment to the County until the City shows that this was not the agreement or that a new agreement providing otherwise has been made with the County.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

STATE BOARD OF HEALTH—Must Ascertain if Funds have been Expended by Institutions before Reallocating Credits.

DR. L. J. ROPER,
State Health Commissioner,
Richmond, Virginia.

August 4, 1947.

My dear Dr. Roper:

This is in reply to your letter of July 29, 1947, in which you request advice concerning the use of funds provided by Chapter 197 of the Acts of Assembly of 1946 as amended by Chapter 31 of the Acts of the Extra Session of 1947. You ask if the funds (both cash and credit) remaining unused at the close of the fiscal year ending June 30, 1947, may be carried forward and reallocated to the localities as of July 1, 1947.

The Act to which you refer provides for a cash appropriation to the State Board of Health of \$300,000 for each year of the current biennium to assist the counties and cities in the hospitalization and treatment of indigent persons. The State Board of Health is required to allocate such funds to the counties and cities quarterly on the basis of population. Section 2 of the Act provides that "Any funds and any credits for services allocated to a county or city which remain unused at the end of any six month period shall be subject to reallocation to the localities by the Board."

It is my opinion that any portion of the \$300,000 appropriated for the fiscal year ending June 30, 1947, which remains unused at that time should be carried forward and reallocated as of July 1, since this would be in accordance with the provision of the statute requiring a reallocation at the end of each six month period. Then, as is customary when a balance that remains from the appropriation to any State agency for the first year of the biennium is needed for expenditure during the second year, the State Board of Health can request the

Division of the Budget to include such balance in the subsequent quarterly allotments to that agency.

The Acts setting up this aid to the localities for hospitalization of indigent persons also provides that the Medical College of Virginia and the University of Virginia shall each establish a credit of \$150,000 per year from amounts appropriated to them for maintenance and operation, including free treatment and care of Virginia patients. These credits, just as in the case with the cash appropriation, are subject to allocation among the localities by the State Board of Health and are used for the same purpose of meeting one-half of the cost of hospitalizing indigent persons for the localities when the patients are sent to these institutions instead of to other hospitals.

As you will see from that portion of section 2 of the Act quoted above, any unused portions of these credits are also to be reallocated at the end of each six month period. However, section 7 of the Act, which deals with these credits, provides that "any credits for services derived from the appropriation to the hospital divisions of the two institutions and allocated by the State Board of Health not so matched by the counties and cities of Virginia, may otherwise be expended by the hospital divisions of the University of Virginia and the Medical College of Virginia."

Since the institutions may expend the sums from which the credits are derived if they are not used by the localities, I think the State Board of Health should ascertain from these institutions whether such funds have actually been expended before making any reallocation of the credits. Otherwise, allocations may be made of credits without the existence of appropriated funds to stand behind the same.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

STATE BOARD OF HEALTH—No Authority to Demand that Hospital Records of Cancer Patients be Divulged.

January 29, 1948.

DR. L. J. ROPER, *Commissioner*,
State Department of Health,
Richmond 19, Virginia.

My dear Doctor Roper:

This is in reply to your letter of January 7, in which you ask whether the following resolution, adopted by the State Board of Health, is consistent with authority granted in section 1487 of the Code:

"That the State Commissioner of Health be instructed to take the necessary steps to obtain such parts of the records of patients in hospitals as are necessary to identify, tabulate, and follow up cancer cases."

As pointed out in your letter, section 1487 of the Code gives the Board authority "to provide for the thorough investigation and study of the causes of all diseases, epidemics and otherwise in this State." While this provision is very broad and certainly permits the Board, by appropriate resolution, to ask for hospital records of cancer patients, it is my opinion that the Board has no power under the above section to demand such records if a hospital refuses to divulge the desired information.

In answer to your second inquiry, I am of the opinion that no hospital

would be subject to suit for divulging their records to the Board of Health when the law so requires.

With best wishes, I am

Yours very truly,

HARVEY B. APPERSON,
Attorney General.

**STATE BOARD OF EMBALMERS—Applicant for License as Embalmer
Need Not Spend Entire Time for Two Years as an Apprentice in Order
to Obtain License Therefor.**

September 30, 1947.

SENATOR B. T. GUNTER, JR.
Accomac, Virginia.

My dear Senator Gunter:

This is in reply to your letter of September 22, 1947, in which you inquire whether an applicant for a license as a licensed embalmer must give his entire time as an apprentice for two years under section 1720 of the Code of Virginia.

I am in agreement with you that this statute does not mean that the applicant must devote his entire time to being an apprentice. It does require that the applicant be a bona fide apprentice and devote as much time as is necessary to learning the profession of embalming. It is my understanding that the State Board of Embalmers is quite reasonable in its application of their ruling that an apprentice should be a full-time employee of a funeral home for twenty-four months. I would suggest that you write to Mr. F. C. Stover, Secretary of the Board, in regard to the cases which you mentioned in your letter.

The State Board of Embalmers is attempting to do its best to see that all apprentices shall have ample opportunity to gain the knowledge needed to correctly equip them for their work. I feel that if you contact them in regard to any case in which you think they have been unfair that they will attempt to be reasonable and will take into consideration any special factors surrounding the particular case.

With best wishes, I am

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

**STATE COLLEGES—Scholarships provided for by Appropriation Act based
on Scholastic year and not Calendar Year.**

June 1, 1948.

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 May 27, requesting my opinion as to the following provision contained in Item 143 of the Appropriation Act of 1948, subparagraph (1) (a);

"Upon recommendation of the State Board of Education the Governor is authorized in his discretion to approve scholarships of not more than \$300.00 each year for college students attending Virginia colleges who are in their senior, junior or sophomore years * * *."

You wish to know if this limits scholarship aid to any one student to \$300.00 per twelve months, or if the provision can be interpreted to mean that each student may receive scholarship aid not in excess of \$300.00 for each of his sophomore, junior and senior years. It is contemplated that under the accelerated program of training now in effect in many schools a student may complete his junior year and a portion of his senior year in a twelve months' period.

This item in the appropriation Act provides for two types of scholarships for teachers for the public schools of Virginia. The primary purpose of the appropriation is to provide capable teachers for the public schools as promptly as possible. It is my opinion that the scholarship aid of \$300.00 each year may be properly interpreted to apply to a scholastic year. By that I mean that a student may receive aid not to exceed \$300.00 for each of his senior, junior and sophomore years, and the fact that he completes one entire scholastic year and a portion of another in a twelve months' period will not prevent him from being eligible to the scholarship aid up to \$300.00 for each of his scholastic years.

Yours very truly,

J. LINDSAY ALMOND, JR.,
Attorney General.

STATE HOSPITAL BOARD—Interest from Investments of Patient Funds cannot be Disbursed to Patients' Amusement Fund; Account of Each Patient Must be Credited with Pro Rata Share Thereof.

February 3, 1948.

DR. JOSEPH E. BARRETT, *Commissioner*,
Department of Mental Hygiene & Hospitals,
309 North 12th Street,
Richmond, Virginia.

My dear Doctor Barrett:

Due to the untimely passing of Judge Apperson, your letter addressed to him of January 27, 1948, has been handed to me for attention. I quote your letter as follows:

"Section 1014b of the Code deals with the handling of private funds provided for patients in the several hospitals under the supervision of the State Hospital Board and this department. These funds are all deposited in one account with a local bank approved by the Hospital Board in a fund known as 'Patients' Funds,' but individual accounts of these funds are kept by each hospital.

"These funds accumulate to very sizable amounts, and you will note that the State Hospital Board is authorized to invest so much of these accumulated funds as it may deem proper in United States government bonds or other securities authorized by law for the investment of fiduciary funds.

"These investments in the past have always been made in United States government bonds. The question now is what disposition can legally be made of the interest accruing from such investments. It can readily

be seen that a distribution of such income to the individual accounts of patients would be practically an impossible procedure because of the great numbers of these accounts and in actual practice oftentimes some of the accounts that were existent when the investments were made have been closed out before the interest has accrued and other accounts have been established which had no funds in the investment.

"I have talked this whole matter over with the State Auditor and I am writing to inquire if in your opinion it would be all right to deposit the income from these investments to the 'Patients' Amusement Fund' at each hospital whereby it would be used for the benefit of all patients. Recently the State Hospital Board passed a resolution authorizing this procedure, but I thought it would be well to clear it with you before it is actually put into effect."

The portion of section 1014b of the Code of Virginia to which you refer and to so much thereof as is here material, I quote as follows:

This section provides for receiving donations and establishing a fund and authorizes investments to be made, "in United States government bonds, or other securities authorized by law for the investment of fiduciary funds".

However, no provision is made for distribution of any interest earned upon such investment. I fully appreciate your statement "that a distribution of such income of the individual accounts of patients would be practically an impossible procedure because of the great number of these accounts and in actual practice oftentimes some of the accounts that were existent when the investments were made have been closed out before the interest has accrued and other accounts have been established which had no funds in the investment. However, notwithstanding this difficulty and, particularly in view of the fact that this statute is dealing with property belonging to persons under legal disability, the same under rules of construction, must be strictly construed. I am, therefore, of the opinion that the only disposition that can legally be made from the interest accruing from the investment is to deposit the pro rata share of each patient in the bank as required by law or to reinvest the same pursuant to the provisions of the statute. I do not think that a strict construction of the statute would give to the State Hospital Board authority to disburse the income from these investments to the "Patients' Amusement Fund" at each hospital.

In view of the apparent difficulty in bookkeeping that this interpretation upon the statute would involve, I may suggest that in the way of digression that the statute should be amended to provide for the expenditure of the interest from investments.

With kind regards, I am

Very truly yours,

C. CHAMPION BOWLES,
Assistant Attorney General.

STATE HOSPITAL BOARD—Member Entitled to Per Diem (Pay) While Attending Meeting of American Association of Mental Deficiency.

DR. JOSEPH E. BARRETT, *Commissioner*,
Department of Mental Hygiene and Hospitals,
Richmond 19, Virginia.

May 6, 1948.

