

REPORT

OF THE

ATTORNEY GENERAL

TO THE

Governor of Virginia

From June 30, 1925 to July 1, 1926

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RICHMOND.  
DAVIS BOTTOM, SUPERINTENDENT OF PUBLIC PRINTING



## ATTORNEYS GENERAL OF VIRGINIA

*From 1776 to 1926*

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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. AYERS .....	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. HANK, JR. ....	1918
JOHN R. SAUNDERS .....	1918-1922
JOHN R. SAUNDERS .....	1922

### Office of the Attorney General

JOHN R. SAUNDERS .....	<i>Attorney General</i>
LEWIS H. MACHEN .....	<i>Assistant Attorney General</i>
LEON M. BAZILE .....	<i>Assistant Attorney General</i>

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

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# REPORT

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COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., November 1, 1926.

HON. HARRY F. BYRD,  
*Governor of Virginia,*  
*Richmond, Virginia.*

MY DEAR GOVERNOR:

As required by law, I herewith submit the following report of the work of this office for the period from June 30, 1925, to July 1, 1926.

This report does not contain all of the opinions rendered by this office, but only those have been selected which are of the utmost importance.

Respectfully,

JOHN R. SAUNDERS,  
*Attorney General.*

## Cases Decided in the Supreme Court of Appeals of Virginia

1. *Anderson v. Commonwealth.* Prohibition. From circuit court of Elizabeth City county. Reversed.

2. *Atlantic Coast Line R. R. Co. v. Commonwealth.* Pullman surcharge. From State Corporation Commission. Reversed.

3. *Bates v. Commonwealth.* Prohibition. From circuit court of Scott county. Error confessed.

4. *Beverly v. Commonwealth.* Attempt to rape. From circuit court of Washington county. Error confessed.

5. *Brown v. Commonwealth.* Contempt of court. From hustings court of the city of Richmond. Affirmed.

6. *Butts v. Commonwealth.* Robbery. From circuit court of Norfolk county. Reversed.

7. *Byrd v. Commonwealth.* Prohibition. From the circuit court of Charles City county. Writ dismissed.

8. *Cornell v. Commonwealth.* Murder. From the circuit court of Brunswick county. Affirmed.

9. *Denis v. Commonwealth.* Forgery. From hustings court of the city of Richmond. Affirmed.

10. *Hall, Culton P., v. Commonwealth.* Prohibition. From circuit court of Wise county. Affirmed.

11. *Hall, Oscar B., v. Commonwealth.* Prohibition. From circuit court of Albemarle county. Affirmed.

12. *Hamilton v. Commonwealth.* Violation of toll laws. From circuit court of Augusta county. Affirmed.

13. *Harrison v. Commonwealth*. Prohibition. From circuit court of Surry county. Dismissed.
14. *Johnson v. Commonwealth*. Prohibition. From circuit court of Hanover county. Affirmed.
15. *Layne v. Commonwealth*. Contempt of court. From circuit court of Charlotte county. Affirmed.
16. *Lee, Arthur T., v. Commonwealth*. Rape. From corporation court of the city of Hopewell. Error confessed.
17. *Lee, Milton, v. Commonwealth*. Assault, with attempt to murder. From circuit court of Essex county. Affirmed.
18. *Looney v. Commonwealth*. Prohibition. From circuit court of Buchanan county. Reversed.
19. *Martin v. Commonwealth*. Prohibition. From circuit court of Nottoway county. Affirmed.
20. *McPherson, Alle, v. Commonwealth*. Prohibition. From circuit court of Prince William county. Error confessed.
21. *McPherson, Cleveland, v. Commonwealth*. Prohibition. From circuit court of Prince William county. Error confessed.
22. *McPherson, Dennis, v. Commonwealth*. Prohibition. From circuit court of Prince William county. Error confessed.
23. *Messer v. Commonwealth* (No. 1). Prohibition. From circuit court of Giles county. Reversed.
24. *Mundy v. Commonwealth*. Manslaughter. From circuit court of Buckingham county. Reversed and remanded.
25. *Nelson v. Commonwealth*. Manslaughter. From circuit court of Nelson county. Reversed.
26. *Nickens v. Commonwealth*. Prohibition. From circuit court of Prince William county. Error confessed.
27. *Palmer v. Commonwealth*. Murder. From circuit court of Alleghany county. Affirmed.
28. *Perdue v. Commonwealth*. Prohibition. From circuit court of Giles county. Error confessed.
29. *Phillips v. Commonwealth*. Larceny. From circuit court of Buckingham county. Error confessed.
30. *Raby v. Commonwealth*. Murder. From circuit court of Prince George county. Dismissed.
31. *Ramey v. Commonwealth*. Prohibition. From circuit court of Buchanan county. Reversed.
32. *Rosenbaum v. Commonwealth*. Larceny. From circuit court of Washington county. Error confessed.
33. *Royals v. Commonwealth*. Prohibition. From circuit court of Norfolk county. Reversed.
34. *St. Clair v. Commonwealth*. Murder. From circuit court of Wythe county. Error confessed.
35. *Scott v. Commonwealth*. Murder. From circuit court of Wise county. Affirmed.

36. *Shiflett v. Commonwealth*. Murder. From circuit court of Albemarle county. Affirmed.

37. *Spencer v. Commonwealth*. Murder. From circuit court of Wise county. Affirmed.

38. *Thomason v. Commonwealth*. Prohibition. From circuit court of Fluvanna county. Reversed.

39. *Virginia Railway and Power Co. v. Burr's Admx.* Action for damages. From hustings court of the city of Petersburg. Reversed and remanded.

40. *Walker & Warner v. Commonwealth*. Forfeited recognizance. From circuit court of Brunswick county. Affirmed.

41. *Warren v. Commonwealth*. Murder. From circuit court of Prince George county. Reversed.

42. *Were v. Commonwealth*. Prohibition. From circuit court of Prince William county. Error confessed.

43. *Wiseman v. Commonwealth*. Embracery. From circuit court of Shenandoah county. Affirmed.

44. *Wood v. Commonwealth*. Assault. From circuit court of Grayson county. Dismissed.

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

*Patterson v. Commonwealth*. Murder. From the Supreme Court of Appeals of Virginia. Dismissed.

*Reeves Warehouse Corporation v. Commonwealth*. Prosecutions under tobacco warehouse law. From the Supreme Court of Appeals of Virginia. Dismissed.

### Cases Pending in the Supreme Court of Appeals of Virginia

1. *Ballard v. Commonwealth*. Attempt to rape. From the circuit court of Albemarle county.

2. *Beavers v. Commonwealth*. Prohibition. From circuit court of Prince William county.

3. *Brooks v. Commonwealth*. Manslaughter. From circuit court of Russell county.

4. *Brown v. Commonwealth*. Prohibition. From circuit court of Charles City county.

5. *Caskie & Gravatt v. Commonwealth*. Blue sky law. From State Corporation Commission.

6. *Chesapeake and Potomac Telephone Co. v. Commonwealth*. Rates. From State Corporation Commission.

7. *Collier & Deane v. Commonwealth*. Malicious trespass. From circuit court of Rockingham county.

8. *Collins v. Commonwealth*. Forfeited recognizance. From circuit court of city of Radford.

9. *Colvin v. Commonwealth*. Prohibition. From circuit court of Fauquier county.

10. *Commonwealth of Virginia and Giles County v. Pembroke Limestone Works*. Alleged erroneous assessment. From circuit court of Giles county.

11. *Crook v. Commonwealth*. Sunday law. From circuit court of Norfolk county.
12. *DeBoer v. Commonwealth*. Prohibition. From circuit court of York county.
13. *Gimbell v. Commonwealth*. Prohibition. From circuit court of Roanoke county.
14. *Grayson v. Commonwealth*. Prohibition. From circuit court of Stafford county.
15. *Harold v. Commonwealth*. Voluntary manslaughter. From circuit court of Warwick county.
16. *Jackson v. Commonwealth*. Housebreaking. From circuit court of Louisa county.
17. *Judd v. Commonwealth* (No. 1). Seduction. From circuit court of Rockingham county.
18. *Judd v. Commonwealth* (No. 2). Application for bail. From circuit court of Rockingham county.
19. *Keeney v. Commonwealth*. Prohibition. From circuit court of Prince William county.
20. *Lillard & McAllister v. Commonwealth*. Prohibition. From circuit court of Madison county.
21. *Lehigh Portland Cement Co. v. Commonwealth*. Assessment. From circuit court of Augusta county.
22. *Manley & Thomas v. Commonwealth*. Trespass. From circuit court of Albemarle county.
23. *Mansfield v. Commonwealth*. Prohibition. From circuit court of Albemarle county.
24. *Messer v. Commonwealth* (No. 2). Prohibition. From circuit court of Giles county.
25. *Morris, et al., v. Commonwealth*. Prohibition. From circuit court of Wise county.
26. *Owens v. Commonwealth*. Prohibition. From corporation court, part 2, city of Norfolk.
27. *Page v. Commonwealth*. Embezzlement. From circuit court of city of Richmond.
28. *Pembroke Limestone Works v. Commonwealth*. Alleged erroneous assessment. From circuit court of Giles county.
29. *Peoples v. Commonwealth*. Murder. From circuit court of Norfolk county.
30. *Pflaster v. Commonwealth*. Malicious assault. From circuit court of Loudoun county.
31. *Piedmont Credit Co. v. Commonwealth*. Forfeited automobile. From circuit court of Washington county.
32. *Piedmont Finance Corporation v. Commonwealth*. Forfeited automobile. From circuit court of Augusta county.
33. *Randall v. Commonwealth*. Prohibition. From the circuit court of Prince William county.
34. *Randolph v. Commonwealth*. Assault. From the circuit court of Scott county.

35. *Rhodes v. Commonwealth*. Embezzlement. From corporation court of city of Richmond.
36. *Rowland v. Commonwealth*. Rape. From corporation court, part 2, of the city of Norfolk.
37. *Shields v. Commonwealth*. Prohibition. Circuit court of Campbell county.
38. *Shiflett v. Commonwealth*. Prohibition. From circuit court of Madison county.
39. *Smith & Miller v. Commonwealth*. Prohibition. From circuit court of Buckingham county.
40. *Smith, S. I., v. Commonwealth*. Attempt to murder. From circuit court of Nottoway county.
41. *Superior Steel Corporation v. Commonwealth*. Taxation. From State Corporation Commission.
42. *Thurpin v. Commonwealth*. Prohibition. From circuit court of Arlington county.
43. *Timmons v. Commonwealth*. Prohibition. From circuit court of Henrico county.
44. *Virginia Pilot Association v. Commonwealth*. Pilotage rates. From State Corporation Commission.
45. *Western Gas Construction Co. v. Commonwealth*. Foreign corporation doing business in Virginia without license. From State Corporation Commission.
46. *Wilson v. Commonwealth*. Malicious assault. From circuit court of Lee county.
47. *Wood, Jno., v. Commonwealth*. Attempt to rape. From circuit court of Albemarle county.
48. *Zimmerman v. Commonwealth*. Prohibition. From circuit court of Bedford county.

### Cases Pending in the Circuit Court of the City of Richmond

1. *Commonwealth v. O. B. Thomas, Treasurer.*
2. *Commonwealth v. G. T. Barr, Treasurer.*
3. *Commonwealth v. W. M. Gray and J. J. Geisler.*
4. *Commonwealth v. O. D. Foster, Adm.*
5. *Commonwealth v. A. D. Phillips, et als.*
6. *Commonwealth v. A. M. Browning.*
7. *Commonwealth v. Chesapeake and Ohio Railway Co.*
8. *Commonwealth v. Atlantic Coast Line Railroad Co.*
9. *Commonwealth v. Virginia Railway and Power Co.*
10. *Commonwealth v. John T. Fitzpatrick, etc.*
11. *Commonwealth v. John B. Evans, Sergeant.*
12. *Commonwealth v. E. Thompson, Clerk.*
13. *Commonwealth v. R. E. Glover, Com'r of Revenue.*
14. *Commonwealth v. Jas. V. Trehy.*
15. *Commonwealth v. Southeastern Iron Co.*
16. *Commonwealth v. R. Lee Harvey, trading as, etc.* Judgment satisfied.
17. *Commonwealth v. Crown Oil and Wax Co.* Judgment satisfied.

18. *Commonwealth v. Sinclair Refining Co.* Dismissed.
19. *Commonwealth v. American Oil Co.* Dismissed.
20. *Commonwealth v. Abingdon Gas and Oil Co.* Judgment without satisfaction.
21. *Commonwealth v. Lee Highway Service.* Dismissed.
22. *Commonwealth v. Taylor Korman Oil Co.* Dismissed.
23. *Commonwealth v. Wilkins & Robinson Co.* Dismissed.
24. *Commonwealth v. John C. Niemeyer, etc.* Judgment satisfied.
25. *Commonwealth v. Seaboard Air Line Railway Co.*

### In Chancery

1. *Commonwealth v. P. H. Huffman, et als.*
2. *Commonwealth v. Walter Milan, Treasurer.*
3. *Commonwealth v. T. J. Young, Treasurer.*
4. *Commonwealth v. A. A. Chapman, Treasurer.*
5. *Commonwealth, ex rel. Joseph Button, Com'r of Insurance, v. Surety Corporation of America.*
6. *Commonwealth v. Provident Relief Association.*
7. *Fidelity and Deposit Co. of Maryland v. Commonwealth.*
8. *Commonwealth v. Wm. H. Wyatt.*
9. *A. G. Harwood v. State Highway Commission, et als.*
10. *Carter Glass v. State Live Stock Sanitary Board.*
11. *R. H. Stuart's Ex'ors v. Commissioners of Sinking Fund.* Ended.
12. *Minton W. Talbot v. C. Lee Moore, Auditor of Public Accounts.*
13. *W. P. Weaver v. State Live Stock Sanitary Board.*
14. *Sunrise Development Corp. v. W. N. Jackson, et als.* Dismissed.

### Portraits of Former Attorneys General Now in the Office of the Attorney General

Portrait of EDMUND RANDOLPH, first Attorney General of Virginia, 1776-1786.  
A copy made and loaned the office by Miss Emma Whitfield, artist, Richmond, Va.

Portrait of JOHN ROBERTSON, Attorney General, June, 1819-1834. Loaned the Attorney General's office by the State Library Board.

Portrait of JOHN RANDOLPH TUCKER, Attorney General, 1857-1865. Presented by his son, Hon. Harry St. George Tucker.

Portrait of RALEIGH T. DANIEL, Attorney General, 1874-1877. Presented by his family.

Portrait of RUFUS A. AYRES, Attorney General, 1886-1890. Presented by his family.

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# OPINIONS

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## JUVENILE AND DOMESTIC RELATIONS COURTS—Appointment of justice.

RICHMOND, VA., June 30, 1926.

HON. W. CLYDE DENNIS,  
*Attorney at Law,*  
*Grundy, Va.*

MY DEAR SIR:

Acknowledgment is made of your letter of June 24, 1926, in which you state the board of supervisors of your county has adopted section 4988 of the Code of Virginia, 1919, as amended by chapter 511 of the Acts of 1926. You then ask me to advise you whether the appointment and qualification of a trial justice will deprive the juvenile justice of the authority formerly granted to him in subsection 5 of chapter 483 of the Acts of 1922.

My opinion is that section 4988 of the Code of Virginia, 1919, as amended, does not in any way affect the jurisdiction of the juvenile and domestic relations courts as given them by chapter 483 of the Acts of 1922. The only Code section known as section 1953 is that section which is found in the Code of 1919, which was amended by the Acts of 1922, page 829. This section provides when the terms of special justices under chapter 81 of the Code shall begin, and has nothing to do with the jurisdiction of juvenile and domestic relations courts, and, as a matter of fact, has no section 5. It is true that Michie, in his Virginia Code of 1924, which is an unofficial code, incorporated chapter 483 of the Acts of 1922 in that code as sections 1953a-1953n, inclusive, but this would not supply the defect contained in subsection 5 (b) of section 4988 of the Code of Virginia, 1919, as amended.

With reference to the second paragraph of your letter, I call your attention to *Pratt v. Allen*, 13 Conn. 119; *G. B. & C. N. G. Ry. Co. v. Gross*, 47 Tex. 428, and *Coquenhan v. Avoca Drainage District, et al.*, 130 La. 323, 326-7, 57 Sou. 989. See also Cooley's Constitutional Limitations, 114-117.

As to the question of salary, subsection 4 of section 4988 of the Code, as amended, provides that a justice is to receive a salary of not less than \$600 per annum, nor more than \$2,500 per annum, to be fixed by the board of supervisors of the county. I do not think that it would be proper for me to express my views as to this question, as it would unquestionably trespass upon a right which the legislature has conferred upon the board of supervisors.

Trusting this gives you the desired information, I am

Very truly yours,

JNO. R. SAUNDERS,  
*Attorney General.*

**EPILEPTIC COLONY—Meaning of contract.**RICHMOND, VA., *June 29, 1926.*

HON. S. L. FERGUSON,

*Appomattox, Va.*

MY DEAR SAM:

I did not write you before now in reference to the corporation or firm with which Mr. J. Tanner Kinnier is connected selling supplies to the epileptic colony, due to the fact that on June 24th Hon. Lewis H. Machen, one of my assistants, wrote you a letter, which he showed me at the time and which I thought pretty well covered the situation. However, I am this morning in receipt of a letter from Governor Byrd, enclosing your letter to him, in which you requested that I write you at once.

In my letter to Dr. J. H. Bell of June 4th, which you have seen and which evidently pertained to this situation, I simply construed section 1059 of the Code of Virginia, 1919, as requested in his letter to me. In addition to section 1059 of the Code of Virginia, 1919, I beg leave to call your attention to section 998 of the Code, which reads as follows:

"No person who is a member of any board of visitors of any State institution, or an employee or agent thereof, or a trustee of any public trust or fund, or a salaried officer of any such State institution, or of any such public trust or fund, shall contract, or be interested in any contract, with such institution, or with the governing authority of such public trust or fund in any manner or form, for furnishing supplies, or for performing any work for said institution, or for said governing authority of said trust or fund. Any person violating the provisions of this section shall be fined not exceeding five hundred dollars."

In your letters to me, you seem to take the position that small purchases made from time to time by the epileptic colony of the corporation are not the character of contract referred to in the statute. I am of the opinion, and I think it is correct, that every purchase is a contract regardless of the amount of purchase or the manner in which the purchase is made, that is by cash or on credit.

This question has several times been presented to this office in connection with various statutes, all having the same general purpose. I would refer you to the opinion of Attorney General William A. Anderson, in report for 1906, page 36; to opinion of Assistant Attorney General C. B. Garnett, in report for 1917, page 92, and to my opinion in Report for 1918, page 89. To the same effect is my letter of February 29, 1924, to Mr. J. G. Hening, of Richmond, of which I enclose a copy. Although these opinions relate to various statutes, they concur in holding that transactions involving sales of goods are contracts within the meaning of the law.

Very truly yours,

JOHN R. SAUNDERS,

*Attorney General.*

## COUNTY SCHOOL BOARD—Loans.

RICHMOND, VA., June 28, 1926.

HON. CHARLES W. CRUSH,  
*Commonwealth's Attorney,*  
*Christiansburg, Virginia.*

MY DEAR MR. CRUSH:

Acknowledgment is made of your letter of June 26, 1926, in which you state that in 1925 the school board of your county, under authority of chapter 352 of the Acts of 1918, borrowed \$45,000; that since the taking effect of chapter 46 of the Acts of 1926 the school board has made application to the board of supervisors to permit it to borrow an additional \$25,000, the first loan not having been repaid. You state that the proper notices required by chapter 46 of the Acts of 1926 have been issued, and then say:

"This loan will not be in excess of one-half of the amount produced by the aggregate school levy for this year, but when added to the previous temporary loan it would be much in excess of such an amount.