My dear Dr. Barrett:

This is in reply to your letter of April 28, in which you state that you desire to know whether or not a member of the State Hospital Board, who has

been officially designated to represent the Board at the meeting of the American Association on Mental Deficiency, is entitled to a per diem while attending the meeting.

The pertinent part of subsection (e) of section 1006 of the Code, as amended, is as follows:

" * * * The members of the State Hospital Board shall receive no salaries, but shall be paid their necessary traveling and other expenses incurred in attendance upon meetings, *or while otherwise engaged in the discharge of their duties*, and the sum of ten dollars a day for each day or portion thereof in which they are engaged in the performance of their duties, provided that such per diem shall not exceed six hundred dollars a year for each member." (Italics supplied)

Chapter 160, Acts of Assembly of 1942, (found as section 1006-b of Michie's Code of 1942) sets forth some of the powers, duties and functions of the State Hospital Board and I quote in part therefrom:

" * * * * *

"(3) Seek and encourage the cooperation and active participation of communities, organizations, agencies, and individuals in the effort to establish and maintain mental health programs and services;

"(4) Initiate and direct the development of long range programs and plans with respect to mental hygiene and hospital services provided by the State, to the end that these services may grow and improve in a steady coordinated manner;

"(5) Develop programs of public information and education for the purpose of promoting an understanding and appreciation of State mental hygiene and hospital services among the citizens of the State;"

" * * * * *

It is my opinion, therefore, that the member of the Board would be entitled to a per diem since the attendance at the meeting of the American Association on Mental Deficiency would be in the discharge of his duties as outlined in the Act quoted above.

Very sincerely yours,

J. LINDSAY ALMOND, JR.,
Attorney General.

STATE PUBLIC HEALTH SERVICE—Physicians Employed by—Must be Licensed by Board of Medical Examiners Before They May Perform Professional Services.

November 5, 1947.

DR. K. D. GRAVES, *Secretary*,
Board of Medical Examiners,
306 Medical Arts Building,
Roanoke, Virginia.

My dear Dr. Graves:

I am in receipt of your letter of October 30, the pertinent part of which is as follows:

"The question has come up as to whether or not physicians employed by the State Health Department of Virginia, and not connected with any hospital, are required to have a Virginia license to practice medicine in order

to perform such professional activities as diagnosing and treating cases, sitting on commissions etc.

"I note in paragraph (c) of section 1621, Chapter 68, of the Code of Virginia, certain men are exempt, viz., any commissioned or contract medical officer serving in the army, navy, coast guard, marine corps, public health service or marine hospital service of the United States while so commissioned and in the performance of his duties etc.

"Please advise me whether the Public Health Service is restricted to the Public Health Service of the United States or whether any person employed by any Public Health Service is exempt."

It is plain that section 1621 of the Code (1946 Supplement) does not exempt a person employed by a State Public Health Service, and since I am unable to find a statute that does exempt such employees, it is my opinion that a physician, employed by the State Public Health Service, must be duly licensed by the Board of Medical Examiners before he may perform such professional services as you describe.

With best wishes, I am

Very truly yours,

HARVEY B. APPERSON,

STATE EMPLOYEES—Merit System—Grade on Merit Examination of Veterans Increased by Certain Percentum of Grade Made.

September 25, 1947.

MR. W. I. HALL,
Merit System Supervisor,
State Capitol,
Richmond 19, Virginia.

My dear Mr. Hall:

This is in reply to your letter of September 19, 1947, requesting my opinion as to the proper construction of Chapter 6 of the Acts of Assembly of 1946, which provides that on examinations given by the Merit System Council the grade or rating of a Veteran shall be "increased by five per centum" and in cases where the Veteran shall have a service-connected disability his grade or rating shall be "increased by ten per centum".

You ask whether in computing the final grade of the Veteran five or ten points, as the case may be, should be added to the grade made or whether five per centum or ten per centum of the grade made should be computed and the resulting figure added to the grade.

Since the Act does not provide that five or ten points should be added to the grade, but provides that the grade shall be increased by five per centum or ten per centum, as the case may be, it is my opinion that the second of the two methods described should be used.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

STATE SOIL CONSERVATION COMMITTEE—Has no Authority to Borrow Money or to Obligate State Funds to Guarantee Return of Privately Owned Machine.

June 16, 1948.

MR. VERNE R. HILLMAN, *Executive Officer*,
State Soil Conservation Committee,
Blacksburg, Virginia.

Dear Mr. Hillman:

This is in reply to your letter of June 8th in which you ask the following questions:

"Does the State Soil Conservation Committee have authority to make state funds available to a soil conservation district or otherwise obligate state funds to guarantee return in the same condition as received, "normal wear and tear excepted," a privately owned machine made available to the district by loan or lease?"

"Do soil Conservation District Supervisors as the governing body of the district have authority to negotiate a loan from commercial banks or other private sources or from cooperative lending agencies, for the purchase of machinery or for other legitimate purposes of the district?"

Although the State Soil Conservation Committee has the authority under section 8-a, Chapter 244 of the Acts of 1944 (section 1289 (20-a) of Michie's Supplement 1946) to maintain its own machinery and the Soil Conservation Districts, likewise, have that power under section 8, chapter 394 of the Acts of Assembly 1938 (section 1289 (20) of Michie's Code of 1942), I have been able to find no authority for one to maintain the equipment of the other.

Therefore, it is my opinion that the State Soil Conservation Committee has no authority to make State funds available to a district in order to guarantee return in the same condition as received of a privately owned machine made available to the district in question.

As to the second question, a governmental sub-division has no inherent borrowing power and, since I am aware of no statute that authorizes the governing body of a Soil Conservation District to borrow money, this question must also be answered in the negative.

Very truly yours,

J. LINDSAY ALMOND, JR.,
Attorney General.

STATE INSTITUTIONS—Governed by Certain Acts of the Assembly Dependent upon Type of Service Rendered.

September 16, 1947.

DR. L. J. ROPER,
State Health Commissioner,
Richmond 19, Virginia.

My dear Dr. Roper:

This in reply to your letter of September 5, 1947, requesting advice as to what institutions are governed respectively by Chapter 80 of the Acts of the General Assembly of 1946 and Chapter 15 of the Acts of the General Assembly of 1947.

Chapter 80 of the Acts of Assembly of 1946 authorizes the State Board

of Public Welfare to fix standards and make regulations for the operation of certain homes defined by that Act as "any place, establishment, or institution operated or maintained for the maintenance or care of two or more aged, infirm, chronically ill or incapacitated persons." Section 5 of this Act reads as follows:

"This act shall not apply to any hospital, nursing home, maternity home, children's home or other home or institution which is now or may hereafter be subject to regulation by the Board, or by the *State Board of Health*, nor to any person who maintains or cares for in his residence or home only persons related to him by blood or marriage." (Italics supplied)

Chapter 15 of the Acts of Assembly of 1947 provides for the licensing and extensive regulation of certain kinds of hospitals by the State Board of Health. To determine what institutions are still governed by the State Board of Public Welfare it is, therefore, necessary to look to Chapter 15 of the Acts of 1947 to see what institutions are subject to regulations by the State Board of Health and, therefore, exempted from the provisions of Chapter 80 of the Acts of 1946. Section 1514-a2, which was added to the Code of Virginia by Chapter 15 of the Acts of 1947, defines "hospital" as:

"* * * any institution, place, building or agency by or in which facilities for any accommodation are maintained, furnished, conducted, operated or offered for the hospitalization of two (2) or more non-related mentally or physically sick or injured persons, or for the care of two (2) or more non-related persons requiring or receiving medical or nursing attention or service as chronics, convalescents, aged, disabled or crippled, including, but not to exclusion of other particular kinds with varying nomenclature or designation, ordinary hospitals, sanatoria, sanatoria, rest homes, nursing homes, infirmaries and other related institutions and undertakings, exclusive of maternity hospitals to the extent same are included within the scope of the provisions of chapter three hundred twenty-two, Acts nineteen hundred forty, as from time to time amended, so long as the licensing, inspection and supervisory provisions thereof remain in full force and effect but no longer, and exclusive of dispensary or first aid facilities maintained by any commercial or industrial plant, educational institution or convent, and exclusive of those institutions now or hereafter subject to control of the State Hospital Board, or medical or educational institutions of the State; * * *

I agree with you that above language indicates that it was the intention of the Legislature for the State Board of Health to regulate and license hospitals and those homes and institutions that provide medical or nursing attention, and that only those institutions and homes that do not provide such attention are left to regulation by the State Department of Public Welfare. You will note that that portion of section 1514-a2 quoted above expressly includes rest homes, nursing homes and other related institutions, as well as ordinary hospitals. If such institutions provide medical or nursing attention for the aged, infirm, chronically ill or incapacitated persons, it is my opinion that they are subject to regulation by the State Board of Health.

In isolated instances where the line of demarcation as to the type of service rendered may fluctuate or otherwise not be consistently clear, I think that it would be perfectly proper for the two agencies to decide questions of jurisdictions by mutual agreement. Since the two statutes deal with related subject matters, it is my opinion that this would be advisable.

As you point out, section 5 of Chapter 80 of the Acts of 1946 provides that rules and regulations adopted by the State Department of Public Welfare are not applicable to those institutions licensed by the State Board of Health.

Likewise, the rules and regulations adopted by the State Department of Health apply only to those institutions regulated by it and not those under the supervision of the State Department of Public Welfare. There is, of course, no reason why each Department cannot set up certain standards adopted by the other if this is deemed advisable.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

STATE INSTITUTIONS—University Club has Right to Use its income Unless There is a Default in Certain Bonds Issued by it.

September 16, 1947.

DR. WALTER S. NEWMAN, *President*,
Virginia Polytechnic Institute,
Blacksburg, Virginia.

Dear Doctor Newman:

Referring to our recent correspondence, and the two agreements which you enclose with your first letter of August 19 with the University Club and the Virginia Polytechnic Institute, you request my opinion upon the right of the University Club to pay off \$6500 of the 7% Class A debenture bonds while reducing the bonds held by the College to the extent of only \$2500.