"Please advise me if, in your opinion, the board of supervisors would have the authority to make a second loan before the first has been paid off, and, if they have such authority, whether the school board can borrow in the second loan more than one-half of the amount produced by the aggregate school levy produced this year. This question is of great importance in the county, and I want your opinion on it and would appreciate it if you will let me know as soon as possible."

Chapter 352 of the Acts of 1918 prohibited a second temporary loan until the first loan had been repaid.

As you say, chapter 46 of the Acts of 1926 contains no such prohibition. Section 2 of the latter act, however, authorizes the school board to make temporary loans, with the approval of the board of supervisors, and provides that a temporary loan, when made, shall be repaid within five years from its date. Section 2 of the act, in authorizing school boards to make temporary loans, however, expressly provides that such temporary loans are "not to exceed one-half of the amount produced by the aggregate school levy in such county, city or town for the year in which the loan is negotiated."

Although chapter 46 of the Acts of 1926 has abolished the prohibition against the making of a second loan while the first loan, or any part thereof, remains unpaid, it seems to me that the clear intent of the above-quoted provision of section 2 of the act was, though permitting more than one loan, to prohibit the aggregate of such loans from exceeding one-half of the amount produced by the aggregate school levy for the year in which the loan is negotiated.

Trusting this gives you the desired information, I am

Very truly yours,

JOHN R. SAUNDERS,

*Attorney General.*

**ELECTIONS—Eligibility of voters.**RICHMOND, VA., *June 28, 1926.*

MR. J. D. WINE,

*Forestville, Va.*

MY DEAR SIR:

Acknowledgment is made of your letter of June 26, 1926, in which you state that a special election will be held in your county on July 6th, and you ask me to advise you what persons are qualified to vote in such election under section 83 of the Code.

Section 83 of the Code provides that "at any such special election, held on or after the second Tuesday of June in any year, any person shall be qualified to vote who is or was qualified to vote at the regular election held on the Tuesday after the first Monday in November of that year." This means that all persons who are or will be eligible to vote in the regular November, 1926, election will be entitled to vote in the special election held in your county on July 6, 1926.

Assuming that a person is qualified as to residence, etc., in order to vote in the November, 1926, election, he or she must have paid his or her capitation taxes for each of the three years preceding the year 1926, for which he or she was assessed or assessable, at least six months prior to the day on which the November, 1926, election will be held. Young persons just coming of age would not be assessed or assessable with a capitation tax, and are, therefore, not required to pay the same in advance.

Trusting this gives you the desired information, I am

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

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**STATUTES—When in effect.**RICHMOND, VA., *June 25, 1926.*

MR. J. S. WALLS,

*234 Holladay street,  
Suffolk, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of June 23, 1926, in which you say:

"Please advise me the exact time that the Acts of the General Assembly for 1926 go into effect. I wish to know whether a person arrested on the night of June 21, 1926, at 11:55 P. M. should be tried under the old law or whether the law as laid down by the Acts of the Assembly for 1926 would be applicable to his case."

Of course, the acts did not go into effect until the beginning of June 22, 1926, which would be midnight June 21-22, 1926. Therefore, a crime committed at 11:55 P. M. on June 21, 1926, would be prosecuted under the law in force at the time the offense was committed. Section 6 of the Code of Virginia, 1919. If the punishment, however, was mitigated by the new law, the defendant could elect to be tried under the new law if he so desired.

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

**BOARD OF SUPERVISORS—Authority of.**RICHMOND, VA., *June 25, 1926.*

MR. B. CLIFFORD GOODE,  
*Division Superintendent,*  
*Martinsville, Virginia.*

DEAR MR. GOODE:

Acknowledgment is made of your letter of recent date, in which you request me to advise you whether the board of supervisors of your county could lay a levy in excess of the \$1.25 authorized by chapter 398 of the Acts of 1920.

The amount of school tax that may be levied by boards of supervisors is limited by chapter 398 of the Acts of 1920. It is my opinion that your board of supervisors is without authority, in the absence of a special act authorizing them to do so, to lay a school levy in excess of \$1.00 and an additional levy in excess of 25 cents to provide for the interest and sinking fund on loans, etc.

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

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**LICENSE—Issuance of.**RICHMOND, VA., *June 25, 1926.*

HON. W. E. RAMSEY,  
*Treasurer of Pittsylvania,*  
*Chatham, Va.*

DEAR MR. RAMSEY:

I beg to acknowledge receipt of yours of the 24th, in which you say:

"I would thank you to give me your opinion as to an act passed by the last General Assembly, page 896, with reference to the issuance of license. If the applicant files with the officer a certificate in writing, stating the capitation paid for the year required by this act, does this release the officer, or should the officer be sure the tax has been paid before delivering the license?"

I have carefully read chapter 539 of the Acts of 1926, to which you refer in your letter, and am of the opinion that when a person who applies for any license, permit, or authorization, has filed with the officer who is authorized to issue such license the certificate in writing, as set forth in this act, such officer is required to issue the license. I do not understand that any penalty attaches to such officer for so doing should it afterwards be ascertained that the applicant has not paid the tax required by law. Of course, if such officer has information before him to the contrary, he would have a perfect right to decline to issue such license.

With regards and best wishes, I am

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

**VIRGINIA REAL ESTATE COMMISSION—Requirement of bond.**

RICHMOND, VA., June 24, 1926.

MR. CHAS. C. BOWE, *Chairman,*  
*Virginia Real Estate Commission,*  
*Richmond Trust Building,*  
*Richmond, Va.*

MY DEAR MR. BOWE:

Acknowledgment is made of yours of the 23rd, in which you say:

"Section 5 of the regulatory real estate license law, approved March 21, 1924, chapter 461, Acts of the General Assembly, has been amended, repealing the bond requirements. Section 10, subsection 3, both in the original and amended law, reads as follows:

"Provided, further, however, that every nonresident of this State shall file a bond in form and content the same as is required of applicants under section five (5) in this act.

"Does the amendment of the first-mentioned section herein above invalidate the last-mentioned section? It is deemed highly desirable to continue the bond requirement of nonresidents."

In reply, I beg to say that I have examined chapter 461, page 691, of the Acts of 1924, and also chapter 489, page 483, of the Acts of 1926, amending sections 3, 5, 7, 9 and 16 of the act of 1924. I find that section 5, as amended in 1926, omits the following provision which was contained in the act of 1924:

"Every application for a license shall be accompanied by a bond to be kept in the office of the commission herein created in the sum of one thousand (\$1,000) dollars, running to the (State of Virginia), executed by two (2) good and sufficient sureties to be approved by the commission or executed by a surety company duly authorized to do business in this State. Said bond to be in form approved by the commission, and conditioned that the applicant shall conduct his business in accordance with the requirements of this act. Provided, however, that the above-prescribed bond shall not be required of any licensed real estate agent residing and conducting a real estate business in any rural section of the State at the time this act takes effect."

It will be observed that section 10 was not amended by the act of 1926. Subsection 3 of that section merely placed nonresident applicants on the same footing with resident applicants in the act of 1924. Therefore, the reference to the bond provided for in section 5 and set forth in subsection of section 10 can have no validity, since it refers to the bond feature of section 5, which has been repealed.

It follows that, in my judgment, no bond is now required either of resident or nonresident applicants. Whether it is desirable to continue the bond requirements, either as to residents or nonresidents, is a matter which I cannot discuss, but can only pass upon the effect of the amendatory act of 1926.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

**COMMISSIONER OF REVENUE—Compensation.**RICHMOND, VA., *June 24, 1926.*

HON. D. WAMPLER FARMAN,  
*Commonwealth's Attorney,*  
*Harrisonburg, Virginia.*

DEAR SIR:

Acknowledgment is made of yours of the 15th, in which you say:

"We have five commissioners of the revenue in Rockingham county. They were elected in November, 1923, and took oath of office January 1, 1924. The General Assembly of 1924, Acts of 1924, page 284, passed an act leaving the matter of the compensation of the commissioners of the revenue with the board of supervisors of Rockingham county. The board has decreased their emoluments approximately \$2,000 a year. The said commissioners claim that this act, passed after they were elected and sworn in as officers, is unconstitutional and is not applicable until January 1, 1928.

"I will appreciate it if you will be good enough to advise me definitely whether or not said commissioners, in your opinion, are entitled to compensation under the old act, or to compensation under the Acts of 1924, page 284. You will note at the top of page 285 of said acts that there is an exception as to Rockingham and Spotsylvania counties."

If you will examine the case of *Shelton v. Sydnor*, which went from the circuit court of Hanover county and which is reported in 126 Va. 625, you will find that Judge Burks, who rendered the opinion in this case, in discussing chapter 286 of the Acts of 1918, found on pages 505-6, held that this statute was unconstitutional and in conflict with the provisions of section 63 of the Constitution, because it provided a rate of compensation for the supervisors in the fifteen counties named in the act which was different from the general classification therein specified. This act is very similar to the act of 1924, page 284, to which you refer in your letter. I would refer you particularly to that part of Judge Burks' opinion which is found in the last paragraph of page 637.

It would, therefore, seem to follow that the act of 1924, referred to in your letter, which fixes a different compensation for the commissioners of the revenue for Spotsylvania and Rockingham counties from that which is provided for other commissioners of the revenue in the act is null and void.

I give you this information as a matter of courtesy, and perhaps it might be wise that the matter should be tested in court.

With kindest personal regards and best wishes, I am

Yours very sincerely,

JOHN R. SAUNDERS,  
*Attorney General.*

**FINES AND FORFEITURES—Where paid.**

RICHMOND, VA., June 24, 1926.

HON. C. LEE MOORE,

*Auditor Public Accounts,**Richmond, Virginia.*

MY DEAR MR. AUDITOR:

Acknowledgment is made of your letter of June 23, 1926, in which you say:

"Upon examining section 72 of chapter 474, page 788, Acts of Assembly, 1926, which directs fines and forfeitures shall be paid into the State treasury and into the treasury of the county, city, or town, I am of the opinion that, in so far as that section directs fines and forfeitures to be paid into the treasury of the county, city or town, it is in violation of the provisions of section 134 of the Constitution of Virginia."

Section 72 of chapter 474 of the Acts of 1926, reads as follows:

"All fines or forfeitures collected upon conviction or upon the forfeiture of bail of any person charged with a violation of any of the provisions of this act constituting a misdemeanor shall be deposited in the State treasury if committed on a State highway and in the treasury of the county, city or town maintaining the court wherein such conviction or forfeiture was had if the offense was committed on a highway constructed and maintained by such political subdivision, in a special fund to be known as the 'highway maintenance fund,' which is hereby created and which shall be used exclusively in the construction, maintenance and repair of public highways, bridges and culverts, or of employing and maintaining devices for traffic control or aid, including personnel, within such respective jurisdictions.

"Failure, refusal or neglect to comply with any of the provisions of this section shall constitute misconduct in office and shall be ground for removal therefrom."

The offenses created by chapter 474 of the Acts of 1926 are offenses against the Commonwealth, and, therefore, all fines collected for violations of this chapter must be paid into the Literary Fund, as provided by section 134 of the Constitution of Virginia.

The provision with reference to the payment of any part of these fines into the treasuries of the localities is, therefore, void as being in conflict with the above-mentioned section of the Constitution, and instead of being paid into such local treasuries must be paid into the State treasury for the benefit of the Literary Fund.

Yours very truly,

JOHN R. SAUNDERS,

*Attorney General.*

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**LICENSE—Selling produce.**

RICHMOND, VA., June 22, 1926.

MR. C. R. LOONEY,

*New Castle, Va.*

MY DEAR SIR:

Acknowledgment is made of your letter of June 21, 1926, in which you state that you are a retail merchant and ask me to advise you whether you can drive your truck in the country and buy up produce, such as butter, eggs, etc., to be sold in your store, without obtaining a license to do so.

It is my opinion that the law permits you to do this without obtaining a license for so doing, but produce so purchased must be included in your report of purchasers in determining the State license tax to be paid.

You further ask me to advise you whether you can deliver goods to your customers, who have ordered the same prior to the delivery, without obtaining a peddler's license.

If the goods have been ordered prior to the delivery, you can do this without an additional license, but the law does not permit you to load your wagon and sell from the same to consumers who have not previously ordered goods, without obtaining a peddler's license so to do, but you can do this if the sales are made only to the trade that is duly licensed retail merchants.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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#### HEALTH—Sewers.

RICHMOND, VA., June 22, 1926.

DR. ENNION G. WILLIAMS,  
*State Health Commissioner,  
Richmond, Va.*

DEAR DR. WILLIAMS:

On April 30th I acknowledged receipt of a letter of Hon. Charles T. Lassiter to you, in which the following questions were asked:

"1. Is section 2757 of the Code sufficiently broad to allow the board of supervisors of Dinwiddie county to establish and maintain, or to cause to be established and maintained, public sewers and *water mains* along the streets, alleys and public highways in the village of Kenilworth if said board shall decide that the same is necessary in order to protect the public health, provided that the sewer proposed to be established shall be approved by the State Board of Health?

"2. If the board of supervisors of Dinwiddie county has authority, under section 2757 of the Code, to establish and maintain public sewers and water mains in the village of Kenilworth, can it apportion the cost by special assessment against the property owners according to benefits, payable in installments bearing legal interest, which assessments shall be a lien upon the real property in the section benefitted?

"3. Has section 2757-A of the Code, Acts 1922, page 68, been amended by the legislature of 1926 so as to make it apply to the village of Kenilworth, in Dinwiddie county, which county is not a separate judicial circuit?"

I replied by saying I had no means of knowing whether there had been any amendments to these statutes until I received the published acts, which have only recently been delivered. I find that these sections have not been amended. I have been of opinion heretofore that, unless amended, these sections were not broad enough to permit the establishment of public sewers in the unincorporated village of Kenilworth. It follows that I must answer all of the questions in the negative.

I return Senator Lassiter's letter herewith.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

**JAILS AND PRISONERS—Duration of sentence.**

RICHMOND, VA., June 22, 1926.

MAJOR R. M. YOEELL, *Superintendent,*  
*The Penitentiary,*  
*Richmond, Va.*

MY DEAR MAJOR YOEELL:

Acknowledgment is made of your letter of June 15, 1926, in which you say:

"I hand you herewith the court order in the case of Pat Vessels, which was received today from King William county. You will note that this man was convicted on April 5, 1923, and at that time was adjudged to be insane and was sent to the Central State Hospital, Petersburg, where he remained until May 25, 1926, when he was returned to King William court and sentenced to five years in the Penitentiary. I am writing to ask if you will kindly give me your opinion whether the time this man was in the Central State Hospital should be allowed him on his Penitentiary sentence, as in cases where they are sent from the Penitentiary to the hospital all the time they remain there is allowed in their sentence, and for this reason I would like to have your opinion in this particular case."

The order entered by the court on June 2, 1926, in part, reads as follows:

"\* \* \* it is considered by the court that the said Pat Vessels be confined in the Penitentiary of this State for a term of five years, from the date hereof, subject to a credit of such time served in jail from May 25, 1926, to the date of this sentence."

I find from an examination of section 4910 of the Code, it is provided that if, after conviction and before sentence, a person is committed to a hospital for the insane and there kept until restored to sanity

"\* \* \* the time such person is confined in the department for the criminal insane at the proper hospital shall be deducted from the term for which he was sentenced to such penal institution, reformatory or elsewhere."

Therefore, this man would be entitled to credit for the time spent by him in the hospital for the insane.

I would suggest that in figuring the time of this man you pursue the course followed by you in other cases where convicts are transferred to hospitals for insane.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

## DEPARTMENT OF AGRICULTURE—Labeling seeds.

RICHMOND, VA., June 22, 1926.

*Hon. G. W. Koener, Commissioner.**Department of Agriculture and Immigration,  
Richmond, Va.*

MY DEAR SIR:

Acknowledgment is made of your communication of yesterday in which you request me to advise you as to the construction of sections 12 and 13 of chapter 114 of the Acts of 1924, relating to the branding and sale of agricultural seeds.

Section 12 of the act provides as follows:

"It shall be unlawful for any person, firm or corporation to sell, offer or expose for sale, or have on hand for distribution any lot of agricultural seeds or mixtures of same, as defined in this act, not properly tagged or labeled as provided herein. The Commissioner of Agriculture and Immigration may cause to be seized and held any lot of agricultural seeds or mixtures of same, found to violate any of the provisions of this act, until the law has been complied with or said violation otherwise legally disposed of; provided, however, that such person, firm or corporation shall have the right immediately to apply to the circuit court of the city or county in which such seizure is made, for release of the same for seizure."

Section 13 of the act prescribes the penalties to be imposed for a violation of the same.

Examination of sections 2, 3, 4, 6 and 8 of the act declare that agricultural seeds shall not be sold in this State, except when properly branded with an analysis tag or label corresponding with the requirements of the act.

Section 6 of the act provides:

"No statements regarding the quality of such agricultural seeds or mixtures, if inconsistent with the requirements of this act, shall be written or printed on the 'analysis tag or label,' or placed inside, or affixed to any container or bulk of agricultural seeds or mixtures sold, offered or exposed for sale or distribution, or held in possession with intent to sell within the State, or shipped from one point within this State to another point within this State, for seeding purposes."

Section 8 of the act reads as follows:

"It shall be unlawful for any person, firm or corporation to sell, offer or expose for sale or distribution, or have in possession with intent to sell within this State, any agricultural seeds or mixtures of same, as defined in this act for seeding purposes, without complying with the requirements of this act, or to falsely mark or label any agricultural seeds or mixtures of same, or to interfere in any way with the inspectors or assistants in the discharge of the duties herein named."

From an examination of the sections of the act above referred to, it is my opinion that the vendor is required to properly brand, tag or label agricultural seeds offered for sale by him, and that, if incorrect analysis tags are attached thereto, the vendor incurs the penalty imposed by sections 12 and 13 of the act, regardless of whether or not he knew the analysis tag was false.

In response to your further inquiry, I am of the opinion that you have no authority to seize agricultural seeds in the absence of proof that the tags attached

thereto are inaccurate or false, and I am further of the opinion that the law vests you with no authority to direct the vendor to suspend the sale of seeds from which samples have been taken for the purpose of analysis pending the analysis by the chemist of your department.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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**BOARD OF SUPERVISORS—Unpaid compensation to clerks.**

RICHMOND, VA., June 21, 1926.

HON. CHARLES B. GODWIN, JR.,  
*Commonwealth's Attorney,*  
*Suffolk, Va.*

MY DEAR SIR:

Acknowledgment is made of your letter of June 18, 1926, in which you say:

"Some time ago our treasurer, Mr. C. R. Fulgham, resigned, and at the time of his resignation he had in his employment in the treasurer's office a young lady who was drawing a salary of \$100 a month. He also had in his employment a man by the name of Reid, who collected taxes for him. Mr. Reid's job was to visit and collect from those who were delinquent in the payment of levies. The duties of the young lady, Miss Artman, who is the deputy treasurer's daughter, were confined within the treasurer's office. Due to the inability of Mr. Fulgham to meet these demands, Miss Artman and Mr. Reid have filed a bill with the board of supervisors requesting them to pay the amount due them for their services, which was unpaid at the time of Mr. Fulgham's resignation. Miss Artman's bill is \$100 and Mr. Reid's bill amounts to around \$300. Both of these parties have been very efficient in their work, and the board would like very much to pay them for their services rendered if they can legally do so, because they feel that while Reid and Miss Artman were not working directly for the county, the services they gave went to the benefit of the county. Before paying either of these items, the board would like to have your opinion as to whether or not they can legally do so."

I note you say in your letter that the services rendered by Miss Artman and Mr. Reid went to the benefit of the county. It seems to me, under these circumstances, that section 2759 of the Code is broad enough to allow the payment of these claims, provided the board thinks that they ought to be paid, and you, as Commonwealth's attorney, are also of the opinion that they should be paid.

While *Nelson County v. Coleman*, 126 Va. 275 (1919), is not in point, it is to be noted that the court in that case, in speaking of this statute, said that its language was "sufficiently broad to embrace every character of claim, whether legal or equitable."

Trusting this gives you the desired information, I am

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

**OFFICE—Eligibility.**RICHMOND, VA., *June 17, 1926.*HON. GEORGE A. BOWLES,  
*Tabscott, Va.*

MY DEAR MR. BOWLES:

In reply to your letter of recent date, in which you desire to be advised whether or not the position of Superintendent of Grounds and Buildings is of such a character as to render a member of the legislature ineligible to hold the same, by virtue of the provisions of section 45 of the Constitution of Virginia, which provides that

"No member of the legislature during the term for which he shall have been elected shall be appointed or elected to any civil office of profit in the State, except offices filled by election by the people."

I would state that, in my judgment, the Superintendent of Grounds and Buildings is not an office as is contemplated by section 45 of the Constitution just quoted. It, therefore, follows that a member of the General Assembly is eligible to hold this position.

With my kindest regards and best wishes, I am

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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**OFFICE—Eligibility.**RICHMOND, VA., *June 17, 1926.*HON. H. E. BEAN,  
*Assistant United States Attorney,  
Norfolk, Va.*

MY DEAR SIR:

I am just in receipt of your letter of the 16th, in which you desire to be advised whether or not your appointment as assistant United States attorney prohibits you from acting as a notary public.

This depends entirely upon whether or not the position of assistant United States attorney is an office. If so, you cannot act as notary public.

If you will examine sections 289, 290 and 291 of the Code of Virginia, 1919, you will find the law bearing on your question, and I am sure you will be able to decide the matter after reading these sections.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

**ELECTIONS—Validity of signature.**

RICHMOND, VA., June 16, 1926.

MR. P. S. FAHRNEY, *Clerk,*  
*Strasburg, Va.*

MY DEAR SIR:

Acknowledgment is made of your letter of June 15, 1926, in which you call attention to section 162 of the Code and ask whether a voter who erases the name of a candidate on a ballot can use a rubber stamp for substituting the name of another person for any office for which he desires to vote, or whether the name substituted must be written.

In my opinion, a name substituted on a ballot with a rubber stamp is such writing as falls within the meaning of section 162 of the Code, and is as valid as if the name were written with pen and ink, or in some other manner.

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

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**OFFICE—Eligibility.**

RICHMOND, VA., June 14, 1926.

MR. HOWELL M. MILLER,  
*Washington, Virginia.*

MY DEAR MR. MILLER:

I am just in receipt of your letter of the 12th, in which you state that at a recent election held in Washington, Va., a third-class postmaster was elected a member of the town council. You then desire to be advised if he can act in this capacity without violating the law.

In reply, I will state that section 291 of the Code provides that a third or fourth-class postmaster can act as a notary public, school trustee, justice of the peace, supervisor, and also hold any district office under the government of any county or the office of councilman of any town or city in the State. It, therefore, follows that the party in question is eligible to be elected and serve as a member of the town council. I am glad to give you this information.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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**DEEDS—Validity of.**

RICHMOND, VA., June 12, 1926.

E. G. LORENZ, ESQ.,  
*Certified Public Accountant (D. C.),*  
*Colorado Building, Washington, D. C.*

MY DEAR SIR:

Acknowledgment is made of your letter of June 11, 1926, in which you say, in part:

"Under date of October 29, 1912, D. H. Leake, special commissioner, conveyed by deed to Coleman Guerrant a tract of land (14 acres), located in

Fluvanna county, deed being admitted to record November 25, 1912, recorded in D. B. No. 7, page 37.

"I note that Katherine Ryan, a notary public of the city of Richmond, taking the acknowledgment of said D. H. Leake, special commissioner, under date of October 31, 1912, omitted to impress her notarial seal.

"The purpose of this letter is to inquire whether or not the aforementioned deed to Guerrant is a valid deed and does, as a matter of fact, actually pass title under your laws without possibility of contest of some sort in the future."

Deeds which are executed in Virginia, conveying estate in Virginia, and acknowledged in Virginia, are valid without a notarial seal being attached to the acknowledgment.

While notaries are permitted by law in this State to have seals, they are not required by law to have the same, and the statute expressly provides that if a notary attaches his seal to an acknowledgment he shall be subject to a fine of \$20, unless he also attaches to the acknowledgment a State seal, which requires the payment of a tax of \$1.00. Therefore, I would say that, if the only trouble with the deed is that the notary failed to attach her notarial seal, it is a valid deed in this State.

Trusting that this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,

*Attorney General.*

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#### INTOXICATING LIQUORS—Trial for same offense.

RICHMOND, VA., June 12, 1926.

ROBERT L. KIRBY, JR., ESQ.,  
*Attorney at Law,*  
*Independence, Va.*

MY DEAR MR. KIRBY:

....

Acknowledgment is made of your letter of June 9, 1926, with reference to the right of the State to try one for a violation of the prohibition law after he has been tried and convicted of the same offense in the Federal court, where the accused was arrested, however, and proceedings started against him in the State court prior to his arrest and trial in the Federal court.

The language of section 98 of the prohibition law is extremely sweeping, but, in view of the decision of our court in *Owens v. Commonwealth*, 129 Va. 757, referred to in your letter, this office would take the position that the State court has the authority to continue the prosecution against the accused. The question is of sufficient importance, however, to justify a test of the matter in the Court of Appeals.

With my best wishes, I am

Sincerely yours,

JOHN R. SAUNDERS,

*Attorney General.*

## CIRCUIT COURTS—Abolition of.

RICHMOND, VA., June 12, 1926.

HON ROBERT T. BARTON,  
*Winchester, Va.*

MY DEAR MAJOR BARTON:

I should have answered your letter of May 27, 1926, prior to this, but it came at a time when I was very busy briefing the Commonwealth's cases on the Wytheville docket, and today is the first opportunity I have had to give the matter any real consideration.

In your letter you say in part:

"With reference to the powers of the commission on redistricting judicial circuits, I would like to know whether in your opinion section 102 of the State Constitution, forbidding the salaries of judges to be increased or decreased during their terms, prevents the abolition of their courts under sections 95 and 98 prior to the expiration of these terms.

"I hope I make my inquiry clear. The commission is considering the abolition of certain circuits and certain corporation courts, but I take it that we cannot abolish a corporation court of a city of the first class except such additional courts as may have been created by act of legislature under the provisions of section 98, nor can the legislature abolish a corporation court of a city of the second class under any condition."

From an examination of section 98 of the Constitution, I am satisfied that the last sentence of your letter quoted above is absolutely sound. This conclusion is supported by *Foster v. Jones*, 79 Va. 642, 644-646 (1884), and section 11 of the article on judges, 33 C. J. 931, 392, especially note 17. Section 94 of the Constitution divides the State into twenty-four judicial circuits, which were specifically designated in this section.

Section 95 of the Constitution authorizes the General Assembly, after January 1, 1906, as the public interest requires, to rearrange the said circuits and to "increase or diminish the number thereof," provided no new circuit shall contain less than forty thousand inhabitants, nor shall the circuit from which such new circuit is created be reduced below forty thousand inhabitants, according to the last census.

As to whether section 102 of the Constitution prevents the abolition of these courts prior to the expiration of the terms for which the judges were elected, I am frank to say I am in doubt. You will find a rather unsatisfactory discussion of the law in section 11 of the article on judges in 33 C. J. 931-932, and I call your attention to the following cases: *The Judges' Cases*, 102 Tenn. 509, 532-549, 53 S. E. 134 (1899), and *State v. Leonard*, 86 Tenn. 485, 7 S. W. 453 (1887).

I have read these cases rather hurriedly, as I am very busily engaged in preparing the Commonwealth's brief before the Interstate Commerce Commission on the exceptions of the Norfolk and Western Railway Company to the report of the examiner disapproving the application of that railroad for authority to lease the Virginia. After reading these cases, I am not at all certain as to the limits of the legislative authority in this State. However, if you can wait until the brief in the railroad case is finished, I will attempt to examine the authorities at some length and let you know what I think of the matter.

With my best wishes, I am

Very truly yours,

LEON M. BAZILE,  
*Assistant Attorney General.*

**LICENSE—Chiropractor.**RICHMOND, VA., *June 11, 1926.*

MR. LORENZA J. HAMMACK,  
*Attorney at Law,*  
*Lawrenceville, Va.*

MY DEAR SIR:

Acknowledgment is made of your letter of June 10, 1926, in which you say in part:

"At the request of the town council of Lawrenceville, Virginia, I am writing to ask that you kindly advise me whether or not they are justified in refusing to issue a license to a chiropractor who holds no certificate from the State Board of Medical Examiners."

It is my opinion that no chiropractor is entitled to practice in this State unless he commenced the practice of chiropractic in the State prior to January 1, 1913, except those who have taken the prescribed examination and been licensed by the State Board of Medical Examiners. See section 1618 of the Code.

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

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**HOSPITALS—Admittance of children.**RICHMOND, VA., *June 11, 1926.*

HON. POSIE J. HUNDLEY,  
*Commonwealth's Attorney,*  
*Chatham, Va.*

MY DEAR MR. HUNDLEY:

Acknowledgment is made of your letter of June 8, 1926, in which you state that Mrs. Maude Bray, a resident of Pittsylvania county, was committed to the Western State Hospital as an insane person and subsequently paroled; that she returned to her home in Pittsylvania county and was again committed to the same hospital in 1925. You further state that on November 16, 1925, she gave birth to a baby while she was a patient in the hospital, and that the county has been called on to provide for the child under section 1047 of the Code of Virginia, 1919, as amended, and pay the expenses connected with its birth. You also state that Dr. DeJarnette thinks that the child should stay with its mother until it is twelve months old. You then ask me to advise you whether the county of Pittsylvania is liable for taking care of the child from its birth in November, 1925, or from June, 1926, the time you were notified by the hospital authorities.

Section 1047 of the Code of Virginia, 1919, as amended, provides that any child born of a mother who was pregnant when admitted to a hospital or a colony shall be deemed a resident of the county or city in which the mother had legal residence at the time of commitment, and that the child may be committed to the State Board of Charities and Corrections by the superintendent as a dependent child, or to the almshouse of the county or city of the child's residence.

This section then provides:

"\* \* \* if after due notice by the superintendent any parent of such child, or next of kin, shall fail or refuse to remove or provide for such child, the cost of the removal of any such child and delivery to the State Board of Charities and Corrections, or to such person or institution as may be designated by the State Board of Charities and Corrections or the almshouse of the county or city of the child's residence, shall be at the expense of the county or city of the residence of such child."

Obviously, a new born baby cannot be disposed of as a dependent child, except under very exceptional circumstances, as the State Board of Charities and Corrections and the almshouses are not equipped for caring for new born babies, nor would the average person care to assume charge of such a child. Therefore, the power of the superintendent of the hospital, committing the child to the State Board of Charities and Corrections or to the almshouse of the county, must be qualified by what is for the essential interest of the baby, and, if the child cannot be taken from the mother until it is twelve months of age, it would seem to me that the county would be responsible for its care until that time.

As a child born under such conditions is a legal resident of the county from which the mother was committed, it is my opinion that the county would be responsible for its care from the time of its birth. In a case of this kind, where the child cannot be taken from the mother, the county has suffered no loss by reason of the failure of the superintendent to notify it at an earlier date.

I assume from the statements contained in your letter that the woman is a married woman. May I suggest that there is no reason why her husband could not be required by the Juvenile and Domestic Relations Court to provide for the child, as it is his duty to do so?

Very truly yours,

JOHN R. SAUNDERS.

*Attorney General.*

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#### **LICENSE—Merchants'.**

RICHMOND, VA., June 9, 1926.

MR. NAT WALLS,  
*Lanexa, Va.*

MY DEAR SIR:

As your letter of May 29, 1926, related to a matter which fell primarily under the jurisdiction of the Auditor of Public Accounts, I submitted it, with its enclosures, to him, and am in receipt of a letter from him in which he says in part:

"For your information I beg to say that Mr. R. W. Taylor, the gentleman mentioned in the letter of Mr. Walls, came in to see me and informed me that it had been his practice to allow persons working for him to take as part of their wages corn and hay, which he bought, at cost prices to himself, as a matter of accommodation to his employees. He paid them their wages and the hay and corn when they desired part of their wages so paid. I do not think to do this requires State mer-

chant's license of Mr. Taylor and so told him. Mr. Taylor does not sell hay and corn, according to his statement to me, to others. He uses it for his own purposes, but does allow his employees to take as part payment of their wages hay and corn, which he purchases, at cost price to himself."

I concur in the conclusion reached by the Auditor.

I am returning the letters enclosed with your letter to me.

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

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#### **HAMPTON ROADS PORT COMMISSION—Unexpended funds.**

RICHMOND, VA., June 8, 1926.

MR. HENRY G. BARBEE, *Treasurer,*  
*Hampton Roads Port Commission,*  
*Norfolk, Va.*

MY DEAR MR. BARBEE:

I am just in receipt of your letter of June 7, in which you enclose a copy of a letter written by Hon. C. Lee Moore, Auditor Public Accounts, to Mr. N. D. Maher, chairman of the Hampton Roads Port Commission.

I have just returned from the Auditor's office, having called his attention to section 4 of the act of the legislature of 1926, which created the State Port Authority of Virginia, the last sentence of which provides that all the unexpended funds under the control of the Hampton Roads Port Commission shall be paid by it to the State Port Authority. Mr. Moore agrees that whatever balance of the \$10,000 is unexpended by the Hampton Roads Port Commission can be transferred to the State Port Authority.

If I mistake not, we are to have a meeting on the 18th, at which time, I presume, all bills are to be paid which are due by the Hampton Roads Port Commission, and then the commission can draw its check for the unexpended portion of the \$10,000, payable to the State Port Authority, or else the Auditor can be directed to transfer the amount. Of course, this will have to be done before June 22, as the new law goes into effect at that time.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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#### **CERTIFICATES OF INDEBTEDNESS—Issuance.**

RICHMOND, VA., June 7, 1926.

FIRST AND MERCHANTS NATIONAL BANK,  
*Richmond, Va.*

GENTLEMEN:

I have examined the index to the Virginia Acts of 1926 with care, and I am satisfied from my examination of the same that chapter 211 of the Acts of 1926 is the only act passed at the 1926 session which in any manner relates to

the issuance or sale of the certificates of indebtedness authorized to be issued and sold under authority of that act.

It is true that chapter 26 of the Acts of 1926 authorized the county of Alleghany to borrow certain money to be advanced to the State under the Robertson act repealed by this act, that chapter 182 of the Acts of 1925 authorized the town of Wakefield to borrow and advance certain money to the Highway Department under the Robertson act, and that chapter 145 of the Acts of 1926 authorized the county of Patrick to borrow certain money and advance it to the Highway Department under the Robertson act. These acts, however, in no way qualify or place any limitation upon the authority of the Commissioners of the Sinking Fund, with the approval of the Governor, to issue and sell the certificates of indebtedness authorized by chapter 211 of the Acts of 1926.

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

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**JUVENILE AND DOMESTIC RELATIONS COURT—Authority to appoint another justice of peace.**

RICHMOND, VA., *June 7, 1926.*

HON. CHAPIN JONES,  
*State Forester,*  
*University, Va.*

MY DEAR MR. JONES:

Acknowledgment is made of your letter of recent date, in which you ask the following questions:

"First, does a magistrate have a right to try a person charged with violation of section 4434 of the Code?

"Second, does a magistrate have a right to try a boy charged with violation of the same section, if asked to do so by the juvenile judge?

"Third, can a minor be specifically tried and convicted of violation of section 4434, or is there a different procedure for trying minors?"

The offense denounced by section 4434 of the Code is by that section made a felony. Therefore, no justice of the peace has jurisdiction of a prosecution under this section, except for the purposes of a preliminary examination and unless the defendant be a juvenile delinquent, in which event the Juvenile and Domestic Relations Court of the county would have jurisdiction under section 1953e of the Code of Virginia, 1924, Acts of 1922, page 835, *et seq.*, to try the case and dispose of it. In the event that the defendant was a juvenile delinquent, he would be tried in accordance with section 1953e of the Code of Virginia, 1924, and his case disposed of as directed by that section and the sections of the Code relating to the disposition of juvenile delinquents.

If you will examine section 1953d of the Code of Virginia, 1924, you will see that it is provided in that section that the court who appoints the juvenile judge shall also appoint a substitute justice for said court, who shall sit when the juvenile justice is disqualified for any cause from sitting or cannot sit in

any case. You will, therefore, see that the juvenile and domestic relations judge has no authority to appoint another justice to sit in his place.

Trusting that this gives you the desired information, I am

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

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#### STATE CORPORATION COMMISSION—Payment of legal services.

RICHMOND, VA., June 5, 1926.

*His Excellency*, HARRY F. BYRD,  
*Governor of Virginia,*  
*Richmond, Va.*

MY DEAR GOVERNOR:

I beg leave to acknowledge receipt of yours of June 2, in which you enclose a letter from the chairman of the State Corporation Commission with respect to the payment of \$500 to Honorable Hugh H. Kerr for certain legal services performed by him for the State.

I note that the letter from the chairman of the Corporation Commission is concurred in by Messrs. Epes and Hooker, the other members of the Commission. In this letter the State Corporation Commission recommends that you pay Mr. Kerr the sum of \$500 out of your contingent fund, which is allowed the Governor by the legislature. You then request that I advise you whether or not this can be legally done.

In reply I will state it is my opinion that it is legal for you to do this.

Very sincerely yours,

JOHN R. SAUNDERS,  
*Attorney General.*

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#### LICENSE—Sale of Jamaica ginger by pharmacists.

RICHMOND, VA., June 5, 1926.

HON. WILBUR C. HALL,  
*Attorney at Law,*  
*Leesburg, Va.*

MY DEAR MR. HALL:

I am in receipt of your letter of June 3, in which you desire to be advised whether or not a merchant has the right to sell Jamaica ginger.

Section 63 of the Layman prohibition law provides as follows:

"It shall be unlawful for any one but a licensed pharmacist to sell, dispense or give away to the consumer the extract, essence or tincture of Jamaica ginger, and such pharmacist only upon the prescription of a regular licensed physician, and then only upon the same conditions as ardent spirits are sold under the provisions of this act."

It, therefore, follows from this section that no one but a licensed pharmacist can sell Jamaica ginger, and even then only after he has obtained a license from the circuit court to dispense it for medicinal purposes and under the prescription

of a physician. If any one is selling this from patent medicine wagons, of course, it is a violation of the law and the sheriff or some other officer should arrest the party, if the matter is brought to his attention. No one has the right to order it from a wholesale house.

I am glad to give you this information.

With kindest regards, I am

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

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### SCHOOLS—Census of school children.

RICHMOND, VA., June 4, 1926.

HON. HARRIS HART,  
*Superintendent of Public Instruction,  
Richmond, Va.*

MY DEAR MR. HART:

Acknowledgment is made of your letter of June 2, 1926, in which you request me to advise you whether it is legal for the State Board of Education to authorize a new census to be taken in a school district which claims to have had an erroneous census in 1925.

The matter appears to be governed by section 653 of the Code of Virginia, 1919, as amended. This section provides that a census shall be taken of the school population on June 1, 1920, and every five years thereafter. The compensation of the person taking the census is limited to \$6 per hundred of the children listed by him, "subject to abatement, on the discovery, before or after the settlement of the account, of errors or omissions in the list." It is next provided that the lists prepared for the quinquennial census "shall be submitted for careful revision to the district school board," which, of course, now means the county school board. In the last paragraph of this section it is provided that, in addition to the regular quinquennial census, an annual cumulative census must be taken prior to June 1, 1921, and every year thereafter, except in those years in which the quinquennial is taken. The last sentence of the act provides that "the cumulative census shall deal only with additions to and *corrections* of the quinquennial census." (*Italics supplied.*)

In my opinion the legislature contemplated that the annual cumulative census should be the means by which errors in the quinquennial census should be corrected, and, therefore, no authority exists for the holding of a new census for the purpose of correcting the errors in the quinquennial census as the statute has provided another method for the same, namely, the annual cumulative census.