It appears from a copy of the letter dated September 10 addressed to you by Mr. Paul T. Norton, Jr., President of said Club, that there has never been any default in the payment of interest on any of the bonds, and, therefore, the trustee, the Bank of Christiansburg, has never had occasion to take charge of the operation of the property or its income. Under these circumstances, it is my opinion that the University Club is not under any obligation to any of the bondholders to pay any of the bonds until maturity, and that it is within the rights, if it so desires, to retire the 7% bonds before maturity in preference to those bearing 6% interest. All of the bonds have an equal standing in so far as the security is concerned, but, as I interpret the agreements, until there has been a default in the payment of interest or principal on some of the bonds, the University Club is at liberty to use its income in such manner as it sees fit.

I am returning herewith the two agreements, and also the letter addressed to you by the President of the Club above referred to.

With best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

STATUTES—Construction of —Amendment by Separate Acts at Same Session—Both Acts Must be Administered Unless They are Utterly Inconsistent.

May 18, 1948.

HONORABLE C. F. JOYNER, JR.,
Commissioner of Motor Vehicles,
Richmond, Virginia.

Dear Mr. Joyner:

This is to acknowledge receipt of your letter of May 11, in which you say:

"I would appreciate it very much if you would advise me the proper course to follow in the administration of the Motor Fuel Tax Act (Chapter 212, Acts of 1932, as amended), and in view of the amendments enacted by the 1948 Legislature.

Chapter 506, Acts of 1948, amended Section 5 of the aforesaid Chapter. This section fixes the amount of the tax, requires certain reports by the taxpayers to be filed and payments to be made and provides for exemption. Subsection (e) of this section was amended so as to exempt any dealer from the payment of motor fuel taxes upon gasoline sold to the Federal Government provided the sale was made in quantities of five-hundred gallons or more at one time. The former law exempted from taxation all sales to the Federal Government regardless of quantity.

Chapter 487, Acts of 1948, amended sections 1, 5 and 6 of the aforesaid Motor Fuel Tax Act. The general purpose of these amendments was to set forth the re-allocation of the motor fuel tax collected on fuel sold for aviation purposes. In re-enacting this chapter, however, the same language as had existed in subsection (e) was retained. Chapter 487 and 506 were approved on the same day.

Under the circumstances, please advise me:

(1) Since both of these acts were signed by Governor Tuck on the same day, should Chapter 487 be administered in preference to 506?

(2) Whether both of these acts should be administered by the Motor Vehicle Division?

(3) If the answer to the foregoing question is in the negative, which section should be administered?"

I have examined both of the acts referred to and find that the only apparent conflict between the two is the re-enactment of Section 5 and, therefore, my comments will be confined to that.

Reference is made to Chapter 506, Acts of 1948, which reads in part as follows:

"(e) Each and every dealer in gasoline or other like products of petroleum by whatsoever name designated shall be exempt from the payment of any and all motor fuel taxes upon gasoline or other like products of petroleum sold by such dealer in the Commonwealth to the United States of America, its departments, agencies and instrumentalities when such gasoline or other like products of petroleum is sold and delivered by such dealer in bulk lots of not less than 500 gallons in each delivery to and for the exclusive use by the United States of America, its departments, agencies and instrumentalities.

The term 'exclusive use by the United States of America, its departments, agencies and instrumentalities' shall be construed to mean the consuming by the United States of America, its departments, agencies and instrumentalities of the gasoline or other like products of petroleum in equipment, devices or motors owned and operated by the United States of America, its departments, agencies or instrumentalities.

The term 'exclusive used by the United States of America, its departments, agencies or instrumentalities' shall be further construed to specifically exclude the use of such gasoline and other like products of petroleum by any person, firm or corporation, whether operating under contract with the United States of America, its departments, agencies and instrumentalities or not, the original purchase by whom from a dealer in gasoline or other products of petroleum in this State would have rendered such dealer liable for the payment of motor fuel taxes upon such gasoline or other like products of petroleum under the laws of the State.

The Commission shall promulgate such rules and regulations and shall prescribe such forms as shall be necessary to effectuate and enforce the purposes of this Act.

All laws or parts of laws in conflict herewith are hereby repealed." Likewise, see Chapter 487, Acts of 1948, a part of which reads as follows: "(e) Motor fuel used by the United States or any of the government-agencies thereof shall not be subject to tax hereunder."

Your attention is invited to the case of *Mahoney v. Commonwealth*, 162 Va. 846, in which the Court stated:

"A bill becomes an act when it is approved by the Governor, or becomes a law without his signature. (See Section 76, Constitution of Virginia). When two bills are signed by the Governor on the same day (as was the case with these two acts), they are to be regarded as having become 'acts' simultaneously, neither one before the other."

It would seem that both of these acts became law simultaneously and the portions of Chapter 506 that purport to repeal acts inconsistent therewith do not repeal by implication that portion of Section 5 as included in Chapter 487.

It is a well settled principle of law that where two statutes are in apparent conflict they should be so construed as reasonably as possible so as to allow both to stand and give force and effect to each. (See case of *Kirkpatrick v. Board of Supervisors*, 146 Va. 113.)

The two acts should be construed together and administered except insofar as they are utterly inconsistent. It seems to me that the provisions of subsection (e) of Section 5 of both of these acts are not totally inconsistent one with the other. It would seem very unreasonable for the Legislature to provide for a limited exemption to a dealer under certain circumstances and then nullify the limitation of the exemption re-enacting the law as it formerly stood. I do not see how you could recognize any other exemption of gallonage sold by a dealer except as provided for in Chapter 506. I do not think that Chapter 487(e) has the same purport as the language found in the former act, that is, Section 5 of Chapter 212, Acts of 1932, as amended by Chapter 196, Acts of 1946. I am of the opinion that the language in Chapter 506 (e) qualifies the applicability of Chapter 487 (e) in those instances where the sale is made by a dealer in quantities of more than five-hundred gallons. In other words, Chapter 487 (e) does not apply to a dealer who sells in quantities less than five-hundred gallons but applies to *all other gallonage (fuel) used by the Government*. Furthermore, if the Government secures any fuel other than through a dealer, which is extremely unlikely but none the less possible, no tax applies to the gasoline; and should the Government itself pay the tax on any fuel which is used by it, the United States should be reimbursed for the tax so paid.

If subsection (e) of Chapter 506 stood alone, it would be very doubtful whether the same would be valid from a constitutional standpoint in view of the decision in the case of *Panhandle Oil Company v. Miss.*, 277 U. S. 218, especially if it were administered in such a way as to preclude the United States Government from securing refunds of the tax paid where the Government itself has paid the tax. (Op. Atty. Gen. 1928-29, p. 156). This office here expresses no opinion on the constitutionality of this act.

It is therefore the opinion of this office that the two acts can and should be administered.

Very sincerely yours,

J. LINDSAY ALMOND, JR.,
Attorney General.

TAXATION—AUTHORITY to Fix Value for Reassessment of Real Estate is Vested Solely in the Board of Reassessors.

January 22, 1948.

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

My dear Mr. Burks:

This is in reply to your letter of January 20, 1948, in which you ask my opinion on the following question. Bedford County had a general reassessment of real estate in 1947. At that time the persons appointed to examine the land completed an appraisalment on a basis of 1940 values. To determine the assessed value of the real estate thus appraised a percentage of the appraised value will be taken, and the resulting figures will be the assessed value on which the tax rate will be applied. You ask who has the duty of determining what percentage is to be used in determining the assessed value.

Section 244 of the Tax Code provides that the persons who are designated to examine the lands shall " * * * ascertain and assess the fair market value thereof * * * ." This puts the duty on the reassessors to determine the assessed value. While it will be noted that this section of the Tax Code requires that the fair market value be used as the assessed value, the Court of Appeals has commented, in *Washington Bank v. Washington County*, 176 Va. 216, " * * * that this mandate has been so honored in the breach that no assessors feel called upon to apply it in practice." The general practice of assessors is similar to that followed in Bedford County, and the fact that section 244 is not strictly followed in setting the assessed value does not relieve the reassessors of the responsibility of determining what the assessed value shall be.

The duty of the court in this matter is set forth in sections 242 and 414 of the Tax Code. Under section 242 the circuit court of the county designates the persons to make the assessment required by section 244. Section 414 declares that any person who feels aggrieved by any such assessment may apply for relief to the circuit court of the county wherein such assessment was made. I find no statute authorizing the court to fix the assessed value of real estate, and it is, therefore, my opinion that the court has no authority to decide what percent of the appraised value shall be taken to fix the assessed value.

The duty of the board of supervisors is limited to ordering the levy to be laid on all property within the county, and it is my opinion that the board of supervisors has nothing to do with determining the assessed values.

I trust this answers the question raised by your letter of January 20, and I shall appreciate your advising if you are aware of any other pertinent section which would affect this opinion.

With best wishes, I am

Yours very truly,

HARVEY B. APPERSON,
Attorney General.

TAXATION—Board of Supervisors Have Authority to Increase Levy Not Withstanding the Objection of Majority of Taxpayers Present at Meeting Wherein Same was Considered.

February 10, 1948.

MR. BERLIN L. ARMSTRONG
Member Board of Supervisors,
Highland County,
Doe Hill, Virginia.

Dear Mr. Armstrong:

I am in receipt of your letter of February 5, 1948, addressed to the Attorney General's Office, which I quote in part as follows:

"I am writing for a little information as a member of the Board of Supervisors of Highland County.

"Do we have the power to increase the levy from \$2.00 to \$4.00 if the majority of the taxpayers object to it at the hearing?"

You will see from the enclosed card that this office is not permitted to give an opinion except when requested to do so by the officials or departments enumerated thereon, however, section 288 of the Tax Code of Virginia provides in part as follows:

"The board of supervisors of each county shall have power, and it shall be their duty, at their regular meeting in the month of January in each year, or as soon thereafter as practicable, not later than their meeting in April, to fix the amount of the county and district levies for the current year; to order the levy on all property within the county segregated by law for local taxation; and to order the levy on the real estate and tangible personal property of public service corporations based upon the assessment fixed by the State Corporation Commission, and certified by the county board of supervisors, both with respect to location and valuations, * * *."