Trusting this gives you the desired information and with my best wishes, I am

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

**U. S. CENSUS—Basis of apportionment.**

RICHMOND, VA., June 4, 1926.

HON. C. LEE MOORE,  
*Auditor of Public Accounts,*  
*Richmond, Va.*

DEAR SIR:

Acknowledgment is made of yours of the 1st, in which you say:

"Section 3466 of the Code of Virginia makes it the duty of the Auditor of Public Accounts to annually apportion amongst the counties and cities composing each judicial circuit the salary of the judge thereof for the year beginning February 1 of the succeeding year, according to the respective population of the counties and cities, as shown by the last preceding census taken under authority of the United States.

"This section of the Code was amended by act approved January 30, 1922 (chapter 2, page 5, Acts 1922), and places this same duty upon the Auditor of Public Accounts, and also the direction to use the census of the United States as the basis for the apportionment.

"This section as amended and re-enacted by Acts of 1922 was amended and re-enacted by act approved February 1, 1924 (chapter 1, page 3, Acts 1924), and places upon the Auditor of Public Accounts the duty of making the apportionment, but omits direction to use the United States census as the basis of apportionment, and does not provide any other basis of apportionment which the Auditor of Public Accounts is to follow.

"In performing the duty placed upon the Auditor of Public Accounts by this section, following precedent, I have since the act of 1924 amending section 3466 of the Code became operative made the apportionment on the basis of the last preceding census taken under authority of the United States.

"Please advise if my action in this respect was correct, and if not, kindly advise me what basis of apportionment I should have followed in making the apportionment and which I must hereafter follow in making apportionment."

In reply I beg to say that, in my judgment, whenever a statute refers to the population of a county or city without stating the method of ascertaining it, it is understood that the latest United States census will be taken as a basis. It is, therefore, my opinion that your conclusion in this matter is correct.

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

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**EPILEPTIC COLONY—Contracting power.**

RICHMOND, VA., June 4, 1926.

DR. J. H. BELL, *Superintendent,*  
*State Colony for Epileptics and Feeble-Minded,*  
*Colony P. O., Near Lynchburg, Va.*

MY DEAR DR. BELL:

Acknowledgment is made of your letter of May 27, 1926, in which you call attention to section 1059 of the Code of Virginia, 1919, and then say:

"If this or any other institution had a director or member of the special board who was extensively engaged in the wholesale business and interested in various firms as a member of these corporations, could we or could we not, under this law, do business with these firms in which he was a stockholder and actively interested?"

Section 1059 of the Code of Virginia, 1919, reads as follows:

"Neither the Commissioner of State Hospitals for the Insane, nor any director, officer, or employee of a hospital or colony shall be personally interested in any contract in relation to the said hospital or colony or its support."

In my opinion this section prohibits your institution from contracting with any corporation or firm in which any director, officer, or employee of your hospital is financially interested through a part ownership of the business or the ownership of stock therein. In this connection I also call your attention to section 4706 of the Code of Virginia, 1919.

Trusting that this gives you the desired information, I am

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

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#### CLERKS OF COURTS—Fees of.

RICHMOND, VA., June 4, 1926.

HON. J. C. NOEL, *Collector,*  
*Internal Revenue Service,*  
*Richmond, Va.*

MY DEAR SENATOR NOEL:

Acknowledgment is made of your letter of June 3, 1926, in which you request me to advise you whether chapter 303 of the Acts of 1922 would permit a release of a notice of a Federal tax lien on real estate to be recorded in the clerk's office without the payment of a fee therefor.

Chapter 303 of the Acts of 1922 provides that notices of such liens "may be filed with the clerk of the court authorized to record deeds for the county or city wherein the land subject to such lien is situated. Such notices shall be recorded in the deed books and properly indexed. No fees shall be collected by the clerks of the courts for filing and recording such notices."

The notice of lien being an instrumentality of the Federal government would, as a matter of course, not be subject to taxation for either the recordation of the instrument or the release thereof, but the fees which the clerks are allowed to charge are not in the nature of taxes, but a charge for the service performed by the clerk, and it would seem from the language of chapter 303 of the Acts of 1922 that it is only the notices of such liens that the clerk must record without charging a fee therefor. It is, therefore, my opinion that, while no

State tax shou'd be paid for admitting the release to record, the clerk would be entitled to charge the fee authorized by law for the release of such lien.

Trusting that this gives you the desired information, I am

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

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### ELECTIONS—Eligibility of voters.

RICHMOND, VA., *June 2, 1926.*

MR. H. B. BARKSDALE,

*Brookneal, Va.*

MY DEAR SIR:

Acknowledgment is made of your letter of June 1, 1926, in which you ask the following question: Can a young man, who wi'll become of age on June 16, 1926, pay his capitation taxes, register and vote in the town election to be held on June 8, 1926?

The young man in question will not be eligible to vote in the regular town election held in June, 1926, for the reason that he will not be twenty-one years of age at the time the election is held. The Constitution expressly provides otherwise in the case of primaries where the person in question will be twenty-one at the time the regular election, for which the primary was held, takes place. I also call your attention to the fact that the registration books have now closed until after the regular town election is held. See section 98 of the Code.

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

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### ELECTIONS—Eligibility of voters.

RICHMOND, VA., *June 2, 1926.*

MR. J. W. SINGLETON,

*Pamplin, Va.*

MY DEAR SIR:

Acknowledgment is made of your letter of June 1, 1926, in which you request me to advise you whether a person, who is otherwise qualified to vote and who fails to pass the registration test by making an incomplete or defective application, can immediately app'y again for registration, or whether he must wait until the next registration period occurs.

Examination of section 20 of the Constitution shows that no limitation is placed upon the number of times one may apply to register. It is, therefore, my opinion that one who is denied registration because his application is not sufficient can apply again without waiting for a new registration period.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

**PRISONERS—Allowance for good behavior.**

RICHMOND, VA., June 2, 1926.

LUCIAN H. SHRADER, ESQ.,  
*Attorney at Law,*  
*Amherst, Va.*

MY DEAR MR. SHRADER:

Acknowledgment is made of your letter of June 1, 1926, in which you say:

"On page 257 of the Attorney General's Report from October 21, 1923, to June 30, 1925, you have a letter addressed to the sheriff of Accomac county stating that a prisoner sentenced to the convict road force is entitled to credit for good behavior to the same extent, and upon the same terms, as provided for convicts in the Penitentiary.

"Please advise me whose duty it is to allow this good time, and release the prisoner when he has been returned from the State road to the county jail, on account of his physical inability to work on the road. Can the jailer release the prisoner, allowing him the time for good behavior?"

Section 2860 of the Code of 1919 requires the jailer to keep a record describing each person committed to jail, the terms of confinement, the offense committed, and when received into the jail and, in addition to that, a record for every month that any prisoner appears to have faithfully observed the rules and requirements of the jail while confined therein. The section then provides, "there shall, with the consent of the judge, be deducted from the term of confinement of such convict four days."

In the case of persons who were sentenced to the roads instead of confinement in jail the credit allowed for good behavior by section 2094 of the Code is the same allowed convicts in the Penitentiary, which is ten days per month. As you state in your letter, it is my opinion that where a person is sentenced to the convict road force, he is entitled to credit for good behavior, whether he actually serves on the convict road force or not.

I take it that in the case referred to in your letter the jailer is the proper party to keep account of the good behavior of the prisoner during that portion of the time he is confined in jail, and that allowance made to the prisoner for good behavior should be with the consent of the judge of the circuit court.

Trusting that this gives you the desired information, I am

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

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**FIREARMS—Registration of pistols.**

RICHMOND, VA., June 2, 1926.

HON. CRAG C. HATCHETT, *Treasurer,*  
*Victoria, Va.*

MY DEAR MR. HATCHETT:

Acknowledgment is made of your letter of June 1, 1926, in which you say:

"Since the publication of a notice in The Times-Dispatch stating that every one owning a pistol or revolver should immediately register same, the citizens of this county have been applying to me to register their guns. They are under the impression that unless they do this right away that they are subject to a fine. My understanding of the law is that I cannot register these pistols and revolvers until proper receipt cards and ledger for keeping the records are furnished me by 'the Board of Trustees of the Virginia State Diseased and Crippled Children's Hospital.' Consequently, I am telling the citizens that as soon as I get the proper cards, etc., I will publish a notice to that effect and they can come and register their pistols, and that they are not laying themselves liable to a fine until I so notify them.

"Please write me if this is correct, and also write me if you know to whom I should apply for these cards and record books."

The act referred to is chapter 158 of the Acts of 1926. In section 1 it is provided, in part, that the "license cards and book shall be furnished by the boards herein provided and shall be paid out of the funds derived from the pistol and revolver licenses." The licenses imposed by the act, however, will not be due until on or before the first day of January, 1927.

I suppose that the board as soon as appointed will take the necessary steps to have the license cards and books printed and furnished to the respective treasurers. I think that your actions in the matter, as outlined above, are right.

With my best wishes, I am

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

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#### REAL ESTATE—Sale of property of State Teachers College.

RICHMOND, VA., June 1, 1926.

DR. JOHN PRESTON McCONNELL, *President,*  
*State Teachers College,*  
*East Radford, Va.*

MY DEAR DR. McCONNELL:

Acknowledgment is made of your letter of May '31, 1926, in which you request me to advise you whether your institution could legally sell real estate belonging to it.

In the absence of express statutory authority for so doing, it is my opinion that such real estate cannot be sold. I know of no statute which confers any such authority upon your institution.

Trusting that this gives you the desired information, I am

Very sincerely yours,

JOHN R. SAUNDERS,  
*Attorney General.*

**PUBLIC WELFARE—Parent and child.**

RICHMOND, VA., May 31, 1926.

MISS GAY B. SHEPPERSON,  
*Director Children's Bureau,  
 State Board of Public Welfare,  
 Richmond, Va.*

MY DEAR MISS SHEPPERSON:

Acknowledgment is made of your letter of May 21, 1926, in which you ask whether a parent can legally give his child away, or place it in an institution without court action.

In the absence of a statute authorizing a parent to give his child away, I would say that an agreement on the parent's part would be illegal and unenforceable. After the child has once been given away, as between the parent and the party to whom it was given, the court will determine, in any proceeding to recover the same, the case in accordance with the best interests of the child affected. I would say that, in my opinion, a parent cannot, by giving his child into the custody of some other person, escape the responsibility of supporting and caring for that child, unless the person who assumes charge of it is fully capable of supporting the same.

For your information, I quote the following from 29 Cyc. 1600-1601:

"Whether or not an agreement by a parent to give the custody of the child to a third person is legally binding, it may be considered by the court in determining the question of custody as shedding light upon the relation of the parties and their feelings for the child, and thus assisting the court in the exercise of its discretion, and the court may well refuse to allow the parent to reclaim the child from those to whom it has been surrendered, where the latter have had the custody for a considerable time, and there has grown up a reciprocal affection between them and the child, which should be respected and not interfered with by a forced separation which would not be for the child's welfare. On the other hand, such an agreement will not be enforced to the detriment of the child, but the court will take the child away from the person to whom the parent has surrendered it and restore the custody to the parent, where it clearly appears that such a course will be most beneficial to the child."

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

**PRIZE FIGHTS—Illegal.**

RICHMOND, VA., May 31, 1926.

MR. W. S. GRANGER, *Captain,  
 Company "H" 116th Infantry,  
 Virginia National Guard,  
 Martinsville, Va.*

MY DEAR SIR:

Acknowledgment is made of your letter of May 24, 1926, with reference to boxing matches for which an admission fee is charged.

Such matches are prohibited by sections 4426 and 4427 of the Code. These sections are too long to be copied into this letter, but you will find them in the clerk's office at Martinsville, or in the office of any of the attorneys there.

A bill was introduced at the last session of the General Assembly to permit the holding of boxing matches by military outfits for which prizes were given, etc., but I am advised that this bill was defeated.

Trusting that this gives you the desired information, I am

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

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### ELECTIONS—Eligibility of voters.

RICHMOND, VA., May 31, 1926.

MR. F. M. SPICKARD,  
Box 241,  
Blacksburg, Va.

MY DEAR SIR:

Acknowledgment is made of your letter of May 27, 1926, in which you state that you have been appointed a judge at the coming municipal election, and request me to answer the following questions:

"Can a man vote who lives in the country, but has property in town?  
Can a man vote who runs a store in town, but lives out of the corporation?"

"Please instruct me fully in regard to who has the right to vote."

The answer to both of these questions depends upon whether the man in question is a legal resident of the town of Blacksburg. In order to be a legal resident of a place, one does not necessarily have to physically reside there.

The Court of Appeals decided in *Williams v. Commonwealth*, 116 Va. 272, that where a person had once gained a legal residence at a place he could lose that legal residence, for the purpose of registering and voting, only by a combination of two acts: first, a removal from the place where the legal residence has been acquired to some other place, and, second, with the intention of abandoning his legal residence at the first place and acquiring a legal residence at the place to which he has moved.

You will, therefore, see that it is impossible for me to give you a definite answer with the information furnished me, but I am sure that, with this rule before you, you will have no trouble in solving the question when you become aware of the facts in each case.

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

**CONTRACTS—Exemption of recordation tax.**

RICHMOND, VA., May 31, 1926.

L. A. McMURRAN, ESQ.,  
*Attorney at Law,*  
*Newport News, Va.*

MY DEAR SIR:

Some time ago you will recall that you submitted to Hon. C. Lee Moore, Auditor of Public Accounts, a contract dated April 3, 1925, between William Gordon and wife, of the first part, and John Austrian and wife, of the second part, concerning certain real estate located in the city of Newport News. It appears from the contract that Gordon and Austrian are the owners in fee of a tract of land in Newport News, and the object of the contract is to bind themselves, their heirs and assigns not to ask for a partition or division thereof by suit or otherwise prior to April 3, 1950, with the further provision that, if either party should desire to sell his undivided interest in said property, before selling it an option must be given to the other party to purchase the same.

On May 22, 1925, Hon. C. Lee Moore, Auditor of Public Accounts, after consulting me, wrote you that we were both of the opinion that this contract, if recorded, was subject to the tax imposed by section 13 of the tax bill, as amended, and the special act, chapter 279 of the Acts of 1924, imposing an additional tax. Some months after this letter was written you requested me to further consider the matter.

I have given the matter my further consideration, as has the Auditor, and we are still of the opinion that the contract, if recorded, is subject to taxation. The language of section 13 of the tax bill, as amended, so far as is applicable here, reads:

"On every contract relating to real or personal property, except as hereinafter provided, which is admitted to record, the tax shall be fifty cents, where the consideration or value contracted for is three hundred dollars or less; where the consideration or value contracted for is over three hundred dollars, and does not exceed one thousand dollars, the tax shall be one dollar; where the consideration or value contracted for exceeds one thousand dollars, there shall be paid ten cents additional on every hundred dollars or fraction thereof of such consideration or value contracted for, \* \* \*."

The conclusion is inescapable that the contract between Messrs. Gordon and Austrian is a contract relating to real property, and I find no exception in the statute exempting such a contract from the recordation tax. I am, therefore, of the opinion that this contract, if recorded, is subject to taxation.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

**PRISONERS—Payment due.**

RICHMOND, VA., May 26, 1926.

MAJOR R. M. YOEEL, *Superintendent,*  
*State Penitentiary,*  
*Richmond, Va.*

DEAR SIR:

Acknowledgment is made of yours of yesterday, in which you say:

"Chapter 301, Acts 1918, states that 'One-half may be drawn upon by said prisoner \* \*.' You will notice that one-half of this money is to accumulate to the prisoner's credit and be paid to him at the time he is discharged. If a prisoner has promised to pay a lawyer a fee towards getting his sentence reduced and has not sufficient money to pay the fee agreed upon, would I be acting within the intent of the law to allow the prisoner to give the lawyer an order on the five cents per day, which is supposed to be held and paid to the prisoner at the time of his discharge? I have usually felt that the law meant for this five cents to be held so that the man would have some money in his pocket when he left the prison. On the other hand, there is a question of whether it would be proper not to allow the prisoner to issue an order on this money if it might mean his release.

In reply, I beg to say that in my judgment the amount due a prisoner upon his release is his property absolutely, and if he wishes all or any part of it to be paid to an attorney, you would be justified in paying it to the attorney on the prisoner's order.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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**BOARD OF SUPERVISORS—Borrowing money by school board.**

RICHMOND, VA., May 26, 1926.

HON. H. M. HEUSER,  
*Attorney at Law,*  
*Wytheville, Va.*

MY DEAR MR. HEUSER:

Acknowledgment is made of your letter of May 25, 1926.

As I wrote you in my previous letter, the meaning of chapter 46 of the Acts of 1926 is not entirely clear in the particular where the school board borrows an amount that is less than the school revenue to cover the period between September and December, but I am rather inclined to the opinion that the law contemplates that the school board must obtain the consent of the board of supervisors before it can borrow money at any time and for any purpose, regardless of whether it exceeds the local revenues for the period or not.

Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

**SCHOOLS—Borrowing money.**

RICHMOND, VA., May 24, 1926.

HON. H. M. HEUSER,  
*Commonwealth's Attorney,*  
*Wytheville, Va.*

MY DEAR MR. HEUSER:

Acknowledgment is made of your letter of May 20, 1926, in which you call my attention to chapter 46 of the Acts of 1926, which prohibits school boards from borrowing money unless the loan is approved by the board of supervisors. You ask whether under section 3 the school board would be entitled to make temporary loans in excess of the year's revenue for the purpose of meeting the expenses between September, when the schools open, and December 1, when its revenue begins to come in.

I have read section 3 of the act with care and, while I am frank to say that it is open to more than one construction, I am rather inclined to think that when this section is read in connection with the title of the act, it was the intention of the General Assembly to prohibit the school boards from borrowing any amount of money for any purpose without first obtaining the approval of the board of supervisors or the council of the city or town before the loan could be made. Certainly, if I represented a client proposing to loan money to the school board, I would advise against the loan being made until the board of supervisors or council had approved the same.

Trusting that this gives you the desired information, I am

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

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**STATE OFFICERS—Accepting employment under Federal government.**

RICHMOND, VA., May 24, 1926.

*His Excellency,* HARRY FLOOD BYRD,  
*Governor of Virginia,*  
*Richmond, Va.*

MY DEAR GOVERNOR:

In response to your inquiry over the telephone as to whether the sheriffs and other officers of this Commonwealth could accept employment under the Federal government for the purpose of enforcing the Volstead law, as contemplated in the executive order of His Excellency, the President of the United States, it is my opinion that the statutes of this State prohibit the officers of the State and the localities from accepting such employment either with or without compensation.

Section 289 of the Code refers to officers of honor, profit or trust under the Constitution of Virginia. Section 290 of the Code reads as follows:

"No person shall be capable of holding any office or post mentioned in the preceding section, who holds any office or post of profit, trust, or emolument, civil or military, legislative, executive, or judicial, under the government of the United States, or who is in the employment of such

government, or who receives from it in any way any emolument whatsoever; and the acceptance of any such office, post, trust, or emolument, or the acceptance of any emolument whatsoever under such government, shall, *ipso facto*, vacate any office, or post of profit, trust or emolument under the government of this Commonwealth or under any county, city or town thereof."

By the express terms of section 290 of the Code all employment by the Federal government of persons holding any office of honor, profit, or trust, under the Constitution of Virginia, is prohibited, and that section declares a violation of its terms a forfeiture of the office held under the Commonwealth or one of its subdivisions. Section 291 of the Code as amended contains certain exceptions to section 290 of the Code, but none of these exceptions is applicable to a case such as is contemplated by your inquiry.

Section 290 of the Code represents the traditional policy of this State, which has always been opposed to any control by the Federal government, however remote, of the officials of the State government. *Bunting v. Willis*, 27 Gratt. (68 Va.) 144 (1876).

Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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## COMMONWEALTH'S ATTORNEYS—Fees of.

RICHMOND, VA., May 21, 1926.

HON. R. KENT SPILLER,  
*Commonwealth's Attorney,*  
*Roanoke, Va.*

MY DEAR MR. SPILLER:

Acknowledgment is made of your letter of the 19th, in which you say, in part:

"In the matter of fees to which this office is entitled, the Auditor of Public Accounts has determined that where costs and fees are paid in felony cases, by the accused, the Commonwealth's attorney is not entitled to the amounts so paid separate and apart from the allowance to which he is entitled to be paid out of the Treasury of the State. I am, therefore, writing to ask that your office assist us in getting the law on this subject straightened out.

"Under section 3513, the clerk of the court in which the case is tried, where costs are paid by the defendant, is required to disburse should be paid to me, in addition to any amount that may be paid by the defendants in cases.

"Under section 3513, the clerk of the court in which the case is tried, where costs are paid by the defendant, is required to distribute to the officers entitled thereto, except in the case of the attorney for the Commonwealth. The fee due unto the attorney for the Commonwealth is turned into the State Treasury by the clerk, and should, under the law, be paid to the attorney by the Auditor of Public Accounts as amounts to which he is entitled, not to be included in his annual allowance, which was intended to cover only cases where no costs were paid

by the defendant. I contend that the law contemplates paying to the for the Commonwealth. The fee due unto the attorney for the Commonwealth whether they be disbursed to him by the clerk or some other duly authorized official. In other words, the fees paid to the clerk in felony cases immediately become money belonging to the Commonwealth's attorney for his services in the case, and should be paid to him by the Treasurer after receipt from the clerk, and all amounts so paid should not be chargeable against the allowance set out in section 3505 of the Code.

In reply, I will say that I have conferred with the Auditor of Public Accounts as to his ruling in this matter, which is to the effect that you are entitled to fees paid into the Treasury by defendants, but not beyond the maximum limit of \$1,750, and he gives as a reason for this view that there will be no occasion for payment of the fees into the Treasury, except that they may be charged against this maximum allowance.

He also says that this has been the uniform interpretation of the law by his office since these fees were first covered into the Treasury.

After careful consideration of sections 3505 and 3513 of the Code, I am constrained to conclude that the Auditor has properly construed these statutes. Of course, the only authoritative mode of determining this matter would be to have a test case taken to the courts.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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## ELECTORAL BOARD—Ballots.

RICHMOND, VA., May 19, 1926.

HON. H. C. DESHIELDS, *Mayor,*  
*Tappahannock, Va.*

MY DEAR MR. DESHIELDS:

Acknowledgment is made of your letter of May 12, 1926, in which you say:

"We have a municipal election of mayor and council on the 8th of June and no one has offered for any of the offices. I have been requested to write on behalf of the electoral board and obtain your opinion as to the legality of printing a blank ballot with lines for the names of such persons as the electors may desire to vote for at the election.

"I can see no reason why this should not be legal, and I will appreciate it if you will write me as to this at your earliest convenience.

"Under the law we now have the right to erase a name and substitute any one we desire on a ticket, I think."

I have endeavored to find some authority on the question submitted in your letter, but have been unable to do so. I can see no reason, however, why blank ballots could not be printed with the names of the offices on the same, but the place for the candidates left blank where there are no nominees before the electors in a general election.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

**CERTIFICATES OF INDEBTEDNESS—When payable.**

RICHMOND, VA., May 19, 1926.

HON. ROSEWELL PAGE, *Second Auditor and  
President Board of Sinking Fund Commissioners,  
Richmond, Va.*

DEAR MR. PAGE:

Acknowledgment is made of your letter of May 12, 1926, in which you say:

"Under Act of General Assembly approved March 19, 1926, known as the State Highway System Indettedness Fund, the Board of Sinking Fund Commissioners are authorized to issue certificate of indebtedness in an amount not to exceed \$7,500,000 to take up the loans made the State under the Robertson act.

"The act, approved March 19, 1926, recites the fact that the certificate is payable at the office of the Second Auditor by warrant drawn on the State Treasurer. Under the Century Act of 1892 the bonds are made payable at the State Treasurer's office.

"Please advise the board if these new certificates can be legally made payable at the State Treasurer's office in light of the act."

Section 7 of chapter 211 of the Acts of 1926 reads as follows:

"The said certificates may be issued in either registered or coupon form, as the commissioners of the sinking fund, with the approval of the Governor, may determine.

"Certificates of indebtedness issued in registered form shall be registered as to principal and interest in the office of the Second Auditor and the State Treasurer, who shall register in books provided for that purpose, the number of each registered certificate issued under the provisions of this act, the date and the date of issue thereof, its maturity, the amount of each certificate and the interest payment dates thereof, and the name and address of the registered owner. Certificates issued in registered form shall be transferable only by the registered owner thereof or his duly authorized attorney in fact, upon presentation of such certificate at the office of the Second Auditor. Interest on such registered certificates shall be payable semi-annually, January 1 and July 1, of each year, by warrants, as interest on the public debt is paid, and out of the sinking fund hereinafter provided. The principal of such registered certificates shall be paid as they severally mature upon presentation and surrender of such certificates on or after the maturity dates thereof, at the office of the Second Auditor by the registered owner or his duly authorized attorney in fact, by warrants of the Second Auditor, payable to the registered owner or his duly authorized attorney in fact, drawn on the State Treasurer, which said warrants shall be paid by the State Treasurer out of the sinking fund hereinafter provided."

The act is badly worded, but inasmuch as the interest on such certificates is made payable by warrants as interest on the public debt is paid, and inasmuch as the warrants are to be paid by the State Treasurer, it is my opinion that the certificates should be made payable at the State Treasurer's office.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

**ELECTIONS—Qualification of voters.**

RICHMOND, VA., May 18, 1926.

HON. WILLIAM C. GLOTH,  
*Commonwealth's Attorney,*  
*Rosslyn, Va.*

MY DEAR MR. GLOTH:

Acknowledgment is made of your letter of May 11, 1926, in which you say:

"An election will be held in Arlington county on the fifteenth day of June for the purpose of voting on bond issue for water for said county.

The law authorizing the bond issue was passed at the 1926 session of the legislature and is known as Senate Bill 120 with Senator Frank L. Ball as patron of said bill.

"Section 1 of the said act provides: 'The circuit court of the county or the judge thereof in vacation upon the petition of the majority of the board of supervisors of said county or upon petition of fifty qualified voters of said district or districts shall make an order requiring the judges of election at the next election of county officers or any other time not less than thirty days from the date of such order, which shall be designated therein, to open a poll and take the *sense of the qualified voters* of the district or districts on the question whether the board of supervisors shall issue bonds for said purposes.'

"The act does not define who are the qualified voters, and I am not certain whether the voters who were qualified in last fall's election will be the qualified voters or whether those who have since qualified, or will be qualified by the day of the election, to-wit, the fifteenth of June, will be the qualified voters. This question is going to be a very important one, and if you will let me have your legal opinion on the subject, I will be very much obliged to you."

In my opinion, in the absence of some special provision in the law fixing the qualifications of voters at such special election, their qualifications would be governed by section 83 of the Code, which, so far as is applicable to the question here under consideration, provides:

"\* \* \* at any such special election, held on or after the second Tuesday in June in any year, any person shall be qualified to vote who is or was qualified to vote at the regular election held on the Tuesday after the first Monday in November of that year. \* \*"

Trusting that this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

**MOTOR VEHICLE COMMISSIONER—Tax on motor vehicle fuel.**

RICHMOND, VA., May 17, 1926.

HON. JAMES M. HAYES, JR.,  
*Motor Vehicle Commissioner,*  
*Richmond, Va.*

MY DEAR SIR:

Acknowledgment is made of your letter of May 14, 1926, in re: the collection of gas tax on motor vehicle fuels when exported or sold for exportation and exported from the State of Virginia.

In response thereto, I call your attention to an opinion given by me to William Thompson, Esq., superintendent of the Texas Company, Norfolk, Va., on May 10, 1923, a copy of which I herewith enclose.

In response to the last paragraph of your letter the wording of section 6 of chapter 107 of the Acts of 1923 is as follows:

"The said tax or taxes shall not be imposed on motor fuels when exported or sold for exportation and exported from the State of Virginia to any other State or nation."

This language is general and, in my opinion, cannot be limited to gasoline, which is shipped from the State of Virginia in tank cars and on boats only.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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#### **ELECTIONS—Use of rubber stamp.**

RICHMOND, VA., May 17, 1926.

MR. W. G. ELLISON,  
*Waynesboro, Va.*

MY DEAR SIR:

Acknowledgment is made of your letter of May 14, 1926, in which you say:

"Will you kindly advise me if a rubber stamp can be used for printing the name of a party for office in the election to be held in the town of Waynesboro on June 8 next, and if it can legally be used for the insertion of a name for mayor? Kindly advise whether it is legal to have this stamp in the voting booths."

Section 28 of the Constitution expressly provides "any voter may erase any name and insert another" on a ballot. I am of the opinion that the insertion of the name of a candidate on a ballot by way of a rubber stamp is legal. I know of no reason why the rubber stamp should not be left in the voting booth.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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#### **OFFICERS—Eligibility of.**

RICHMOND, VA., May 14, 1926.

HONORABLE H. G. COCHRAN,  
*Judge of the Juvenile and Domestic Relations Court,  
Norfolk, Va.*

MY DEAR JUDGE:

In response to your inquiry over the telephone a few moments ago whether under the provisions of section 1948 of the Code the Honorable Harry

Brinkley, who is United States Commissioner, can be appointed as substitute judge of the Juvenile and Domestic Relations Court of the city of Norfolk to act during your absence for a short time, I would say that under provisions of section 291 of the Code, as amended by the Acts of 1924, he can be so appointed and act in this capacity.

This section, you will observe, provides certain qualifications for section 290, one of which is that a United States Commissioner can act as a justice of the peace. The Juvenile and Domestic Relations Court is really a special justice's court. It, therefore, follows that Mr. Brinkley can act in this capacity.

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

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**GAME AND INLAND FISHERIES—Money from sale of licenses for Hunting.**

RICHMOND, VA., May 12, 1926.

HON. L. W. TYUS, *Assistant Secretary,*  
*Department of Game and Inland Fisheries,*  
*Richmond, Va.*

DEAR SIR:

Acknowledgment is made of yours of the 10th, in which you say:

"Chapter 422, Acts of Assembly (1926, p. 720), for the protection of elk in Bland, Craig, Giles, Montgomery and Pulaski counties includes a clause reading as follows:

"Any nonresident of this State desiring to hunt elk in any of the counties mentioned in this act must, before beginning to hunt therein, secure from the clerk of the county in which he wishes to hunt a certificate permitting him to hunt elk in the county. This certificate is in addition to the regular State nonresident hunters' license and the fee charged for such certificate shall be ten dollars."

"This department wishes to be advised if it is required to furnish the above-mentioned certificates to the clerks of the foregoing counties, and if money collected for the sale of such certificates is to be paid into the 'Game Protection Fund' of the State."

In reply, I beg to say that I believe the law contemplates that the Department of Game and Inland Fisheries shall furnish certificates to the clerks and that the money collected should be paid into the 'Game Protection Fund' in the same manner as money collected for the sale of licenses for hunting.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

**GAME AND INLAND FISHERIES—Kennel tax.**

RICHMOND, VA., May 12, 1926.

HON. L. W. TYUS, *Assistant Secretary,*  
*Department of Game and Inland Fisheries,*  
*Richmond, Va.*

DEAR SIR:

Acknowledgment is made of yours of the 10th, in which you say:

Section 2 of chapter 413, Acts of Assembly, approved March 22, 1920, among others things, provides:

"\* \* \* but any person may pay a kennel tax of ten dollars, which shall entitle him to keep therein not more than twelve dogs belonging to himself, or in training for others, or he may pay fifteen dollars, which shall entitle him to keep in said kennel as many dogs belonging to himself or in training for others as he may desire—such kennel dogs to be at all times kept confined, unless accompanied by the owner or his agent, but in case of fox hounds and deer hounds, when in a chase, or returning home from chase, such dogs may at such times be let out from under the immediate control of the owner or other person having them in charge."

"\* \* \* upon the payment of the tax hereinabove provided for, the person paying the same shall be entitled to receive a receipt card therefor, on which shall be plainly recorded by the treasurer the date on which such tax is paid, and a metal license tag, on which shall be stamped or otherwise permanently marked the year for which the license is paid, and the serial number of the license."

"Some of the treasurers of the counties, cities and towns issue one tag to a kennel only, while others issue a tag for each dog in a kennel. This lack of uniformity has led to considerable confusion and complaint. In order to avoid dissatisfaction, it seems desirable that a uniform policy, in accordance with the law, be adopted."

"The department desires, therefore, to be advised whether the treasurer is authorized, under the law, to issue more than one tag to a kennel."

In reply, I beg to say that I do not think the treasurer is authorized under this statute to issue more than one metal license tag for each kennel.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

**GAME AND INLAND FISHERIES—Dogs.**

RICHMOND, VA., May 12, 1926.

HON. L. W. TYUS, *Assistant Secretary,*  
*Department of Game and Inland Fisheries,*  
*Richmond, Va.*

DEAR SIR:

I have yours of the 10th, in which you say:

"Chapter 467, Acts of Assembly (1926, p. 757), amends section 5 of the dog law, including a provision not covered under the title of the act or by the enacting clause, which reads as follows:

"Provided that any person who keeps dogs under a kennel license as provided by law may transfer such dogs to any part of the State upon notification to the Department of Game and Inland Fisheries."

"Without reference to the validity of the act or that portion thereof not covered under the title, this department desires to be advised if the above language is to be construed as permitting the transfer of a portion of the dogs that may be kept under a kennel license or whether it requires, if the owner desires to take advantage of its privileges, that all the dogs kept under such kennel license be transferred."

In reply, I beg to say that, in my judgment, the above proviso should be read in connection with the other laws relating to kennels, and that in case dogs in the kennel are transferred to some other part of the State, the kennel should not be divided, but all the dogs in the kennel must be transferred.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

#### PRISONERS—Allowance for good behavior.

RICHMOND, VA., May 12, 1926.

HON J. POWELL ROYALL,  
*Commonwealth's Attorney,*  
*Tazewell, Va.*

MY DEAR SENATOR ROYALL:

Acknowledgment is made of your letter of May 11, 1926, as to the credit to be given jail prisoners.

If you will read section 5019 of the Code of 1919, as amended by Acts of 1924, you will see that in sentencing a person to confinement in jail the judge or justice must deduct from the time to be served the time spent by such person in jail pending trial.

Where a person has been sentenced to the convict road force he is entitled to ten days per month off, regardless of whether he actually serves on the roads or not. Where he has been sentenced to jail and not to the roads, he is entitled to the ten days per month only in those cases where he actually works on the roads. (See section 2094 of the Code.)

Where a person is sentenced to jail and spends his time in jail, he may be allowed by the judge four days per month for good behavior, under authority of section 2860.

Trusting this gives you the desired information, I am,

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

#### ELECTIONS—Eligibility of voters.

RICHMOND, VA., May 11, 1926.

MR. H. B. BARKSDALE,  
*Brookneal, Va.*

MY DEAR SIR:

Acknowledgment is made of your letter of May 6, 1926, in which you say:

"There will be an election held in this town on the second Tuesday in June. There are some parties who have moved to Lynchburg and Charlottesville, Va., since the beginning of this year. Will you please advise me whether or not these parties can vote in this election? They are qualified voters."

The right of these parties to vote in the June election, assuming that they are otherwise qualified, will depend, as to residence, upon the question whether they moved from Brookneal to Lynchburg and Charlottesville, respectively, with the intention of changing their legal residence from Brookneal to the places to which they moved. If on the other hand, when they moved from Brookneal, they intended to retain their legal residence at Brookneal, they would be entitled to vote if otherwise qualified. *Williams v. Commonwealth*, 116 Va. 272.

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

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**LICENSE—Dog.**

RICHMOND, VA., May 11, 1926.

HON W. W. WEBB, *Treasurer,*  
*Abingdon, Va.*

MY DEAR SIR:

Acknowledgment is made of your letter of May 6, 1926, in which you say:

"Is a minor whose parents are living, one or both, and such minor resides with parent or parents, as the case may be, eligible to make application for a dog license tag under the license act? That is, are the licenses legally issuable applicant as above where the minors in making such application certify they are under age?"

In my opinion an infant can own a dog. An infant, therefore, would be entitled to make application for and receive a dog license upon the payment of the required fee.

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

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**ELECTIONS—Registration books.**

RICHMOND, VA., May 11, 1926.

MR. THOMAS J. NOTTINGHAM,  
*General Registrar,*  
*Norfolk, Va.*

MY DEAR SIR:

Acknowledgment is made of your letter of May 10, 1926, in which you request me to advise you whether the registration books have to be closed prior to the regular municipal election held in June.

If you will examine section 98 of the Code, you will see that the registrar in cities and towns is required, on the third Tuesday in May, to proceed to register the names of all qualified voters within his election district not previously registered, who shall apply to be registered, "commencing at sunrise and

closing at sunset, and shall complete such registration on the third Tuesday in May." This section further provides that the registrar "shall, at any time previous to the regular days of registration, register any voter entitled to vote."

This means that between the third Tuesday in May and the day on which the regular municipal election is held in cities and towns the registration books must be closed, and I have so ruled a number of times previously. Report of the Attorney General, 1923-1925, page 142.

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

### INHERITANCE TAX LAW—Reductions.

RICHMOND, VA., May 11, 1926.

HON. C. LEE MOORE,  
*Auditor of Public Accounts,*  
*Richmond, Va.*

MY DEAR MR. AUDITOR:

Acknowledgment is made of your letter of recent date in which you request me to advise you whether it is lawful for you, in administering the inheritance tax law, to allow as deductions from the net estate taxes due by the estate at the time of the decedent's death.

While it is true subsection 8 of section 44 of the tax bill, as amended, provided by subsection 9 of section 44 of the tax bill, as amended, under which amount of said estate, after deducting debts and costs of administration," it is provided by subsection 9 of section 44 of the tax bill, as amended, under which section the tax is assessed, "said taxes shall be assessed upon the actual value of the property at the time of the death of the decedent."

The Court of Appeals in *Kincheloe v. Gibson*, 115 Va. 119, 129 (1913), held that taxes accrue and become personal charges against the owners of real estate as of the first day of February of each year, and where the owner dies subsequent to that date, the taxes for that year become a preferred charge against his estate. It, therefore, follows that in order to determine the actual value of the property at the time of the death of the decedent, who dies after the first day of February, the taxes for that year should be deducted in assessing the inheritance tax.

I am aware of the opinion given you on January 5, 1926, by Mr. F. Warren Wall, counsel for the State Tax Commission, but in my opinion the case of *West Virginia Pulp and Paper Co. v. Karnes*, 137 Va. 714, 722 (1923), relied on by Mr. Wall, is not applicable to the question here under consideration. In that case the contention was that taxes were debts, within the meaning of section 2304 of the Code of 1919, entitled to be deducted by the taxpayer.

In the instant case, however, the question is not one of deduction, but as to what property can be assessed with taxes, the law having expressly provided that the tax must be assessed upon the actual value of the property at the time of the death of the decedent.

It necessarily follows that in arriving at the actual value of the property personal charges against the decedent, which have accrued at the time of his death, must be deducted.

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

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### SCHOOLS—Classification of salaries.

RICHMOND, VA., May 11, 1926.

His Excellency, HARRY F BYRD,  
*Governor of Virginia,*  
*Richmond, Va.*

MY DEAR GOVERNOR:

Acknowledgment is made of your letter of May 8, 1926, in which you say:

"I enclose your letter from the Superintendent of Education. Please advise if the bill passed by the General Assembly requiring me to approve certain increases in salaries permits classification as outlined in the attached letter from the Superintendent of Education."