Section 290 of the Tax Code provides in part as follows:

"When any order for a levy is made by the board of supervisors, which, in the opinion of the attorney for the Commonwealth, is illegal, or from which he shall be required to appeal by any six freeholders of the county, the said attorney shall appeal therefrom, within thirty days after such order is made, to the circuit court of said county, and such appeal shall operate as a supersedeas."

You will see from the foregoing quotations that the boards of supervisors of the several counties are given the power and it is their duty to fix the amount of the levy for the current year and no limitation in amount is placed upon them. This is true notwithstanding the majority of the taxpayers at the hearing object. If for any reason the levy is thought to be illegal, the commonwealth's attorney may on his own motion or at the request of six freeholders appeal to the circuit court.

Your attention, however, is called to section 698 of the Code of Virginia, as amended by the General Assembly at its extra session of 1945 Chapter 16, pertaining to levying taxes and appropriating money for school purposes which fixes a minimum and a maximum which shall be levied for school purposes which is not less than fifty cents (\$0.50) nor more than two dollars and a half (\$2.50) on the hundred dollars assessed value of the property in any one year.

With kind regards, I am

Very truly yours,

C. CHAMPION BOWLES,
Assistant Attorney General.

TAXATION—Disposition of Taxes Collected on Sale of Aviation Gasoline at Washington National Airport.

January 21, 1948.

HONORABLE WILLIAM M. TUCK,
Governor of Virginia,
The Capitol,
Richmond, Virginia.

My dear Governor Tuck:

This is to acknowledge receipt of your letter of December 5, 1947, in reference to the division of certain funds between the Corporation Commission Division of Aeronautics and the State Highway Department. I quote your letter as follows:

"I am advised by Colonel Allan C. Perkinson, Director of the Division of Aeronautics, that the State Highway Department and the State Corporation Commission are agreeable to the division of the disputed aviation fund on a fifty-fifty basis but that the Division of Motor Vehicles has dissented, raising the question of the legality of such a division.

"In order that this matter may be settled before consideration of proposed legislation concerning future receipts of a suggested special aviation and airport fund, it would appear advisable to have your opinion on the question.

"I understand you are familiar with the background of this fund, but am enclosing Col. Perkinson's letter, together with the report of the Advisory Committee on Aviation, which may be subject to revision on the basis of your opinion.

"I shall appreciate your returning the file with your opinion at your earliest convenience."

I find that my predecessor, Justice Abram P. Staples, rendered an opinion July 17, 1946, in a letter addressed to the Honorable H. Lester Hooker of the Corporation Commission, on a portion of the law relating to this opinion which is in part as follows:

"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 released to the State Corporation Commission to meet the appropriations made by Items 88 and 88½ of the Appropriation Act of 1946 (Acts of 1946, pp. 803, 804)."

I am in entire agreement with the opinion as quoted above. However, it will be observed that the conclusion reached in the last paragraph thereof is based upon the hypothesis that the amounts advanced to the State Corporation Commission on behalf of its Division of Aeronautics by the State Highway Department have exceeded the amount collected from the tax on aviation gasoline.

A study made by a committee of three auditors, consisting of representatives from the staffs of the State Highway Department, the Division of Motor Vehicles and the State Corporation Commission, has demonstrated the impracticability of determining the total amount of taxes collected on aviation gasoline for use in Virginia from July 1, 1942 to date. I am informed that the representatives from the State Highway Department and the State Corporation Commission are agreed that, notwithstanding the difficulty involved in determining the precise amount of such taxes collected, apparently taxes collected on such aviation gasoline were substantially in excess of budget appropriations for the bienniums 1942 and 1944, respectively. In view of this finding, it would seem that we may assume for the purpose of this discussion that the State Highway Department has been fully reimbursed through medium of taxes paid on aviation fuel for such advances as have been made by it to the Aviation Division of the State Corporation Commission, to cover appropriations for the support of such division, for the bienniums aforesaid. Therefore, it would appear that the disposition of the fund in question would in no wise be affected by the advances heretofore made by the State Highway Department to the Aviation Division.

The dispute over the establishment of the boundary line between the District of Columbia and the Commonwealth of Virginia resulted in the establishment of the fund which is the subject of your letter, such fund to be accumulated until, and to be distributed only upon, the settlement of this boundary line controversy. This question was settled and the boundary line was established by Chapter 26, Acts of 1946.

Notwithstanding the fact that the monies in the fund were derived from taxes paid on aviation gasoline, it does not appear that the Aeronautics Division of the State Corporation Commission may participate in the fund in the absence of additional legislation except insofar as the said fund was accumulated prior to the biennium commencing July 1, 1942. That such would be the case may be seen upon examination of Chapter 206, Acts of 1942, having reference to the appropriation to the Aeronautics Division. Section 6 thereof reads in part as follows:

"The revenue derived from the tax levied as aforesaid is hereby appropriated for the construction of the roads and projects comprising the State primary highway system and for the construction or maintenance of the roads and projects, comprising the State secondary highway system and shall be applied to no other purpose, * * * ; and there shall be paid out of this fund the amount appropriated to the Corporation Commission for the Division of Aeronautics."

Section 6 of the aforesaid Acts has not been amended since its enactment, although Chapter 206, aforesaid, was amended by Chapter 140 of the Acts of 1944, and again by Chapter 357 of the Acts of 1946, both of which amendments, however, dealt with other sections of the aforesaid chapter.

Since, upon the advice of the Attorney General by letter dated September 21, 1941, the aviation fuel taxes collected at the National Airport were held intact in a special fund until the effective date of the 1942 act, it is my opinion

that the Corporation Commission Aeronautics Division should be paid the amount of the taxes accumulated prior to the effective date of the act, aforesaid, based upon the provisions of Chapter 368 of the Acts of 1938, Sections 2, 3 and 4, which created a special fund for the administration of the aviation laws. This act provided for a refund of two (2) cents per gallon to intrastate operators of airplanes, three (3) cents of the tax on each gallon being retained for the special fund.

I am advised that the auditors of the Division of Motor Vehicles, the State Corporation Commission and the Department of Highways are in agreement that the special fund accumulated during this period is \$25,436.44. I am further advised that the total accumulated fund since September 21, 1941, is \$218, 131.50.

In view of the fact that the full amount of appropriations provided for the support of the State Corporation Commission, Aeronautics Division, since the effective date of the 1942 Act, have been paid, I am of the opinion that so much of the fund in question as may have accumulated subsequent to the effective date of Chapter 206, Acts of 1942, in view of the definite language of Section 6 thereof, is a part of the funds of the State Highway Department. If, by reason of the fact that the amount accumulated in the fund derived wholly from the purchase of aviation gasoline, the conclusion is reached that some part of the said fund should be apportioned to the Aviation Division, such action would in my opinion require authorization from the General Assembly.

For the foregoing reasons, therefore, I am of the opinion that the State Corporation Commission—Aeronautic Division should be credited with the sum of \$25,436.44 and that the remainder of said fund, that is \$192, 695.06, should be credited to the State Highway Department, unless and until some other and different disposition thereof shall be authorized by the Legislature.

I am returning your file herewith.

With kindest regards, I am

Respectfully,

HARVEY B. APPERSON,
Attorney General.

TAXATION—Motor Vehicle License Fees for Common Carriers and Irregular Common Carriers and Contract Carriers under Section 35aa—Motor Vehicle Code.

March 4, 1947.

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

Dear Governor Tuck:

I have your request for my opinion as to a form of letter to be used by the Commissioner of Motor Vehicles to accompany applications sent out by him for use by applicants for 1947 license plates to be used on vehicles of common carriers and irregular common carriers in interstate commerce which have no regular route or schedule, and regular common carriers in interstate commerce which do have a regular route or schedule, and also certificated common carriers doing an intrastate business in Virginia.

The following form of letter is suggested, and, in my opinion, it is a proper interpretation of the license taxes imposed upon these vehicles when used in the manner stated:

"The enclosed is an application for the renewal of your 1947 license plates. Under Chapter 196, Acts of 1946, the fees for license plates depend upon the use made of the particular vehicles. This Act provides for a greater fee for vehicles used in intrastate or regular common carrier operations than for those used in contract carrying operations, or irregular interstate common carrier operations.

"Under the new law, you can segregate your equipment in accordance with the use you intend to make of the same; that is, those vehicles used in intrastate common carrier operations can be segregated and must be licensed as common carriers, and those used in contract carrier operations, or in operations as *interstate* irregular common carriers, or both, can be segregated and licensed as contract carrier vehicles. Vehicles licensed as contract carriers cannot be used in intrastate common carrier operations, nor those licensed as certificated or regular common carriers be used in contract carrier operations.

"If your vehicle, according to the use to be made of it, should bear a CH, TH, CHTR, or TRH license tag, it will incur a license tax as a contract carrier. If it should bear only an X or IX tag, it will incur a license tax as a common carrier.

Carriers who operate not more than two (2) vehicles which are rated by the manufacturer at not more than one and one-half (1½) ton carrying capacity, which do not exceed 15,000 pounds gross load on the road each, and whose gross yearly earnings from the operations of said vehicles do not exceed five thousand (5,000) dollars will incur the same license tax as a private carrier."

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**TAXATION—Motor Vehicle License fees for Interstate Common Carriers
Same as that for Contract Carriers.**

April 2, 1947.

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

My dear Governor Tuck:

Considerable confusion and complaint has arisen over the interpretation by the Commissioner of Motor Vehicles of the words "regular common carriers in interstate commerce," as used in my letter to you of March 4, 1947, with respect to the license taxes to be imposed on certain motor vehicles engaged in transporting goods in interstate commerce. When I expressed the views set out in said letter, I was informed that a "regular carrier" operated on a fixed route and also maintained a fixed time schedule in the same manner as an intrastate certificated carrier usually does. I find that this information was erroneous and that carriers classified by the I. C. C. as "regular common carriers" are not required to maintain a fixed time schedule of service though they are restricted to a particular route while one classified as an "irregular common carrier" by the I. C. C. is not restricted to any particular highway route, and also he is not required to maintain a fixed time schedule.