I note that the classification proposed by the Superintendent of Public Instruction consists of both a minimum and maximum compensation for the president, professors, etc., in the State teachers colleges.

Chapter 88 of the Acts of 1926 provides that the salary of no officer or employee of any State institution, which is not specifically fixed by law, "shall be hereafter increased, or authorized to be increased, without prior authorization of said board or commission and the consent of the Governor first obtained in writing *in each case.*"

In my opinion the proposed classification, if approved by the Governor, would not be a compliance with chapter 88 of the Acts of 1926.

Trusting that this gives you the desired information, I am

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

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### MOTOR VEHICLE CARRIERS—Tax.

RICHMOND, VA., May 11, 1926.

MONROE TRANSFER AND STORAGE COMPANY,  
*Hampton, Va.*

GENTLEMEN:

Acknowledgment is made of your letter of May 8, 1926.

While it is true that the motor vehicle carriers law does require the holder of a class "C" certificate to pay but ten dollars for a license tax, chapter 374 of the Acts of 1924, which is another statute, expressly provides in the seventh

paragraph of section 1 thereof that each motor vehicle carrier doing a business in this State shall pay to the State, in addition to the license tax, an annual tax equal to one-tenth of one per centum of its gross receipts from business done within the State.

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

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#### PHYSICIANS—Liability of.

RICHMOND, VA., May 11, 1926.

HON. W. L. LANCASTER, *Mayor,*  
*Blacksburg, Va.*

MY DEAR MR. LANCASTER:

Acknowledgment is made of your letter of May 7, 1926, in which you say in part:

"May I inquire as to the responsibility of towns, cities and counties in the case of a physician who treats venereal diseases and the party fails to pay him, or is not able to pay for the treatment? Is the municipality liable for the charge?

"If a patient is under treatment and fails to report or finish the treatment, syphilitic case, is it not a fact that he is guilty of a felony and might be sent to the Penitentiary?"

The only case in which the State pays a physician for the treatment of such persons is where they are confined in jail. Then under Code, section 4956, the jail physician is entitled to a fee of seventy-five cents in some cases and fifty cents in other cases.

I find nothing in the Code with reference to the treatment of such cases at the expense of cities and towns. I am advised by the State Board of Health that the city of Richmond employs a special physician for the purpose of treating such cases, and the city attorney advises me that this physician is paid by the director of public safety out of a lump appropriation made to him by the city council for taking care of the matters falling under his department. I would say, however, that a city or town would have the authority to enact an ordinance providing for the employment of a physician for the treatment of such persons as they are, indeed, a menace to the community. You will find in the Acts of 1918, page 561, a statute aimed at the curbing of the spread of venereal diseases.

As to your second question, I do not find that a person who fails to complete the necessary treatment is guilty of a felony. He would unquestionably be subject to quarantine, however, and it is possible that the council could make such action an offense against the town.

Trusting that this gives you the desired information, I am

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

**ELECTIONS—Naturalization.**

RICHMOND, VA., May 10, 1926.

MR. F. C. HILLMAN,  
*Clintwood, Va.*

MY DEAR MR. HILLMAN:

Acknowledgment is made of your letter of May 8, 1926, in which you say:

"Can a man who has just been naturalized a citizen of the United States since February 1, 1926, pay his capitation tax for 1927 and vote this fall same as a man becoming of age since February 1?"

If this man has been a resident of Virginia two years prior to the date of the November, 1926, election, of the county of Dickenson one year prior to that time and of the precinct in which he offers to register and vote thirty days, and is otherwise qualified, he can register and vote, provided he has paid all capitation taxes with which he was assessed or assessable during the three years preceding the year 1926. If he has been residing in Virginia for three years or more, he is assessed or assessable with a capitation tax for each of those years as section 4 of the Virginia Tax Bill classifies all male inhabitants of the State as subject to a capitation tax. Aliens as well as citizens who inhabit this State are subject to the payment of a capitation tax.

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

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**HOTELS—Guests.**

RICHMOND, VA., May 10, 1926.

ORKNEY SPRINGS HOTELS, INC.,  
945 Pennsylvania Avenue, N. W.,  
Washington, D. C.

GENTLEMEN:

Acknowledgment is made of your letter of May 5, 1926, in which you say in part:

"You will note we have printed on our booklets, '*Strictly Gentile Hotel*.' Will you kindly let me know by return mail, if possible, if there is a law in Virginia that prohibits the use of the above on our booklets? We are getting ready to have our new booklets printed and will leave it off if there is a law, as in other States, prohibiting it."

From an examination of our Code I find no statute with reference to this matter, but the common law which is in force in this State holds that an inn-keeper is under a legal obligation to receive and entertain all unobjectionable persons who offer themselves as guests, so long as he has accommodations for them and they are able and willing to pay a reasonable consideration therefor,

and that for a breach of this duty the innkeeper is subject to an action for damages.

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

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#### SCHOOLS—Dispute relative to location.

RICHMOND, VA., May 10, 1926.

HON. CECIL CONNOR,  
*Commonwealth's Attorney,*  
*Leesburg, Va.*

MY DEAR SIR:

Due to the necessary absence of the Attorney General from the office today, he referred your letter of May 6, 1926, to me with the request that I answer the same as you desire a reply on or before tomorrow.

It appears from the facts stated in your letter that about seventeen or eighteen years ago a dispute arose in your county as to whether a new high school should be established in the village of Lincoln or the town of Purcellville, and that the board finally selected a site at Lincoln on which the school was later erected. You further state that in March, 1926, the building was destroyed by fire; that on April 10, 1926, the county school board at its regular session considered the matter of erecting a new building at which time certain persons requested that the site be changed, but, after due consideration, the county board unanimously decided to erect the new building on the old site at the village of Lincoln, and that within the statutory period, under authority of section 666 of the Code, as amended, more than five heads of families filed their complaint in writing with the division superintendent of schools who, being unable within ten days after the receipt of the same to satisfactorily adjust the matter granted an appeal to the school trustee electoral board. The last-mentioned board met to consider the matter on April 26, 1926. That board decided that it was without authority to entertain the appeal because the superintendent of schools had not approved the site, location, plans and specifications therefor as required by section 673 of the Code. Thereupon on April 27, 1926, the division superintendent of schools attempted to "officially express" his "disapproval of the location for a new school to be erected in Mt. Gilead district at Lincoln on the former site as decided by your board at its meeting on April 10, 1926. This decision is made in accordance with the Code of Virginia, section 673."

You then ask the following questions:

"Does there now arise the right of appeal from this action of the division superintendent? If so, to what body does the appeal lie—to the electoral board, or to the court, or to the Superintendent of Public Instruction? And who has the right of appeal? Can the county board appeal from the veto—that is, action of the division superintendent in disapproving decision of the county board?"

You will recall that section 673 of the Code, so far as is applicable to the question here under consideration, reads as follows:

"No school house shall be contracted for or erected until the *site, location*, plans and specifications therefor shall have been submitted to and approved in writing by the division superintendent of schools, whose action in each case shall be reported by him to the State Board of Education; \* \* \*." (*Italics supplied.*)

In the case before us for consideration on the facts stated in your letter, the site of the high school was selected seventeen or eighteen years ago. Therefore, when the county school board decided to rebuild on the old site they did not relocate a new site, or select a new location, and the only power conferred upon the division superintendent of schools, under section 673 of the Code, is to approve or disapprove the plans and specifications therefor.

It is my opinion that in this case he is without jurisdiction to disapprove the old site or location, as that was selected and approved seventeen or eighteen years ago, and, being without authority to disapprove the action of the county school board in this particular, his approval likewise is not necessary, as the school board has not selected a new site or location. This being true, when the division superintendent of schools could not satisfactorily adjust the complaint of the more than five heads of families referred to in your letter, he followed the proper procedure in granting an appeal to the school trustee electoral board, and that board now has jurisdiction of that appeal under section 666 of the Code of Virginia, 1919, as amended. It is my opinion that the board was in error when it decided that it was without jurisdiction.

I would, therefore, suggest that the school trustee electoral board now proceed to consider the appeal under section 666 of the Code, as amended.

Trusting that this gives you the desired information, I am

Very truly yours,

LEON M. BAZILE,  
*Assistant Attorney General.*

#### BOARD OF SUPERVISORS—Relative to school bond issue.

RICHMOND, VA., May 10, 1926.

HON. B. CLIFFORD GOODE,  
*Division Superintendent,*  
*Martinsville, Va.*

MY DEAR MR. GOODE:

Acknowledgment is made of your letter of May 3, in which you say:

"You will find enclosed a copy of a resolution adopted by the school board and the board of supervisors of Henry county relative to a school bond issue of \$150,000.

"The proposed bond issue is for the whole county in which all of the magisterial districts are included in the allocation of funds.

"The question has been raised as to whether the county as a whole can vote a bond issue for schools. Commonwealth's Attorney Joseph R. Taylor has asked me to write you and ask for an opinion on the proposed bond issue so that there will be no question about the formulation of the petition to the circuit judge."

I understand that the proposed bonds are to be issued in accordance with sections 765-773 of the Code of 1919. Section 644c of the Virginia Code, 1924,

which is section 3 of the Act of 1922, p. 737, vests the county school board with all powers and charges it with all the duties and obligations "heretofore vested in or conferred or imposed upon the several district school boards of the particular county, as well as the county school board of such county." Therefore, it is my opinion that the county school board would have a right to pass the resolutions, etc., provided for by sections 765-773 of the Code of 1919.

However, sections 765-773 of the Code of 1919, provide for and contemplate the issuance of district school bonds and authorize elections by the several school districts and not the county; therefore, it is my opinion, that, while the election may be held in several districts on the same day, that a separate election must be held in each district and the bond issue must carry in each district before bonds chargeable against that district can be issued.

Trusting that this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

**AUTOMOBILES—State not subject to action for injuries inflicted through negligence of its employees.**

RICHMOND, VA., May 8, 1926.

LINWOOD H. WARWICK, ESQ., *Chief Clerk,*  
*Virginia Geological Survey,*  
*University of Virginia,*  
*Charlottesville, Va.*

MY DEAR SIR:

Acknowledgment is made of your letter of May 6, 1926, in which you say in part:

"Will you kindly advise me, at your early convenience, whether the State of Virginia is liable for damages on account of accidental personal injuries sustained by others on the part of drivers of State-owned and operated cars. My reason for making this inquiry is to ascertain whether the Virginia Geological Survey should take out liability insurance on the automobiles operated by its employees in the discharge of their official duties."

The State is not liable for damages on account of injuries inflicted on others by the drivers of State-owned automobiles. The drivers of such machines, however, would be liable if guilty of negligence.

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

**BOARD OF EQUALIZATION—Payment of members.**

RICHMOND, VA., May 7, 1926

HON. R. A. BICKERS,  
*Commonwealth's Attorney,*  
*Culpeper, Va.*

MY DEAR MR. BICKERS:

Acknowledgment is made of your letter of May 6, 1926, in re: Payment of the members of the local board of equalization for a few days work done after the repeal of the law before knowledge of the repeal came to their attention.

I took the matter up with the Auditor, and he advised me that inasmuch as the work was done in good faith the State has been paying its part of the compensation of the members of such boards, where they worked for a few days after the repeal of the law. It seems to me that this is clearly the just thing to do, as these men performed their work in good faith without at the time having the means of knowing the law under which they were employed had been repealed, and, while this is not a strict technical application of the law, I am of the opinion that justice demands that these men be paid.

Trusting this gives you the desired information, I am

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

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### INTOXICATING LIQUORS—Application for pardon.

RICHMOND, VA., May 6, 1926.

*His Excellency, HARRY FLOOD BYRD,*  
*Governor of Virginia,*  
*Richmond, Va.*

MY DEAR GOVERNOR:

Some days ago you referred to me for attention the file in the matter of the application of Clarence Sullivan for a pardon from six months of punishment inflicted by the jury on the trial of the third indictment against him.

You will recall that on April 9, 1926, you denied a pardon in this case. On April 15, Hon. S. P. Powell, Commonwealth's attorney of Spotsylvania county, wrote you a very long letter about the subject from which it appears that Clarence Sullivan was found at a still in Spotsylvania county on September 3, 1925, engaged in manufacturing liquor and having in his possession a still in operation, whiskey and mash, and also a pistol. For some reason three indictments were returned against the man: first, for having a concealed weapon; second, for the possession of a still, and, third, for the making of liquor with a pistol in his possession. It also appears from Mr. Powell's letter that Sullivan pleaded guilty to the first two indictments and, in spite of his plea of guilty, the matter was submitted to a jury, which imposed a penalty of \$50 for carrying a concealed weapon, and imposed a fine of \$100 and three months on the public roads for possessing a still. It appears that the next day he was tried on the charge of manufacturing ardent spirits with a pistol in his possession, and that in that case the jury returned the following verdict:

"We, the jury, find the accused, Clarence Sullivan, guilty of manufacturing distilled ardent spirits as charged in the indictment and fix his punishment at six months in jail and \$100 fine and having a firearm within the prohibited distance while engaged in said manufacture guilty and fixed his punishment at six months in jail. E. W. Chewning, foreman."

The indictment in the third case was founded upon the offense created by section 9 of the Virginia Prohibition Law which reads as follows:

"If any person shall unlawfully manufacture, transport, or sell any ardent spirits, as herein defined, and at the time of such manufacturing, transporting, or selling or aiding or assisting in any manner in such act, shall carry on or about his person, or have on or in any vehicle which he may be using to aid him in any such purpose, or have in his possession, actual or constructive, at or within one hundred yards of any place where any such intoxicating liquor is being unlawfully manufactured, transported or sold, any firearm, dirk, bowie-knife, razor, slung-shot, metal knucks or any weapons of like kind, he shall be deemed guilty of a felony, and on conviction shall be confined in Penitentiary not less than one year, nor more than three years, or, in the discretion of the jury, or the court trying the case without a jury, confined in the jail for not less than six months, nor more than twelve months.

"All persons manufacturing, transporting, or selling, or aiding or abetting in such act, with knowledge of the possession by any one or more of their number of the deadly weapons as above set forth, shall be deemed principals to the crime and punished as such.

"Any such firearms, dirk, bowie-knife, razor, slung-shot, metal knucks or any weapons of like kind shall be confiscated as now provided by law."

It is true that the manufacture of ardent spirits is prohibited by section 3 of the prohibition law, which in the case of distilled ardent spirits is punished as a felony by section 5 of the act. The unlawful manufacturing of ardent spirits, however, when the person engaged in the manufacture of the same carries on or about his person, or has in his possession, actual or constructive, in the vicinity of a still, firearms is a different and substantive crime from the crime of manufacturing denounced by sections 3 and 5 of the Virginia Prohibition Law.

The offense denounced by section 9 of the Virginia Prohibition Law is a single offense and not two offenses, and, therefore, in my opinion, the jury could return a verdict fixing one punishment for the offense charged in the indictment, namely, the unlawful manufacturing of ardent spirits while possessed of a firearm or other deadly weapon, and the jury was without authority to impose one punishment for the manufacture of ardent spirits and another for the possession of a firearm while so engaged in the manufacture of ardent spirits. The verdict was, therefore, in my opinion, bad in that it attempted to impose two punishments for one offense.

The verdict was also, in my opinion, defective in that it imposed a fine in addition to the jail sentence for violation of section 9 of the Virginia Prohibition Law. It will be seen from an examination of the above section that it imposes its own penalties for a violation thereof, namely, confinement in the Penitentiary not raise any question as to the legality of the punishment imposed. jury, or the court trying the case without a jury, confinement in jail for not less than six months, nor more than twelve months.

Section 6 of the Virginia prohibition law, which provides for penalties generally, has no application to a prosecution under section 9 of the act, as section 6 of the act expressly provides that it shall not apply to cases which are "otherwise herein provided" for. The punishment for a violation of section having been fixed by that section, of course, section 6 did not apply and the assessment of a fine was without authority under the law.

As the judgment in the case appears to have been entered on or about the 5th of October, 1925, the time for applying for an appeal has expired, but it

seems to me that the relief sought by Sullivan in this case would be afforded by resort to the courts on a writ of *habeas corpus*.

The file shows that this man is entitled to little or no consideration on an application for a pardon from a sentence lawfully imposed on him for a violation of the prohibition law, but, as I have said, if the statements contained in Mr. Powell's letter are correct, as I assume they are, the punishment inflicted on him in the case of the third indictment is clearly unauthorized by law and ought to be corrected. However, I think he has an adequate remedy by *habeas corpus* to do this without resort to the pardoning power for relief.

From the statements contained in Mr. Powell's letter it appears that the man was not represented by counsel, and this no doubt accounts for the fact that the defects in the verdict referred to were overlooked, as Mr. Powell does not put his request for a pardon on the ground that the verdict was illegal, but on the ground that the jury gave the accused more time than they thought they were giving him, because of their ignorance of the fact that he had been previously tried on the other two indictments and sentenced to punishment thereunder. I also observe that Senator Goolrick, who represents Sullivan at this time, does not raise any question as to the legality of the punishment imposed.

I have a very high regard of Judge Coleman's ability and of his fairness as a jurist, and I am sure that if the matter is presented to him in the proper light it can be corrected on a writ of *habeas corpus* without additional bother to you.

Very truly yours,

LEON M. BAZILE,  
*Assistant Attorney General.*

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#### GAME WARDENS—Trespassing on posted lands.

RICHMOND, VA., May 6, 1926.

W. LEE BECKNER, ESQ.,  
*Game Warden,*  
*Clifton Forge, Va.*

MY DEAR SIR:

Your letter of recent date has not been answered sooner because of the fact that I have been compelled to be out of the city a number of times recently. You say:

"There are several streams in this section of Virginia that have been leased by individuals, and I have been approached by quite a number of fishermen asking if they could fish in these streams, notwithstanding the fact that parties have posted them conspicuously.

"The first part of section 3338 provides that it is not necessary to get permission to hunt and fish on unenclosed mountain land west of the Blue Ridge mountains. However, the latter part of this same section 3338 states: 'and if any person after being warned not to do so by the owner or tenant of *any premises* shall go upon the lands of said owner or tenant, he shall in addition to the liabilities imposed under this section, be deemed guilty of a misdemeanor and upon conviction thereof, punished by a fine of \$50, etc.' My construction of this section is that any person trespassing

on any lands that have been posted, notwithstanding the fact that these are located west of the Blue Ridge mountains, that they will be subject to a fine not exceeding \$50, etc."

In reply, I beg to say that I think your construction of section 3338 is correct.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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### SCHOOLS—Superintendent—Call meeting.

RICHMOND, VA., *April 30, 1926.*

HON. WILBUR C. HALL,  
*Attorney at Law,*  
*Leesburg, Va.*

MY DEAR MR. HALL:

Acknowledgment is made of your letter of April 28, 1926, in which you say in part:

"I want to know if the superintendent can compel the chairman of the county school board to call a meeting. Upon organization of the county school board of Loudoun county, a resolution was adopted that special meetings could be called on request of two members."

County school boards as they now exist were provided for by chapter 423 of the Acts of 1922. Section 5 of that act, after providing for the organization meeting and the selection of a chairman and secretary, provides:

"The board shall meet at such other times as may be prescribed by law, or as necessity may require. If the board consist of an even number, the division superintendent shall have a vote on any question in the case of a tie vote."

Section 3 of the same act provides:

"The county school board as above constituted is hereby vested with all the powers and charged with all the duties and obligations hitherto vested in, or conferred or imposed upon, the several district school boards of the particular county, as well as the county school board of such county as now constituted, except as herein provided and except in so far as such powers and duties may be inconsistent with the functioning of the county school board as the unit of operation of the public free school system in the county."