Under these circumstances, I do not perceive any reasonable basis for classifying, for purposes of license taxes, a "regular interstate common carrier" differently from an "irregular" one. Neither enjoys any special privilege at the hands of the State. In my opinion, therefore, the only motor carriers of freight which should be charged a license tax as "common carriers" are those

operating intrastate as such, and who enjoy the special and exclusive privileges of certificated intrastate common carriers. All others should be classified as contract carries and pay license taxes as such.

I regret very much that my former letter misled the Commissioner of Motor Vehicles, but the mistake was due to a failure on my part to understand the facts governing these operations.

I am sending Mr. Joyner a copy of this letter.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Public Carrier May be Assessed Virginia Gasoline Tax for Travel Within United States Military or Other Reservation.

January 22, 1948.

GENERAL J. A. ANDERSON
State Highway Commissioner
Department of Highways,
Richmond, Virginia.

My dear General Anderson:

Your letter of January 20, 1948, was duly received, which I quote as follows:

"Several days ago I addressed the following letter to Judge Hooker of the Corporation Commission and to Mr. Joyner, Motor Vehicle Commissioner:

"A question has recently arisen concerning which I would like to have your thoughts. It concerns the assessment of public carriers with the Virginia gasoline tax for travel within Federal reservations. As I understand it the U. S. Code and the Oklahoma Supreme Court hold that the State has the right to levy and collect gasoline taxes within Federal areas the same as in other areas except where the gasoline is for the exclusive use of the United States.

"I will appreciate it if you gentlemen will have the matter studied and advise me concerning it."

"I quote from Judge King's reply of January 16.—

"Judge Hooker has handed me your letter of January 15, 1948, in reference to the gasoline tax, as this is in one of my departments.

"In answer to your inquiry, the Commission has not been assessing public carriers with the Virginia gasoline tax for travel within Federal reservations. In view of the fact that several departments of the State Government are affected in this matter, I would suggest that you ask Attorney General Apperson for an official ruling on the matter, with which, of course, the Commission will conform its ruling."

"In view of Judge King's letter, I will appreciate it if you will give us your opinion as to the course to be followed."

This question has never reached the Court of Appeals of Virginia, however, in view of the acts of Congress, it seems to be clear that public carriers may be assessed with the Virginia gasoline tax for travel or operation within United States military or other reservations owned by the Federal Government. The Congress of the United States on June 16, 1936, and again on October 9, 1940,

recognized this principle and enacted section 12 Title 4 of the United States Code, which is as follows:

"(a) All taxes levied by any state, territory or the District of Columbia upon, with respect to, or measure by, miles, purchases, storage, or use of gasoline or other motor vehicle fuels may be levied, in the same manner and to the same extent, with respect to such fuels when sold by or through post exchanges, ship stores, ship service stores, commissaries, filling stations, license traders, and other similar agencies, located on United States military or other reservations, when such fuels are not for the exclusive use of the United States. Such taxes, so levied, shall be paid to the proper taxing authorities of the state, territory of the District of Columbia, within whose borders the reservation effected may be located.

"(b) The officer in charge of such reservation shall, on or before the fifteenth day of each month, submit a written statement to the proper taxing authorities of the State, territory or the District of Columbia within whose borders the reservation is located, showing the amount of such motor fuel with respect to which taxes are payable under subsection (a) for the preceding month."

The Attorney General of the United States in 1936 in construing this act expressed the opinion that

"National parks or reservations within the meaning of this section, and the state may levy taxes on gasoline and other motor vehicle fuels sold by concessions located in national parks when such fuels are not for the exclusive use of the United States."

The leading case on this subject arose in Oklahoma in the case of *Sanders v Oklahoma Tax Commission*, reported in Pacific Reporters, 2d Vol. 169, p. 748, from which I quote:

"Under Federal act, the states are given the right to levy and collect gasoline taxes within the Federal areas regardless of form of such taxes, to same extent as though such areas were not Federal areas, except in cases where gasoline is for the exclusive use of the United States."

In view of the United States Code above quoted and the authorities referred to, I am of the opinion that the State of Virginia has the right to levy and collect gasoline taxes within Federal areas the same as in other areas unless the gasoline is for the exclusive use of the United States.

With kindest regards,

Sincerely yours,

HARVEY B. APPERSON,
Attorney General.

TAXATION—Recordation Tax is Based on Consideration of the Deed or Actual Value of Property which ever is Greater. Must be paid on Every Deed Recorded.

March 31, 1948.

HONORABLE ARNOLD MOTLEY, *Clerk*,
Circuit Court of Essex County,
Tappahannock, Virginia.

My dear Mr. Motley:

Due to the fact that Judge Almond has not yet qualified as Attorney

General, I am acknowledging your letter of March 16, in which you ask the following questions regarding the tax of twelve cents per one hundred dollars on conveyances of real estate:

- "A. Where real estate is conveyed subject to an existing deed of trust which is assumed by the grantee, and no consideration actually passes, is the tax assessed on the basis of the actual value of real estate conveyed, or the actual value less outstanding liens?
- "B. Where a husband, with his wife uniting her dower, conveys real estate to a third person who immediately reconveys it to the husband and wife as tenants by the entireties, with the right of survivorship as at common law, is the above tax chargeable on either or both of these conveyances?"

Section 121 of the Tax Code provides that on every deed which is admitted to record the tax shall be based upon "the consideration of the deed or the actual value of the property conveyed, whichever is greater."

Therefore, in answer to your first question, it can be seen that the "outstanding liens" are not to be deducted from the actual value of the property in determining the recording tax. Of course, if a lien, the assumption of which is the consideration for the conveyance, is of greater value than the actual value of the real estate, then the lien will be the sole basis of computing the tax.

In answer to question "B", assuming that both conveyances are recorded I am of the opinion that the tax is chargeable to both conveyances, since section 121 of the Tax Code pertains to *every* deed which is admitted to record.

Very sincerely yours,

WALTER E. ROGERS,
Assistant Attorney General.

TAXATION—Recordation Tax on Deed of Trust when State Director, Farmers Home Administration, is Trustee is Collectible.

May 28, 1948.

MR. ROBERT M. OLDHAM,
Deputy Clerk of Accomack County,
Accomac, Virginia.

My dear Mr. Oldham:

This is in reply to your letter of May 17, in which you request my opinion as to whether the State recordation tax should be collected on a deed of trust in which the State Director, Farmers Home Administration for Accomack County, Virginia, is trustee. You enclosed a copy of the deed of trust in which Isaiah Cropper and his wife of Accomack County, are grantors, and the Eastern Shore Citizens Bank of Onancock, Virginia, is beneficiary. The State Director, Farmers Home Administration, appears authorized to act as trustee under this instrument by the Bankhead Jones Farm Tenant Act as amended in 1946, the Farmers Home Administration having guaranteed the loan secured by the deed of trust.

The Bankhead Jones Farm Tenant Act, as amended in 1946, is found in Title 7, U. S. C. A. sections 1001 and following. Sections 1005a through 1005d provide for the insurance of mortgages.

Section 1024 of the Bankhead Jones Act provides as follows:

"(a) All property which is being utilized to carry out the purposes of sections 1001-1005d of this title (other than property used solely for adminis-

trative purposes) shall, notwithstanding that legal title to such property remains in the Secretary, be subject to taxation by the State, Territory, district, dependency, and political subdivision concerned, in the same manner and to the same extent as other similar property is taxed.

"(b) All property to which subsection (a) of this section is inapplicable which is held by the Secretary pursuant to sections 1001-1005d, 1007, and 1008-1029 of this title shall be exempt from all taxation now or after August 14, 1946 imposed by the United States or any State, Territory, district, dependency, or political subdivision, but the Secretary shall make payments in respect of any such property in lieu of taxes."

I also call your attention to the fact that paragraph 15 of this deed of trust states that the grantors will record at their expense.

It is my opinion that the State tax on recordation should be collected on the admission of this deed of trust to record under section 121 of the Tax Code of Virginia.

I am returning the copy of the deed of trust with this opinion.

Very truly yours,

J. LINDSAY ALMOND, JR.,
Attorney General.

TAXATION—Recordation Tax Based on the Obligation Secured Thereby.

January 29, 1948

HONORABLE C. T. GUINN, *Clerk*,
Culpeper County Circuit Court,
Culpeper, Virginia.

My dear Mr. Guinn:

This is in reply to your letter of January 23, in which you request my opinion on the following set of facts:

"Mr. A. has given a deed of trust for \$6,000.00, which is of record in this office. He now wishes to give a deed of trust for \$10,000.00, using \$6,000.00 of the new loan to pay off the old loan. The Bank thinks the State tax should only be charged on the \$4,000.00, as the balance of the \$10,000.00 is to be used to cancel the old loan."

The pertinent part of section 121 of the Tax Code, which deals with the recordation tax on deeds of trust, provides, in part, as follows:

"On every deed, except a deed exempt from taxation by law, which is admitted to record, the tax shall be twelve cents on every hundred dollars or fraction thereof of the consideration of the deed or the actual value of the property conveyed, whichever is greater;

"On deeds of trust or mortgages *such tax shall be upon the amount of bonds or other obligations secured thereby; * * **" (Italics applied)

It is my opinion that the manner in which a person uses the loan in question has no bearing on the amount of tax to be paid, therefore, the tax should be on the full amount of the obligation secured by the deed of trust.

With best wishes, I am

Very truly yours,

HARVEY B. APPERSON,
Attorney General.

TAXATION—Recording Lease Should be Based on Estimate of Coal to be Mined Where Consideration is Rented Royalty.

October 9, 1947.

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

My dear Mr. Looney:

Due to the change in the administration in the Office of the Attorney General and the amount of work which came into the office just at the time of this change, we have been unable to give you an earlier reply to your letter of October 2, 1947.

You state that a lease for strip mining of coal for certain coal lands has been presented for recordation and you ask what would be the proper recordation tax under section 121 of the Tax Code. You state that there is no minimum rental set out in the lease, but that a rental royalty of a certain price per ton of all coal mined is prescribed. I cannot give you any positive opinion on this matter without having the lease before me and without the knowledge of how much coal could be mined under the lease. However, the following views may be of assistance to you in determining the proper tax.