Section 633 of the Code of Virginia, 1919, provides as follows with reference to district boards:

"Any member may call a meeting by giving due notice to the other two members. Any two members shall constitute a quorum; a concurrence of a majority of the board in a duly assembled meeting shall be required to constitute a valid act."

There can be no question but that this law is still in force and effect by virtue of the provisions of section 3 of chapter 423 of the Acts of 1922.

With reference to the old county school boards as constituted at the time chapter 423 of the Acts of 1922 was enacted, section 640 of the Code of Virginia, 1919, made the division superintendent ex-officio president of the county school board.

Section 641 of the Code of Virginia, 1919, provides as follows:

"It shall be the duty of the president to call meetings of the board whenever, in his judgment, such meetings are needed, and also when requested to do so by two chairmen of the district boards of the county."

Section 643 of the Code of Virginia, 1919, required the county school board to hold a regular annual meeting in the month of July, the date thereof to be fixed by the board itself, or, if it failed to do so, by the president.

It would seem from the provisions of section 3 of chapter 423 of the Acts of 1922 that all the above sections are in force, except so far as the powers and duties conferred or imposed therein are "inconsistent with the functioning of the county school board as the unit of operation of the public free school system in the county."

In view of the fact that section 5 of chapter 423 of the Acts of 1922 provides that the county school board at its first meeting shall select one of their number chairman, I have had some hesitation in holding that section 640 of the Code of Virginia, 1919, which makes the division superintendent ex-officio president of the county school board, is still in force, but upon reflection and in view of the last sentence of section 5 of chapter 423 of the Acts of 1922, which provides that in a case where the board consists of an even number the division superintendent shall have a vote on any question in the case of a tie vote, and also in view of the fact that repeals by implication are never favored, I am of the opinion that section 640 of the Code is still in force and effect, so far as it makes the division superintendent president of the county school board.

Therefore, it is my opinion that the division superintendent can call a meeting of the county school board as provided for in section 641 of the Code of Virginia, 1919.

Trusting that this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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#### SCHOOLS—Duties of Superintendent.

RICHMOND, VA., *April 30, 1926.*

HON. WILBUR C. HALL,  
*Attorney at Law,*  
*Leesburg, Va.*

MY DEAR MR. HALL:

Before answering the remaining questions in your letter of April 28, 1926, I would like to have a little more information of the facts in connection with the same. Could you tell me whether the case to which you refer was adjudicated

on its merits when the appeal was taken to the circuit court, or whether the proceeding was disposed of for any technical reason? In other words, I would like to know whether the circuit court determined the matter in issue.

You will observe that section 666 of the Code of Virginia, 1924, provides, in part, that, when an appeal is taken to the circuit court and passed on by the court or judge in vacation, the court or judge "shall decide finally all questions at issue and shall have an order entered in the chancery order book setting forth such decision." It would seem from this section that, if a building site had been selected in the manner prescribed by law and that persons objecting to that site had appealed therefore, the adjudication of the court would be final.

With reference to the third question asked in your letter, namely, what time must the superintendent approve or disapprove the action of the county school board, under the provisions of section 673 of the Code of Virginia, 1924, you will observe that this section, so far as is applicable to the question here under consideration, provides:

"No school house shall be contracted for or erected until the site, location, plans and specifications therefor shall have been submitted to and approved in writing by the division superintendent of schools, whose action in each case shall be reported by him to the State Board of Education; \* \* \*"

It seems to me that, while this section involves a discretionary duty on the part of the superintendent of schools, it must be read in connection with section 666 of the Code of 1919, as amended. You will see from an examination of the latter section that when a dispute arises over the action of the county school board in any matter from which an appeal may be taken, the division superintendent is required to adjust the same within ten days, or to grant an appeal to the trustee electoral board. It seems to me that this statute contemplates that the division superintendent shall make his decision in matters of this kind within ten days. Certainly, it would seem that this is sufficient length of time for the superintendent to act.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

#### **AUTOMOBILES—Mail carriers.**

RICHMOND, VA., *April 30, 1926*

HON. H. PRINCE BURNETT,  
*Commonwealth's Attorney,  
Independence, Va.*

MY DEAR MR. BURNETT:

Acknowledgment is made of your letter of April 24, 1926, in which you say:

"A question has arisen here as to the right as to the star mail carrier from this point of Fries to carry passengers and make charge for same. There is a licensed bus line over this route. The latter part of section 2154a-2, G. L. Appendix 2, seems to give this right. I will appreciate it if you will give me your opinion on this."

Section 2154-a-2, G. L. Appendix 2, is the same as section 2, chapter 161, of the Acts of 1923. This section was amended by the Acts of 1924, p. 330. The law as amended reads as follows:

"\* \* \* provided, however, that nothing in this act contained shall apply \* \* \* to United States mail carriers operating star routes, *while engaged solely in carrying mail.*"

This provision, in my opinion, was designed merely for the purpose of preventing any question being raised as to the right of mail carriers to transport mail without complying with the provisions of chapter 161 of the Acts of 1923, as amended, and was not intended to authorize a mail carrier to engage in the business of transporting persons or property without complying with the provisions of the law requiring motor vehicle carriers to obtain a permit from the Corporation Commission, etc.

Trusting this gives you the desired information, I am

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

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#### APPALACHIAN POWER CO.—Recordation tax.

RICHMOND, VA., *April 29, 1926.*

HON. C. LEE MOORE,  
*Auditor of Public Accounts,*  
*Richmond, Va.*

MY DEAR MR. AUDITOR:

You will recall that this morning a conference was held in your office at which you, Robert E. Scott, Esquire, and I were present, at which time we discussed the question whether the Appalachian Power Company was an internal improvement company, within the meaning of section 13 of the Virginia Tax Bill, as amended, and, therefore, entitled, when recording a deed of trust or mortgage upon its property, lying partly in this State and partly in another State, to have the recordation tax based upon such proportion of the amount of bonds or other obligations secured thereby as the property secured in the State bears to the whole of the value of the property conveyed by such deed.

At said conference we agreed that the Appalachian Power Company, which operates lines for the distribution of electric power, was an internal improvement company within the meaning of section 13 of the Virginia Tax Bill, as amended, and it was further agreed at that conference that I should place this opinion in writing for your future guidance in the matter.

I am, therefore, writing to say that it is my opinion that the Appalachian Power Company is an internal improvement company within the meaning of section 13 of the Virginia Tax Bill, as amended, and that the recordation tax on its deeds of trust or mortgages should be based on such proportion thereof as its property in Virginia bears to the whole property conveyed by such deed of trust or mortgage.

The Court of Appeals in *Pocahontas Collieries Co. v. Commonwealth*, 113 Va. 108, 114 (1912), referred to telephone and telegraph companies as being included within the classification of internal improvement companies, and, in my

opinion, a public service corporation generating and distributing electricity through conduits or lines is an internal improvement company within the meaning of section 13 of the Virginia Tax Bill, as amended

Yours very truly,

LEON M. BAZILE,  
*Assistant Attorney General.*

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**LICENSE—Exemption of fire companies.**

RICHMOND, VA., April 28, 1926.

MR. E. B. MOORE, *Cashier,*  
*The Peoples Bank,*  
*Appalachia, Va.*

MY DEAR SIR:

Acknowledgment is made of your letter of April 26, 1926, in which you say in part:

"I have been informed that the last legislature passed an act exempting all volunteer fire companies from payment of license on any carnival operated under their name after June 15.

"Will you kindly advise me if this true and, if so, may the carnival operate concessions under this act."

Your inquiry has reference to House Bill No. 465, which will be chapter 354 of the Acts of 1926, amending and re-enacting section 107 of the tax bill. This section imposes a tax upon every person, firm, company, or corporation who exhibits performances in a side show, dog and pony show, trained animal show, carnival, circus, menagerie and circus, or any other show, exhibition or performance similar thereto.

The section then provides in part:

"\* \* \* but this section shall not be construed to prohibit \* \* \* exhibitions of volunteer fire companies, whether an admission be charged or not. \* \* \*"

In my opinion, this means that volunteer fire companies may give exhibitions for which admission fees are charged without being subject to tax, but this language does not give to volunteer fire companies the right to permit a carnival to be operated under the name of the volunteer fire company unless all the exhibitions and participants therein are bona fide members of such volunteer fire company, nor does it permit exhibition by those who make it their business to give such exhibitions to exhibit without license, although the exhibitions are under the auspices of or for the benefit of a volunteer fire company.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

**TAXATION—Property.**RICHMOND, VA., *April 28, 1926.*

HON JAMES P. WOODS,  
*Attorney at Law,*  
*Roanoke, Va.*

MY DEAR MR. WOODS:

Acknowledgment is made of your letter of April 27, 1926, in which you state that you propose to offer for record a deed conveying only the equity in mortgaged property, and then say:

"The grantee does not assume the mortgage, the deed reciting, however, that the conveyance is subject to the outstanding mortgage. The entire property mortgaged is worth a million or more dollars, but the equity above the mortgage is worth only a nominal sum, perhaps \$100,000."

You state that the Auditor has ruled that the tax must be paid on the value of the entire property, and ask my opinion as to whether this ruling of the Auditor is correct.

The matter is governed, as you say, by section 13 of the tax bill, as amended, which 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 ten cents on every hundred dollars or fraction thereof of such consideration of actual value; \* \* \*."

A similar question was passed on by this office on April 17, 1914, in an opinion given the Auditor by Hon. Christopher B. Garnett, then Assistant Attorney General, in which he held that in such a case the tax was to be collected on the actual value of the property conveyed. For your information I am sending you a copy of the opinion referred to with which I fully concur.

Trusting that this gives you the desired information, and with my best wishes, I am

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

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**TAXATION—Church schools.**RICHMOND, VA., *April 28, 1926.*

WILLIAM D. SAUNDERS, ESQ.,  
*Blacksburg, Va.*

MY DEAR MR. SAUNDERS:

Acknowledgment is made of your letter of April 27, 1926, in which you request me to advise you whether a school, operated by a church, which has recently installed an electric plant, could sell electric current to a town and the citizens of the neighborhood without subjecting its property to taxation.

The matter is governed by subsection (d) of section 183 of the Constitution. This section of the Constitution, so far as is applicable to the question here under consideration, provides:

"Except, as otherwise provided in this Constitution, the following property and no other, shall be exempt from taxation, State and local; but the General Assembly may hereafter tax any of the property hereby exempted save that mentioned in subsection (a) :

"(d) Buildings with the land they actually occupy and the furniture, furnishings, books and instruments therein, *wholly devoted to educational purposes*, belonging to, and actually and exclusively occupied and used by churches, public libraries, incorporated colleges, academies, industrial schools, seminaries, or other incorporated institutions of learning, including the Virginia Historical Society, which are not corporations having shares of stock or otherwise owned by individuals or other corporations; together with such additional adjacent land owned by such churches, libraries and educational institutions as may be reasonably necessary for the convenient use of such building, respectively; and also the buildings thereon used as residences by the officers or instructors of such educational institutions, and also the permanent endowment funds held by such libraries and educational institutions directly or in trust, and not invested in real estate; provided, that such libraries and educational institutions are not conducted for profit of any person or persons, natural or corporate, directly, or under any guise or pretence whatsoever. But the exemption mentioned in this subsection shall not apply to any industrial school, individual or corporate, not the property of the State, which does work for compensation, or manufactures and sells articles, in the community in which such school is located; provided, that nothing herein contained shall restrict any such school from doing work for or selling its own products or any other articles to any of its students or employees." (Italics supplied.)

In my opinion the school referred to would lose its exemption from taxation if it engaged in the sale of electric current as suggested in your letter. The case of the State Farm and the Virginia Polytechnic Institute referred to in your letter are entirely different, as both of these institutions are owned and operated by the State and, of course, the State can engage in any kind of business authorized by law without subjecting itself to taxation.

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

#### **MOTOR VEHICLE COMMISSIONER—Refund gasoline tax.**

RICHMOND, VA., April 27, 1926.

HON. JAMES M. HAYES, JR.,  
*Motor Vehicle Commissioner,*  
*Richmond, Va.*

MY DEAR SIR :

Acknowledgment is made of your letter of April 26, 1926, in which you say:

"House Bill No. 221, approved March 24, 1926, provides for payment of the refund of tax on gasoline to the city of Richmond amounting to \$3,233.79.

"The Motor Vehicle Commissioner be, and he is hereby, authorized and directed to draw his check in favor of the city of Richmond, for the aforesaid sum of three thousand, two hundred and thirty-three and seventy-nine one-hundredth dollars, which shall be paid by the State Treasurer out of collections in his hands created by said act."

"I think the intention of this act was that this money be refunded to the city of Richmond by check drawn by me for such refund, and this

amount be deducted from the current collections as under section No. 7 of Gas Tax Act. Same provides that the office shall repay to such consumer when the tax is collected on motor vehicle fuel.

"I would thank you to render an opinion as to whether or not I will be authorized to draw my check for this amount and include this refund along with other refunds made by this office. This office cannot draw a check on the State Treasurer, and if such check were drawn by the Auditor, it would mean this amount would have to be divided and deducted from the amount apportioned to the State highway and construction fund and the amounts due various counties. I have this application for refund filed with this office by Mr. H. C. Cofer, city comptroller of the city of Richmond, and I shall hold same pending your opinion in regard to same."

I have examined House Bill No. 221 referred to in your letter and have discussed the same with the Auditor of Public Accounts, and it is my opinion that you are authorized to draw your check for this amount and include this refund along with other refunds made by your office, as suggested by you.

The Auditor concurs in this opinion.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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#### RAILROAD CROSSINGS—Signals.

RICHMOND, VA., April 27, 1926.

HON. H. G. SHIRLEY, *Chairman,*  
*State Highway Commission,*  
*Richmond, Va.*

MY DEAR MR. SHIRLEY:

Acknowledgment is made of your letter of April 22, 1926, in which you ask three questions. You first ask to be advised whether section 5 of chapter 474 of the Acts of 1926, entitled, an act to regulate the operation of vehicles on public highways, etc., repeals Code section 3985.

I have examined section 3985 of the Code of 1919 and section 5 of chapter 474 of the Acts of 1926 with care, and, in my opinion, Code section 3985 is not repealed by section 5 of chapter 474 of the Acts of 1926. In fact, in my opinion, section 5 of chapter 474 of the Acts of 1926 is merely supplemental to section 3985 of the Code of 1919. Section 3985 of the Code requires railroad companies to construct and maintain railroad crossing or signal boards at grade crossings on public highways, while subsection c of section 5 of chapter 474 of the Acts of 1926 requires the erection at such crossings of signs visible for one hundred feet on each side of such railroad tracks with the words "Slow down, five miles, Va. law." There is nothing to prevent the railroad company from erecting this sign below the regular cross-arms in the place where the former signs, "Main line, danger" were placed.

Your second question is as follows:

"In wording the sign 'slow down' could the figure 5 be used instead of the word five, due to reducing space and convenience in reading?"

Subsection c of section 5 of chapter 474 of the Acts of 1926 reads as follows:

"Except in cities and incorporated towns it shall be the duty of steam railway companies to erect and maintain, at every point where a public highway crosses such railway at grade, and on which line trains other than purely local trains are operated, a sign, visible for one hundred feet on each side of its tracks with the words, 'Slow down, five miles, Va. law,' in letters at least six inches in height, painted in black upon a white background. Such signs shall be rectangular in shape, and of sufficient height to carry in two lines the words above required, and shall be of proportionate length."

While it is true the language of the act directs the word five to be written, in my opinion, this provision is merely directory and not mandatory, and, therefore, the requirements of the law would be complied with if the figure 5 were used instead of the word five, since the use of the figure would accomplish the purpose designed by the act, and, in fact, be more effective than the written word five on the sign.

Your third question is as follows:

"A number of railroads have sign boards that at present will not carry two lines of words. Will the wording as specified by the law carried on one line comply with the law?"

The purpose of subsection c of section 5 of chapter 474 of the Acts of 1926, in my opinion, is to require notice to be given to the traveling public that the Virginia law requires travelers approaching such crossing to slow down to five miles; therefore, if this information is conveyed to the traveling public by the sign, I think that is all that is contemplated by the statute, and, therefore, to place such information on one line instead of two lines would accomplish the purpose of the law. I am of the opinion, however, that the letters of the sign must be at least six inches in height, as well as the figure 5, and that the letters and the figure 5 must be painted in black upon a white background.

I have examined the sketch enclosed with your letter, and, in my opinion, signs erected in accordance therewith will comply with the law.

Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

#### **ELECTIONS—Capitation taxes.**

RICHMOND, VA., *April 27, 1926.*

HON. S. R. CURTIS, *Treasurer,*  
*Lee Hall, Va.*

MY DEAR SIR:

Acknowledgment is made of your letter of April 26, 1926, in which you state that a young man having come of age was assessed with capitation taxes for the years 1923-1924, and in September, 1924, enlisted in the army, from which he was discharged on January 20, 1926. You also state that he was assessed with a capitation tax for the year, 1925, and ask whether his tax for that year must be paid as a prerequisite to his right to vote in the November, 1926, election.

Your question should be answered in the affirmative, as section 21 of the Constitution provides, as a prerequisite to the right to vote, that all State capitation taxes with which one is assessed or assessable, during the three years next preceding that in which he offers to vote, must be paid. Unless the young man in question, when he entered the army, abandoned his residence in Virginia and changed it to some other State, he would be assessable with a capitation tax for the year 1925. If, when he enlisted in the army, he abandoned his residence in Virginia, and so intending changed it to some other place, he would not be qualified to vote in the 1926 election on account of the fact that he had not been a resident of the State for the two years required by the Constitution in November, 1926.

I assume from your letter that the young man in question retained his residence in Virginia. That being so, he was assessable with a capitation tax and must pay the same before he can vote in the election that is to be held this year.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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#### INTOXICATING LIQUORS—Notice to Commonwealth's attorney.

RICHMOND, VA., *April 26, 1926.*

HON. J. POWELL ROYALL,  
*Commonwealth's Attorney,*  
*Tazewell, Va.*

MY DEAR MR. ROYALL:

Acknowledgment is made of your letter of April 23, 1926, in which you call attention to the trial and disposition by the police justice of Pocahontas of the case of W. M. Thomas, charged with the operation of a still. You state that the police justice failed to give you notice of this case, and that you have never been notified to appear at the trial of any prohibition cases in the town of Pocahontas. You then say:

"I do not understand that any person charged with the enforcement of the prohibition law has the right to try the same without first notifying the Commonwealth's attorney, whose duty it is to appear at the trial of such cases."

In response to your inquiry I call your attention to the last paragraph of section 34 of the prohibition law, which reads as follows:

"In any prosecution before a mayor or police justice, the commissioner of prohibition and the attorney for the Commonwealth of the city or town shall be notified by the said mayor or police justice, in time to attend said trial, and the said attorney for the Commonwealth and the commissioner, his deputies and inspectors, shall have the same power in respect to such cases that they have in cases before the circuit or corporation court."

This section places a mandatory duty upon the mayor or police justice of all towns having prohibition ordinances to notify the attorney for the Commonwealth of all trials pending before such mayor or police justice involving the

violation of the liquor law, which notice must be given a sufficient length of time in advance of the trial to enable the Commonwealth's attorney to attend the trial and represent the prosecution.

I would suggest that you call the attention of the police justice to this section of the prohibition law, with which I am sure he must be unfamiliar, in order that the condition you refer to may be remedied.

With regards and best wishes, I am

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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### CONTRACTS—Erection of buildings at Catawba.

RICHMOND, VA., April 23, 1926.

DR. ENNION G. WILLIAMS,  
*State Health Commissioner,*  
*Richmond, Va.*

MY DEAR DR. WILLIAMS:

Acknowledgment is made of your communication of April 21 with which you sent me a letter addressed to you by Mr. A. Lambert Martin, business manager of Catawba Sanatorium, dated April 17, 1926, in which he asks for my opinion as to the legality of awarding a contract for the erection of certain buildings at Catawba Sanatorium without securing competitive bids. Mr. Martin states in his letter that he believes that it will be to the best interest of the sanatorium to award this contract to the proposed contractor, Messrs. Sears and Brown, of Salem.