Section 121 of the Tax Code provides in part as follows:

"On every contract relating to real or personal property, except as hereinafter provided, which is admitted to record, the tax shall be twelve cents on every hundred dollars or fraction thereof of the consideration or value contracted for; provided, however, that the tax for recording a deed of lease for a term of years shall be taxed according to the provisions of this section, except where the annual rental, multiplied by the term for which the lease runs, equals or exceeds the actual value of the property leased, then the tax for recording the deed of lease shall be based upon the actual value of the property at the date of lease."

In the case you put it appears that the consideration can only be determined by estimating the amount of coal that will be mined, and technically the tax should be based upon that amount. I suggest, therefore, that you and the person offering the lease for recordation get together on a reasonable estimate. I realize that, as a practical matter, this may be extremely difficult and it may be that under the terms of the lease no coal or very little will actually be mined. If, in view of such facts, you consider that no estimate of the amount of royalties can be made with reasonable accuracy, I am of the opinion that the minimum tax of 12 cents should be imposed.

Very sincerely yours,

HARVEY B. APPERSON,
Attorney General.

TAXATION—Recordation Tax—Payment not Required on Supplemental Deed of Trust Securing Same Indebtedness.

June 29, 1948.

HONORABLE J. EDWARD WILTSHIRE,
Clerk, Circuit Court of Orange County,
Orange, Virginia.

Dear Mr. Wiltshire:

I have examined the extracts of the two deeds of trust which you sent to me with your letter of June 23rd. It is my opinion that, if the \$100,000.00 bond

secured by the deed from Puerto Rico Mills, Inc. was given for a loan made to that company by the Trade Bank and Trust Company, then the deed of trust from The Piedmont Knitting Company, Inc., should be admitted to record without the payment of the recordation tax.

Section 121 of the Tax Record reads in part as follows:

"This section is not to be construed as requiring the payment of any tax for the admitting to record of any deed of trust, mortgage, contract, agreement, or other writing supplemental to any deed of trust, mortgage, contract, agreement, or other writing theretofore admitted to record and upon which the tax herein imposed has been paid, hereinafter called the original instrument, where the sole purpose and effect of the said supplemental deed of trust, mortgage, contract, agreement, or other writing is to convey, set over, or pledge property, real or personal, in addition to or in substitution (in whole or in part) of the property conveyed, set over, or pledged in the original instrument, to secure or to better secure the payment of the amount contracted for in the original instrument; but in such case there shall be no tax for the admitting to record of said supplemental deed of trust, mortgage, contract, agreement, or other writing."

The deed from the Piedmont Knitting Company clearly shows that it was executed in connection with a loan from Trade Bank and Trust Company to the Puerto Rico Mills, Inc., and that the collateral bond secured thereby was executed as collateral to secure advances made by the Trade Bank and Trust Company to Puerto Rico Mills, Inc. Though made by a different party, that deed of trust clearly conveyed property "to secure or better secure the payment" of the loan made by the bank to Puerto Rico Mills, Inc., and though given to secure a different bond, that bond was simply executed as collateral also securing such loan.

I call your attention, however, to the fact that the Piedmont Knitting Company deed, while mentioning the loan to Puerto Rico Mills, Inc., does not specifically refer to the deed of trust executed by that company. The bearer bond secured by the Puerto Rico Mills deed, while payable at the Trade Bank and Trust Company, may have been given for a loan made by some other party. If so it would not represent the loan for which the other deed was given as collateral security.

In view of the fact that both deeds are of the same date and to the same trustees and for principal and collateral bonds payable at the same bank, the above suggestion is unlikely and, if you are satisfied that the loan secured by the Puerto Rico Mills deed was from the Trade Bank and Trust Company and thus a loan also secured by the collateral bond and deed of trust from the Piedmont Knitting Company, Inc., it is my opinion that you would be justified in admitting the latter deed to record as a supplemental deed of trust without the payment of the tax.

Very truly yours,

J. LINDSAY ALMOND, JR.,

TAXATION—Recordation Tax on Deed of Partition is Fifty Cents and not Based on value of Land Partitioned.

June 29, 1948.

HONORABLE C. H. MORRISSETT,
State Tax Commissioner,
State Office Building,
Richmond 15, Virginia.

Dear Mr. Morrisett:

This is in reply to your letter of June 21st, in which you ask for my opinion

as to the proper recordation tax to be charged for the recordation of deeds when co-owners of a piece of real estate effect a partition by the passage of as many deeds as there are co-owners, instead of effecting the partition by one deed.

Section 121 of the Tax Code provides, in part, that:

"The tax on any deed of partition among joint tenants, tenants in common or co-partners, shall be fifty cents."

A partition is a dividing of lands held by joint tenants, co-partners or tenants in common so that they may each hold a distinct part in severalty. The partition may be effected by a single deed in which all co-owners join or it may be effected by separate deeds in which the parcels allotted to the several co-owners are conveyed to them respectively. See 47 C. J. page 272 and 40 Am. Jur. page 15. Since the effect of using several deeds to effect the partition is exactly the same as using one deed and the administrative construction of the quoted portion of Section 121 of the Tax Code has been to consider each of the several deeds as a partition deed, it is my opinion that, where several deeds are used and they each show on their face that their purpose is to effect a partition between co-owners, such deeds should be taxed at the flat rate of 50 cents each and not at the rate based upon the value of the property conveyed in each instance.

I have considered the previous opinion of this office contained in the Report of the Attorney General for the year July 1, 1945, to June 30, 1946, to which you referred in your letter, but in view of the administrative practice cited by you and the fact that tax statutes are strictly construed in favor of the taxpayer, I think the better view is to hold the flat 50 cents tax applicable to such separate deeds used to effect a partition.

I am sending you an extra copy of this opinion which you may send to Mr. H. B. McLemore, Clerk.

Sincerely yours,

J. LINDSAY ALMOND, JR.,
Attorney General.

TRIAL JUSTICES—Have Same Powers as Conferred on Juvenile and Domestic Relations Courts in Certain Cases.

August 22, 1947.

HONORABLE ROBERT B. DAVIS,
Civil and Police Justice,
Bristol, Virginia.

My dear Judge Davis:

This is in reply to your letter of August 20.

You state that under Chapter 7 of the Acts of the General Assembly, Extra Session, 1942, the Civil and Police Justice of the City of Bristol shall also be the Juvenile and Domestic Relations Judge, and his jurisdiction, powers, etc. shall be the same as are now conferred and imposed upon Trial Justices by the laws of Virginia and the amendments thereto or hereafter enacted. You then ask whether or not you, as Juvenile and Domestic Relations Judge of Bristol, have any authority to try cases under sections 1950 and 1953e of the Code.

I agree with your position in regard to section 1950, for that section has reference to the special justices elected in cities of more than twenty-five thousand inhabitants in accordance with section 1945 of the Code and, therefore, is not applicable to your Court.

However, it is my opinion that you have authority to try cases as Juvenile

and Domestic Relations Judge under section 1953e, for this section refers to the special justices elected in towns and in counties.

Section 49871 of the Code, which was passed subsequent to section 1950 and 1953e, states that a Trial Justice shall also be Judge of the Juvenile and Domestic Relations Court in each county and city in his territory. This section does not prescribe the jurisdiction of the Juvenile and Domestic Relations Court, but only provides as to who shall act as judge thereof. In my opinion, the Trial Justice who acts in the capacity of Judge of the Juvenile and Domestic Relations Court would have all the power conferred by section 1953e and, therefore, your Court, which has the power of a Trial Justice Court, would also have such power.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TRIAL Justices—Have Authority to Suspend Unserved Portion of Sentence for a Misdemeanor.

January 15, 1948.

HONORABLE A. E. COOLEY,
Trial Justice of Carroll County,
Hillsville, Virginia.

My dear Mr. Cooley:

This is in reply to your letter of January 7, 1948, in which you ask if a trial justice has any authority to suspend unserved portions of sentences for misdemeanors. This office has previously held that under section 1922-b of the Code, a trial justice has the power to suspend any unserved portion of the sentence of the prisoner convicted by him of a misdemeanor. In this connection, the case of *Richardson v. Commonwealth*, 131 Va. 802, construes section 1922-b, and it is my opinion that under that decision and in line with previous opinions of this office, a trial justice may suspend the unserved portion of a misdemeanor sentence.

With best wishes, I am

Very sincerely yours,

HARVEY B. APPERSON,
Attorney General.

TRIAL JUSTICES—Have no Authority to Accept Personal Checks in Lieu of Money for Judgement for Fine; Is personally Liable in Event Check is Worthless.

May 6, 1948.

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

My dear Mr. Bennett:

This is in reply to your letter of April 21, in which you request my opinion as to the liability of a trial justice for the acceptance of personal checks of the defendant in the payment of fines and costs, when such personal checks are returned by the banks unpaid.

Section 2575 of the Code prescribes that fines collected for offenses committed against the State shall be collected only in lawful money. It is my opinion that a trial justice has no authority to accept a personal check in complete satisfaction of a judgment for the payment of a fine and/or costs, and is personally liable in the event such check is worthless.

However, the trial justice is authorized to allow payment by installments under section 4987; and it appears to me that under this section he may accept a personal check and suspend the execution of sentence on condition that the check be honored. In such event, he should not mark the fine as paid, until the check is honored, and in the event the check is worthless, then the fine should be reported unpaid in accordance with sections 2550 and following of the Code.

With best wishes, I am

Very truly yours,

J. LINDSAY ALMOND, JR.,
Attorney General.

TRIAL JUSTICES—Trial Justice Does not Have to Accede to Demand of Surety on Peace Bond.

WITNESSES—Summons Must be in Writing Before Witness Can Claim Fee.

February 5, 1948.

HONORABLE WILLIAM D. PRINCE,
Trial Justice for Sussex County,
Stony Creek, Virginia.

My dear Mr. Prince:

Due to the untimely death of the Attorney General, I am acknowledging receipt of your letter of January 28, from which I quote as follows:

"I am enclosing a filled out bond and I desire your opinion as to the legality of same. You will notice in the latter part of this bond, it reads as follows: 'and upon the further condition that the said John Doe shall keep the peace and be of good behavior for a period of 30 days from the date thereof'. This is what I desire to know. If this bond is duly taken and duly sworn to by John Doe and Bill Smith as his surety, is Bill Smith legally responsible, as surety, in the sum of \$100.00 in the event that the said John Doe does not keep the peace and be of good behavior for a period of 30 days from the 26th day of January, 1948. In the event that the surety, Bill Smith, is willing to comply with the first part of this bond, that is, that he will be responsible for the appearance of John Doe on the 9th day of March, 1948, at 10 a. m., at Sussex, Virginia, but refuses to be responsible for the latter clause of this bond, which says that he must keep the peace and be of good behavior for a period of 30 days, can Bill Smith demand the above conditions and refuse to comply with the latter clause, as stated above and does the law require me to accede to his demand?"

"Again, I wish your opinion on section 3529 of the Code of Virginia. Does this section require a witness to be under a WRITTEN summons; in other words, can a witness, who is verbally summoned by an arresting officer legally collect his attendance and mileage fee?"

In answer to your first problem, it is my opinion that the law does not require you to accede to the demand of the surety who refuses the responsibility for the second condition in the bond. Whether or not you desire to hold a sure-

ty to both conditions set forth in the bond in question is purely a discretionary matter.

As to your second question, I am of the opinion that in order for a witness to collect attendance and mileage fees provided for in section 3529 of the Code it is necessary for the summons to be legally issued in accordance with section 6217 of the Code. As long as the sheriff or any police officer has a summons duly issued directing him to summon a witness such witness may legally collect his fees.

Very sincerely yours,

WALTER E. ROGERS,
Assistant Attorney General.

**TRIAL JUSTICE COURTS—Should Include in Cost for Commonwealth
Attorney a Fee for \$2.50.**

February 19, 1948.

HONORABLE HAROLD H. PURCELL,
House of Delegates,
The Capitol,
Richmond, Virginia.

My dear Mr. Purcell:

I have your letter of February 18, 1948, enclosing a letter dated February 6, 1948, from Hon. Harold R. Stephenson, Attorney for the Commonwealth, Fluvanna County, in which letter Mr. Stephenson writes, in part, as follows:

"Section 3505, Code of Virginia, provides for a fee of \$5.00 to Commonwealth's Attorneys in misdemeanor cases. The Attorney General ruled on May 1, 1947—see opinions of Attorney General from July 1946 to June 30, 1947, page 35,—that a fee of \$5.00 was proper. However, Section 4987 M, Code of Virginia, provides that the Trial Justice shall include in the cost of services for the Commonwealth's Attorney a fee of \$2.50."

In view of the fact that the new Attorney General has not qualified and since the letter was addressed to me, I will give you the benefit of my views on this case.

The opinion of the Attorney General referred to by Mr. Stephenson deals with the question of Commonwealth's Attorneys' fees to be taxed in a trial before a civil and police justice in which type of case section 3505 of Michie's Code of Virginia seems to be applicable and justifies the opinion. This is true because I am unable to find any new legislation in reference to taxing such fees before civil and police justices. However, the same section, 3505 of the Code, is not applicable in taxing such fees before a trial justice court because section 4987m, Michie 1946 Supplement, as amended and re-enacted by the General Assembly of 1944, Chapter 327, which section specifically relates to taxing of costs by trial justice courts. Paragraph 5 of this section is as follows:

"For services rendered by the Commonwealth attorney in any such cases in which he is required by law to appear, and in which he actually appears on behalf of the Commonwealth, a fee of \$2.50."

This language seems to be plain that the fee to be taxed for a Commonwealth's Attorney in a trial justice court in cases in which he is required by law to appear is \$2.50.

For the foregoing reasons, I am of the opinion that there is no conflict between the two sections of the Code relating to this subject matter; and the opin-

ion of this office referred to by Mr. Stephenson applies only to civil and police justices and not to trial justices.

If you are interested in clarifying the provisions of section 3505 of the Code, the same could be amended and re-enacted so as to exclude the words "court or justice of his county or city" and insert in lieu thereof "the civil or police justice". However, in view of the foregoing reasons which I have given, I am of the opinion such an amendment to the statute is unnecessary.

Mr. Stephenson's letter dated February 6, 1948, is returned for your files.

With kind regards,

Sincerely,

C. CHAMPION BOWLES,
Assistant Attorney General.

**TORTS—No liability on the Part of V. P. I. for Acts of its Students.
VIRGINIA POLYTECHNIC INSTITUTE—Not Liable for the Torts of
its Students.**

December 11, 1947.

DR. WALTER S. NEWMAN, *President*,
Virginia Polytechnic Institute,
Blacksburg, Virginia.

My dear Doctor Newman:

In your letter of December 8, 1947, you present the question of whether V. P. I., is financially obligated to pay for damage done by individual students to property in the town of Blacksburg, or other places off the campus, when such damage is done by them while in no way engaged in regular college activities.

It is my opinion that the college is in no way responsible for damage done by students under the circumstances suggested by your question. It seems to me that the question of payment for the damage caused rests solely between the party whose property was so damaged and the individual student or students.

With best wishes, I am

Very truly yours,

HARVEY B. APPERSON,
Attorney General.

**VETERANS—Can Obtain Copies of Certain Records from Clerks of Court
Without Charge.**

July 31, 1947.

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

My dear Governor Tuck:

In your letter of July 24, 1947, which was received in my absence on vacation, you request my opinion upon a question raised by Mr. Hugh T. Williams, Service Officer, Ballard Pruitt Post 647, V. F. W. The question is whether or not the clerks of courts can make a charge to Veterans for copies of records in support of their claims for educational benefits and subsistence while attending school under the so-called Bill of Rights.

Chapter 132 of the Acts of Assembly of 1930 (section 5214c of Michie's Code of Virginia) reads as follows:

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

It is my opinion that when the copies of the records are needed to support applications under the so-called GI Bill of Rights for money for education and subsistence while attending school the provisions of this section are applicable and the copies should be furnished to Veterans by the clerk free of charge.

With best wishes, I am

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

VETERINARY EXAMINERS, STATE BOARD OF—May Examine Applicants not Graduates of Accredited School—Not Liable to Cattle Owner.

July 16, 1947.

DR. H. T. FARMER, *Secretary-Treasurer*,
Virginia State Board of Veterinary Examiners,
P. O. Box 436,
Richmond 3, Virginia.

My dear Dr. Farmer:

I am in receipt of your letter of July 10, from which I quote in part:

"There are only a few states in the United States that will allow Brandeis graduates to take the state board veterinary examination. Massachusetts is one such state, that allows it, and Brandeis University is located in Massachusetts. Under our existing state law we, examiners, cannot refuse to examine these graduates. We are looking for a way out of our dilemma.

"During the last two years about sixty graduates of Brandeis University have taken the examination before our state board of veterinary examiners. From this 'Diploma Mill' about thirty men have been licensed in this State,

who, according to the Bureau of Animal Industry are not qualified to test cattle. Should cattle react to either the Bang or the Tuberculin test no indemnity will be paid the (perhaps) non suspecting cattle owner for his reacting cattle. Unless the veterinarian applying the test was an accredited veterinarian. In such an event I am wondering if the cattle owner would not have a case against the board of veterinary examiners who licensed this man knowing that he was not, and could not become, an accredited veterinarian."

"Would it, under the facts set forth, be in order for this examining board to ask of all candidates taking the examination, this question. 'Are you an accredited veterinarian and if not are you allowed to take the accredited veterinary examination given by the Bureau of Animal Industry'? If this answer is 'no' can we refuse a license on these grounds?"

In answer to your first question, it is my opinion that a cattle owner would not have a case against the Board. The Veterinary Examiners issue licenses to men who have met the standards required to practice in this State. It is immaterial that the Federal Government has a different or higher standard than that required in this State before a person becomes an accredited veterinarian.

Your second question must be answered in the negative. Section 1276 of the Code requires the Board to examine all persons making application to them. Until legislation is passed requiring applicants to be graduates of an accredited veterinarian school it is my opinion that the Board must continue to examine graduates of Brandeis University.

With best wishes, I am

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

VIRGINIA HOSPITAL AND INSPECTION ACT—Home for Indigent Aged Persons Which Accepts Children and Offers Hospital Facilities Should be Licensed.

May 6, 1948.

DR. L. J. ROPER, *Commissioner*,
State Department of Health,
Richmond 19, Virginia.

My dear Dr. Roper:

This is in reply to your letter of April 29, in connection with the enforcement of Chapter 15, Section 1514a-2, Acts of Assembly, Extra Session of 1947, as amended, and known as the Virginia Hospital Licensing and Inspection Law.

You pointed out that the term "hospital" is defined in sub-section (3) of Section 1514a-2 and means any institution, place, agency, etc. in which there is offered hospitalization of two or more non-related mentally or physically sick or injured persons, or any institution, place, agency, etc. that cares for two or more non-related persons requiring or receiving medical or nursing attention. You also point out that the General Assembly of 1948 amended the Act by adding to it institutions to be excluded from its provisions as follows:

"and exclusive also of any home for indigent aged persons owned or operated by a county, or by two or more political sub-divisions jointly, city or town."

You desire an opinion as to whether or not the homes excluded by the above amendment should be included in the category of a "hospital" when they have certain hospital facilities available for the care and treatment of two or more patients. You also state that many of these homes accept children as well as aged persons.

If the facts are such that the home is owned or operated by a county, town, city, or two or more political sub-divisions jointly and is run exclusively for indigent aged persons and the hospital facilities are available only for the inmates of that home, it is my opinion that such a home is excluded from the provisions of the Act by the 1948 amendment.

However, if the home regularly accepts children and, for example, wayward mothers, and hospital facilities are provided for them, it is my opinion that the home is not one for indigent aged persons within the meaning of the Act and thus is not exempt from licensing and inspection.

In other words, it appears to me that whether or not a so-called home for indigent aged persons comes within the provisions of the Virginia Hospital Licensing and Inspection Law would depend largely upon the facts surrounding each case. If the admission of a child to a home for indigent aged persons is merely incidental to the admission of an aged person, the fact that hospital facilities are available would be immaterial. On the other hand, if the home held itself out as caring for a certain number of children a year and provided nursing or medical care for them, the Act would be applicable.

In conclusion, I should state that, if a home is being operated for aged persons as well as for children, only that part of the home that is set aside for children should be licensed and inspected under the Act in question.

Very sincerely yours,

J. LINDSAY ALMOND, JR.,
Attorney General.

VIRGINIA MILITARY INSTITUTE—Eligibility of Members of Board of Visitors not Affected by Terms of Statute under Certain Conditions.

May 11, 1948.

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

My dear Governor Tuck:

I am in receipt of your letter of May 10, requesting an opinion as to the eligibility of Mr. Jay W. Johns and Mr. W. I. Whitefield for reappointment to the Board of Visitors of the Virginia Military Institute, said appointments to take effect July 1, 1948.

You state that the records of your office disclose that Mr. Johns has been a member of this board since September 23, 1937, and Mr. Whitefield's membership dates from September 19, 1940.

The statute of these gentlemen as to eligibility for reappointment is controlled by Acts of Assembly of 1946, Chapter 250, page 414 (Virginia Code Section 835). This Act was approved March 25, 1946.

The provisions of the statute relating to ex-officio members have no bearing on the instant question. The law renders ineligible for reappointment those persons who have served for or during more than two successive terms. However, both of the gentlemen named by you were incumbents at the time the Act took effect and serving terms which began on July 1, 1944. This term for each will expire July 1, 1948. The act, insofar as material, provides that "incumbency during the current term when this amendment takes effect con-

stitutes the first of the two successive terms with respect to eligibility for appointment." It is clear, therefore, that the term beginning July 1, 1944, and ending July 1, 1948, must be considered as the first of the "two successive terms" and both Mr. Johns and Mr. Whitefield as eligible for appointment to the second of the "two successive terms" which begin July 1, 1948.

Respectfully submitted,

J. LINDSAY ALMOND, JR.,
Attorney General.

WARRANT—Charging Violation of State Law—Fine Should be Paid into State Treasury.

August 13, 1947.

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

My dear Mr. Johnson:

This is in reply to your letter of August 6, 1947, in which you state that one Benjamin H. Luster was convicted on a warrant charging him with "operating an automobile on the streets of Smithfield while under the influence of intoxicants." You further state that the Town of Smithfield has an ordinance against drunken driving, and ask whether or not the fine imposed in this case should be paid to the Town or into the State treasury.

From the copy of the warrant in this case which you sent to me with your letter of August 11 it appears that the warrant is in the name of the Commonwealth and on the back the case is styled "Commonwealth vs. Benjamin H. Luster." The warrant charges a State offense and does not specifically charge a violation of a town ordinance, as is customary when the warrant is for the violation of such an ordinance. It is my opinion, therefore, that the warrant in this case is one charging a violation of a State offense and not a violation of a town ordinance and, in accordance with the past rulings of this office in such cases, the fine should be paid into the State treasury.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

WARRANTS—Person Can Not be Tried upon a Search Warrant.

January 15, 1948.

HONORABLE A. E. COOLEY,
Trial Justice of Carroll County,
Hillsville, Virginia.

My dear Mr. Cooley:

This is in reply to your letter of January 10, in which you ask whether a trial justice has the right to try an accused under a search warrant.

Search warrants were not known at common law and therefore can be given only the effect which the statute allowing issuance of search warrants permits. A search warrant does not accuse anyone of a crime, but merely authorizes a search for specified things in specified places. There is nothing in the Code from which it could be implied that a person can be tried upon

a search warrant, and it is, therefore, my opinion that a regular type warrant should be used, and a search warrant cannot be used as the basis for trying an accused.

With best wishes, I am

Very truly yours,

HARVEY B. APPERSON,
Attorney General.

WOMEN—Employed as Office Assistants May Work More Than Forty-Eight Hours per Week.

November 26, 1947.

HONORABLE ARCHER L. JONES,
Commonwealth's Attorney,
Hopewell, Virginia.

My dear Mr. Jones:

This is in reply to your letter of November 21, in which you request my opinion as to whether the provision of section 1808 of the Code which prohibits a female from working more than 48 hours in any one week and more than 9 hours in any one day of 24 hours is applicable to the following type of female employee:

"X operates a dry cleaning establishment in this city in which a number of employees are employed. After the clothes are dry cleaned they are then sent to two separate branch offices. In each of these offices a lady is employed, whose duties are as follows: To receive the clothes from the customer as they bring them into the branch offices to be sent to the plant for cleaning, and to give the customer a receipt therefor. The driver from the plant then comes to the branch offices and gathers up the clothes which have been checked in, and after they are cleaned redelivers them to the branch office. The lady employed in branch office then delivers them to the customers as they call in person for the same, collecting from the customers and giving him a receipt. She then enters this amount on the records of the company. The young ladies thus employed in the branch offices have no other duties."

The pertinent part of section 1808 of the Code, as amended by Chapter 409, Acts of Assembly 1938, is as follows:

"No female shall be employed, suffered, or permitted to work in any factory, workshop, laundry, restaurant, mercantile or manufacturing establishment in this state more than forty-eight hours in any one week, nor more than nine hours in any one day of twenty-four hours. * * * But nothing in this section shall be construed to apply to females whose full time is employed (a) as bookkeepers, stenographers, cashiers or *office assistants*, buyers, managers or assistant managers and office executives. * * *" (Italics supplied)

It is apparent for the facts set out above that the employee in question works in *an office* and *not in a factory*, workshop, laundry etc. Therefore, it is my opinion that she is an "office assistant" and as such is not prohibited from working more than 48 hours in any one week or more than 9 hours in any one day of 24 hours.

Very sincerely yours,

HARVEY B. APPERSON,
Attorney General.

WORLD WAR II HISTORY COMMISSION—Sale of Publications Issued by it Should be Through the Division of Purchase and Printing.

July 31, 1947.

MR. W. EDWIN HEMPHILL, *Director*,
Virginia World War II History Commission,
University of Virginia Library,
Charlottesville, Virginia.

Dear Mr. Hemphill:

This is in reply to your letter of July 28, in which you ask whether the Virginia World War II History Commission is prohibited from offering for sale the publications which it is planning to issue.

Chapter 159 of the Acts of Assembly, 1944, which empowers the History Commission to collect, assemble, edit and publish certain material, does not authorize the direct sale of the same by the Commission. I call your attention to section 401 of the Code, which provides in part as follows:

"All books, documents, and maps published by the State shall be delivered to the Director of the Division of Purchase and Printing, who shall distribute the number of copies as required by law and preserve at least twenty-five copies of each. The Director is authorized to sell, or distribute, or to sell and distribute, the books, documents and maps not required to be distributed or preserved, fixing such price per copy as may be reasonable and sufficient to cover the cost of printing, mailing and handling. * * *

It is my opinion that the sale of the publications of the Commission should be through the Director of the Division of Purchase and Printing. I suggest that you communicate with him in order that plans can be made for the sale and distribution of such publications.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

WORLD WAR ORPHAN ACT—No tuition Should be Paid for Such Orphans Admitted to a State Institution.

August 20, 1947.

MR. V. L. NUNN, *Auditor*,
College of William and Mary,
Williamsburg, Virginia.

My dear Mr. Nunn:

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

"A question as to the interpretation of the 'World War Orphan Act' on pages 817 and 818, Item 122 of the 1946 Acts of Assembly, has come up, and it will be greatly appreciated if you will give us your decision as to which of the following is correct:

"Children between the ages of 16 and 25 years, are according to the Act, entitled to be admitted to State Institutions of secondary or college grade free of tuition. Does this mean the institution is to rebate the tuition, or is it supposed to bill the State Board of Education for the amount of tuition? According to a letter from Mr. Anderson, Director of Rehabilitation, the State Board of Education is not to pay the bill. However, according to the last paragraph of the item referred to above, it appears a fund has been set up within the State Board to take care of such cases."

The item referred to appropriates \$4000 for each year of the biennium for

the purpose of providing for matriculation fees, board and room rent, books and supplies, at any educational institution in the State of Virginia, approved in writing by the Superintendent of Public Instruction, for the use and benefit of certain children. The item also provides that such children "upon recommendation of the State Board of Education shall be admitted to State institutions of secondary or college grade, free of tuition. The amounts that may become due to any such educational or training institution, not in excess of the amount hereinafter specified, shall be payable to such institution from the fund hereby created on vouchers approved by the State Board of Education. * * * Not more than \$200 shall be expended for any one child during any one year."

I have given this matter very careful thought and have reached a definite conclusion that the provision for payment of tuition by the State Board of Education refers only to institutions other than "State Institutions of secondary or college grade". In view of the limitation of \$200 which may be expended, it would be very much to the advantage of the student to attend such a State institution "free of tuition", rather than attend an institution like Roanoke College, Hampden Sydney, Randolph Macon, or other similar institutions, where the tuition would be paid and deducted from his \$200 maximum. If it had been intended that the State Board of Education should pay the tuition at the State institutions referred to, there would have been no reason for inserting the provision that the child should be admitted to such institutions free of tuition.

It is my opinion, therefore, that no tuition should be paid for any such child admitted to a State institution "upon recommendation of the State Board of Education".

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

WRIT OF POSSESSION—Officer Executing Writ has Authority to Remove Persons and Property from Dwelling.

April 27, 1948.

HONORABLE L. H. SHRADER,
Trial Justice for Amherst County,
Amherst, Virginia.

My dear Mr. Shrader:

This is to acknowledge your letter of April 23, from which I quote in part as follows:

"Please advise whether under a writ of possession delivered to the sheriff the sheriff should give the possession of the property as directed by the writ and whether or not it is the duty of the sheriff to remove from the dwelling the person and the property in the dwelling."

I am assuming for the purpose of this opinion that the judgment under which the writ in question issues is for the possession of real property.

Section 6483 of the Code provides, among other things, that the officer to whom the writ of possession has been delivered shall put the plaintiff in possession. Therefore, it is my opinion that the officer must take all necessary steps in order to do so, and, if the removal of a person from the dwelling and the removal of all the personal property therein are required in order to carry out the provisions of section 6483, it is the duty of the sheriff in the instant case to so remove the person and the personal property.

Very sincerely yours,

J. LINDSAY ALMOND, JR.,
Attorney General.

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