I have examined the general appropriation bill for the biennium 1926-1928 and find nothing in this bill which appropriates a part of the money to be used in paying for this work which requires the board to advertise for competitive bids. I have also examined sections 1510-1514b of the Code of Virginia, 1924, and find nothing therein which requires such contracts to be awarded on competitive bids, nor do I find anything in the general sections of the Code which would require this contract to be let only on competitive bids, although there are provisions in the Code which require certain public contracts to be let only on competitive bids.

In the absence of such a provision, I have reached the conclusion that, while the awarding of a public contract without competitive bids is no doubt bad in policy, it, nevertheless, is not illegal. This is shown by *State, ex rel. Bare v. Lincoln County*, 35 Neb. 346, 350-351 (1892), where it is said:

"There is no provision of statute making the duty of county boards to let contracts for county printing, publishing and advertising of the character involved herein to the lowest and best bidder. The legislature has, however, enacted provisions requiring county boards to award contract for the furnishing of all books, blanks and stationery required for the use of the county officers to the lowest bidder when the cost of furnishing the same exceeds the sum of \$200 per year. (See sections 149, 150, 151 and 152, chapter 18, Compiled Statutes.) In view of the provisions of said sections, the omission of the law-makers to provide that contracts for the printing of the delinquent tax list and the publishing of the proceedings of the board shall be awarded upon competitive bids is significant. The only

proper conclusion to be drawn from the failure to so provide is that no legal duty rests upon a county board to invite bids for such work, or to award contracts therefor to the lowest and best bidder. The fact that it had in previous years been the custom in Lincoln county to let the contract for county printing, publishing and advertising to the lowest bidder does not change the legal aspect of the case. While there is no law which requires county boards to let such contracts in the mode contended for by the relators, yet it is within their discretion so to do. Although the respondents did not act for the best interest of the county in making the contract complained of in this action, yet, as no statutory provision has been disregarded, the relators are not entitled to the relief demanded. The writ is denied.'

Trusting that this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,

*Attorney General.*

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#### CERTIFICATES OF INDEBTEDNESS—Sale of.

RICHMOND, VA., *April 21, 1926.*

HON. HARRIS HART,

*Superintendent of Public Instruction,*

*State Board of Education,*

*Richmond, Va.*

MY DEAR MR. HART:

Acknowledgment is made of your letter of recent date in which you say in part:

"A bill was passed by the last Assembly, and is now approved by the Governor, providing that the State Board of Education may sell \$1,000,000 worth of its holdings in Century or Riddleberger bonds and lend to the State institutions of higher learning sums from this amount on certificates of credit issued and guaranteed by State institutions.

"Already some of the institutions are putting in requests for loans under the provisions of this law.

"May I ask that you review this law and let me know your opinion as to its constitutionality, having in mind particularly section 184 of the Constitution of Virginia?

"Under the provisions of the act it does not occur to me that the State Board of Education would run serious risk in making loans to higher institutions. It does establish a general policy which is entirely different from the former usage to which the literary fund has been put. I want to make to the State Board of Education appropriate recommendations as to the allotment to the several institutions under the provisions of this act, but, of course, I do not want to make any such recommendations if there be serious question about the constitutionality of the law."

I have examined the act to which you refer, a copy of which you sent me, with care. Section 1 of the the act authorizes the governing boards of certain enumerated State educational institutions, subject to the approval of the State Board of Education, through the commissioners of the sinking fund, to issue and sell certificates of indebtedness "in the names and on behalf of their institu-

tions, respectively," to raise funds for the purpose of constructing dormitories, etc. The last sentence of section 3 of the act provides as follows: "The certificates of indebtedness issued under this act are the certificates of the institutions issuing them, respectively, and not the certificates of the State."

I have examined section 184 of the Constitution, as amended, with care, and also sections 185 and 187, and, after careful consideration of the matter, it is my opinion that the act referred to is not in conflict with these sections of the Constitution and, therefore, valid. In this connection, I call your attention to the opinion given by me to the Finance Committee of the Senate on February 20, 1918, in re: the constitutionality of Senate Bill No. 146 (Report of the Attorney General, 1918, pages 151-153). This opinion sets forth my reasons for the constitutionality of a statute substantially similar to the one here under consideration, and it is unnecessary to here repeat what is said there.

Trusting that this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

#### AUTOMOBILES—Licenses.

RICHMOND, VA., April 21, 1926.

HONORABLE HARRY F. BYRD,  
*Governor of Virginia,*  
*Richmond, Va.*

MY DEAR GOVERNOR:

Acknowledgment is made of your letter of April 14, 1926, in which you say:

"I am advised by the Motor Vehicle Commissioner that a number of owners of automobiles who live in Virginia are obtaining their automobile licenses in Washington, where the license tax is much lower.

"Please advise the power of the State to require the securing of automobile licenses within the State."

It is my opinion that where the owner of an automobile resides in Virginia he must obtain a Virginia license as a prerequisite to the operation of that automobile in Virginia. The reciprocity section of the automobile law, which authorizes the operation of automobiles in this State under licenses obtained in other States, applies to automobiles owned and operated by nonresidents of Virginia, and not to residents of this State.

I have discussed this matter with the Motor Vehicle Commissioner since the receipt of your letter, and I have suggested to him that a suitable case be selected for prosecution, and that an indictment be obtained in this case, so that an appeal may be taken in the event the Commonwealth loses in the trial court. Due to an omission in the Code, if the prosecution were started before a justice of the peace, and the justice decided against the Commonwealth, the Commonwealth would have no appeal, although the case is one affecting the State revenue, therefore, I suggested an indictment. I have offered to furnish the Motor Vehicle Commissioner with the assistance of this office in the prosecution of the case if necessary.

Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

**ELECTIONS—Capitation tax.**RICHMOND, VA., *April 21, 1926.*

MR. T. McCALL FRAZIER,  
*Room 32, Dominion National Bank Building,  
Bristol, Va.*

MY DEAR MR. FRAZIER:

I am just in receipt of your letter of the 19th, to which I will reply at once. In this you call my attention to the fact that the general election this year will be held on November 2, and it happens that May 2, which is six months prior to the general election, falls on Sunday. You then desire to be advised whether or not, inasmuch as such is the case, can the time for the payment of poll taxes be extended to May 3, which is Monday, or is it necessary to pay these taxes on Saturday, May 1?

By reference to calendars for preceding years, you will observe that it so happens that six months prior to the general election in every year falls on the corresponding day in May, which is always on Sunday. It has been the consistent ruling of this office that in order to comply with the provisions of section 21 of the Constitution, which requires the payment of poll taxes at least six months prior to the general election, that such taxes must always be paid on Saturday, and the time cannot be extended until Monday after the Sunday, which is six months prior to the general election.

There can be no doubt about this, and notices should be sent to the treasurers of your district advising them that they will have no authority to place the names of persons on the voting list who do not pay their capitation taxes until Monday, May 3.

With my kindest personal regards and best wishes, I am

Yours very sincerely,

JOHN R. SAUNDERS,  
*Attorney General.*

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**COMMISSION FOR BLIND—Appropriation.**RICHMOND, VA., *April 20, 1926.*

MR. L. L. WATTS, *Executive Secretary,  
Virginia Commission for the Blind,  
1228 East Broad street,  
Richmond, Va.*

MY DEAR MR. WATTS:

I beg leave to acknowledge receipt of yours of even date, the contents of which I have carefully noted.

I find that on page 21 of the appropriation bill the legislature of Virginia at its session of 1926, in making certain appropriations to the State Board of Education, that the following language is used in connection with this appropriation:

“\* \* \* and an amount not exceeding five thousand dollars for training and caring for blind children under eight years of age, or who are ineligible to enter the State schools for the blind, said sum of five thousand dollars to be used and expended under direction and supervision of the

Virginia Commission for the Blind. Any unused balance of this sum shall revert to and become a part of the elementary fund. \* \* \*

In my judgment, the legislature intended to specifically appropriate this amount of \$5,000 for training and caring for blind children under eight years of age, and whatever balance is left, if any, shall revert to and become a part of the elementary fund.

Of course, this money is to be expended under the direction and supervision of the Virginia Commission for the Blind.

With kindest personal regards and best wishes, I am

Yours very truly,

JOHN R. SAUNDERS,

*Attorney General.*

#### **LICENSE—Merchants' license.**

RICHMOND, VA., *April 20, 1926.*

MR. L. W. WOOD,

*Charlottesville, Va.*

MY DEAR SIR:

Acknowledgment is made of your letter of recent date, in which you say:

"To what extent can merchants, who are licensed at some city in Virginia send their representatives to another city or county and sell either by sample or from their supplies at hotel room or elsewhere. My own idea is that where there is a city license required it must be taken out in every city that they operate, but in counties where there can be no special license and in cities where no city license is required then such operations may be carried on under the general license taken out elsewhere in the State."

In connection with your inquiry, I beg leave to call your attention to chapter 317, page 490, of the Acts of 1918. If you will examine section 9 of this chapter you will find that it specifically refers to rooms in hotels.

I have discussed this matter with the Auditor of Public Accounts, and he and I agree that a special license is not necessary for a sale of goods by sample without delivery of goods at the time of sale. In this connection I would also call your attention to the case of *Kloss v. Commonwealth*, 103 Virginia.

Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,

*Attorney General.*

#### **REAL ESTATE COMMISSION—Payment of salary increase.**

RICHMOND, VA., *April 19, 1926.*

VIRGINIA REAL ESTATE COMMISSION,

*Richmond, Va.*

GENTLEMEN:

Acknowledgment is made of your letter of April 17, 1926, in which you submit for my consideration the action of the Auditor in declining to pay the

order of your Commission dated April 1, 1926, directing the payment to W. B. Rudd of \$87.51 on account of salary increase of \$29.17 per month from January, 1926, to March, 1926, inclusive. The Auditor in disallowing this claim, except as to \$29.17 balance of salary for the month of March, 1926, took the position that the funds of your Commission had lapsed into the State Treasury at the close of business February 28, 1926.

Section 3 of chapter 461 of the Acts of 1924 appropriates to each member of the Commission the sum of \$10 per day and his actual and necessary expenses incurred in the performance of duties pertaining to the office. This section also authorizes the Commission to employ a secretary and clerk with authority to fix their compensation.

The last paragraph of section 3 of chapter 461 of the Acts of 1924 provides as follows:

"All fees and charges collected by the Commission under the provisions of this act shall be paid into the (general) fund in the (State Treasury); it being expressly provided, however, that the total expense for every purpose incurred shall not exceed the total fees and charges collected and paid into the Commission."

Section 186 of the Constitution, so far as is applicable to the question here under consideration, reads as follows:

"All taxes, licenses and other revenue of the State, shall be collected by its proper officers and paid into the State Treasury. No money shall be paid out of the State Treasury except in pursuance of appropriations made by law; *and no such appropriation shall be made which is payable more than two years after the end of the session of the General Assembly, at which the law is enacted authorizing the same; \* \* \*.*" (Italics supplied.)

I find no provision for the Virginia Real Estate Commission in the general appropriation bill for the years 1924-1926, and am, therefore, of the opinion that the second and third paragraphs of section 3 of chapter 461 of the Acts of 1924 was an appropriation made by the General Assembly for the payment of the salaries and expenses incurred by your Commission, since, under the provisions of section 186 of the Constitution, "no money shall be paid out of the State Treasury except in pursuance of appropriations made by law."

The second and third paragraphs of section 3 of chapter 461 of the Acts of 1924 being appropriations out of the State Treasury made by law, it is my opinion that, in accordance with section 186 of the Constitution, no payments could be made out of the State Treasury under authority of this appropriation "more than two years after the end of the session of the General Assembly" of 1924, which enacted chapter 461 of the Acts of 1924 authorizing the payment of these appropriations. The General Assembly of 1924, which passed the act referred to, adjourned *sine die* on March 18, 1924 (Acts of 1924, page 773). More than two years after the end of the session of 1924 having lapsed on April 1, 1926, when the bill referred to was presented to the Auditor, I am of the opinion that the Auditor was right in declining to pay the same.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

## INTOXICATING LIQUORS—Sufficiency of indictment

RICHMOND, VA., April 17, 1926.

HON. VERNON B. TATE,  
*Commonwealth's Attorney,*  
*Wise, Va.*

DEAR MR. TATE:

Acknowledgment is made of yours of the 13th, in which you say in part:

"Where a person is indicted for manufacturing ardent spirits, would it be legal to ask the court to instruct that if the defendant was found not guilty of manufacturing ardent spirit, that they, the jury, could find him guilty of possession of the still, which is a misdemeanor charge? In other words, does the indictment charging the manufacturing sufficiently charge the possession of the still? In an indictment for murder, which charges murder of the first degree and by statute you can find the defendant guilty of any of the lesser crimes, except involuntary manslaughter, where the intent is alleged.

"I am fully aware that an indictment cannot stand where it alleges a felony in one count and a misdemeanor in the other count.

"The reason for this request is that in my experience, I have made cases for manufacturing, and the jury sometimes could, under the evidence, return a verdict for the possession of a still. In the manufacturing charges it necessarily charges the possession of the still; in others words, a person must have the still before he can manufacture ardent spirits.

"This proposition arises in some cases where the evidence is very conflicting as to whether the still was in actual operation, and jury giving the defendant the doubt as whether in operation, must find a verdict of not guilty as to manufacturing, but there is plenty of evidence to convict for possession of the still. Where a verdict of not guilty as to manufacturing is returned, it would be a bar to conviction for possession of the still in a separate indictment, or would it be a bar to prosecution? Same evidence in both instances."

In reply, I would say that this question has not been decided by our Supreme Court of Appeals, so far as I am aware. Undoubtedly, the general proposition is true that under an indictment for any offense a person may be found guilty of any of the constituent parts of the crime. A charge that a person manufactured distilled spirits would undoubtedly embrace the charge that the person possessed the still and under such an indictment could be found guilty of possession. This would not be true, however, if the indictment merely charged the manufacture of ardent spirits, for that would embrace fermented spirits, not involving the use of a still.

It is my judgment that a verdict of not guilty as to manufacturing would be a bar to conviction for possession of a still during the twelve months prior to the indictment. I suppose the cases must be rare in which a person who has a still for the purpose of making liquor is arrested before he has actually used it for that purpose.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

**ELECTIONS—Residence.**RICHMOND, VA., *April 17, 1926.*

HON. M. R. KIRK, *Mayor,*  
*St. Charles, Va.*

DEAR SIR:

Acknowledgment is made of yours of the 13th, in which you say:

"I desire to ask you for the following information:

"1. The little town of St. Charles was incorporated by the circuit court for the county about twelve years ago this past year. At the August term of the circuit court we had an order of the court cutting off a part of the territory from the town on account of reducing the amount of public road there was to keep up. The court ordered that all taxes for the year 1925 be paid into the town, as they had already been assessed. In the part cut off there are 12 or 15 persons who voted, and we have an election in June, 1926, to elect mayor and council for the next two years, and I understand that some of those living in the part cut off think they will be entitled to vote in the coming election, because the voting place in all general elections for all of the territory surrounding the town is in the town. But the question is whether the parties cut out by the order of the court will be entitled to vote in the town election or not?

"2. How long would one have to live in the town to become a voter, if otherwise qualified?

"3. If a person's family lived in the town and he moved away on account of working conditions, and he kept qualified, would he be entitled to vote in the town election?"

Replying to your first question, I would say that persons living in the territory cut off from the limits of the town may no longer vote in the town elections, since only residents of a town are qualified to vote in such elections.

Answering your second question, it is necessary for a resident who moves from a county into a town situated in the county to be there one year (Constitution of Virginia, section 18).

Answering your third question, I would say that a person who lives in the town and moves away and gives up his residence there loses his vote in the town, since the privilege of voting in any town is dependant upon a residence there.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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**INTOXICATING LIQUORS—Suspension of sentence.**RICHMOND, VA., *April 16, 1926.*

HON. ARCHER L. JONES,  
*Commonwealth's Attorney,*  
*Hopewell, Va.*

MY DEAR ARCHER:

Acknowledgment is made of your letter of April 2, in which you say in part:

"Suppose a man is arrested on a warrant charging him with the second violation of the prohibition law under a city ordinance, which is exactly the same as the State law, and he is tried and convicted in the corpora-

tion court and given eight months and a fine of \$250, which judgment is suspended for a period of sixty days in order that the defendant may have time to apply for a writ of error and supersedeas to the judgment of the corporation court. No writ of error or supersedeas is granted; in fact, none is applied for, and the sixty days has expired. Has the judge of the corporation court any authority to suspend the jail sentence upon the payment of the fine, or any authority to parole the defendant?"

Of course, you realize that the subject of your inquiry addresses itself more properly to the judge of the court before whom the case is pending, and I do not wish this letter to be taken as in any manner of trespassing upon the rights of the court, or to be regarded as in any manner criticizing the decision which may have been or may be rendered by the court before whom the matter is pending. In other words, you have asked my opinion, and I am giving it to you for what it may be worth in aiding you in your presentation of the matter and with a view of assisting the trial court to reach a correct conclusion, if you care to use the authorities herein referred to.

Section 6 of the Prohibition Act, in the second paragraph, provides as follows:

"But no court, nor the judge thereof, of this Commonwealth, nor any justice, mayor or other officer trying the case, shall suspend the sentence of any person convicted of any felony or the illegal manufacture, or the sale, of ardent spirits, or the transportation thereof in quantities exceeding one gallon, or for any second or subsequent conviction of any offense against the prohibition laws of this State or any ordinance of a city or town authorized by this act, since the first day of November, nineteen hundred and sixteen."

It would, therefore, seem that no court has the authority to suspend a sentence where the conviction is for a second offense. As to whether the court may suspend the execution of a sentence already rendered, or whether it may suspend the imposition of a sentence are questions which may not be covered by the letter of the second paragraph of section 6 of the Virginia Prohibition Law. It seems to be settled, however, in the absence of statute, that when a sentence has been imposed "the court has no authority to relieve the convict from its execution." *State v. Sturgis*, 85 Atl. (Me.) 474, 43 L. R. A., N. S., 443, 445 (1912). Speaking of this, the court said:

"There is a conflict of authority as to the power of the court, after a conviction, to indefinitely postpone the imposition of the punishment thereof prescribed by law, but, however the courts may differ as to such power, it is well established that the court cannot, after the judgment in a criminal case is rendered and the sentence pronounced, indefinitely postpone the execution of that sentence, or commute the punishment and release the prisoner therefrom in whole or in part."

Unquestionably, the trial court has the authority after verdict or on a plea of guilty to suspend or postpone the imposition of sentence for proper cause until some future time. The power, I think, is inherent in the courts to temporarily suspend sentence in order to afford time for motions for new trials, in arrest of judgment, appeals, etc., and to inform the court as to the sentence to be pronounced. Although there is a conflict as to the power of the court to indefinitely suspend the imposition of sentence, the weight of authority denies any such power

in the absence of specific statutory authority to the courts. Thus in *State ex rel. v. Sapp*, 87 Kan. 740, 125 Pac. 78, 42 L. R. A., N. S., 249, 250 (1912), the court said:

"We think the better rule is that, where a verdict or plea of guilty has become final, the court has no discretion, as a disciplinary measure, to suspend the imposition of sentence, but is under an absolute duty to pronounce it, and this duty is violated whenever an order is made the purpose and natural effect of which is that the defendant shall understand that he may never be punished. There is an obvious and important difference between the mere delay to pronounce sentence and its suspension in the sense in which the expression is here used. Whether a postponement is rightful depends not upon its length or definiteness, nor upon whether it extends beyond the term, but upon its purpose and character. Whenever prior to judgment the defendant is permitted to go at large with the understanding that (although the verdict or plea of guilty is to stand) he may escape punishment altogether, and that his subsequent conduct may affect the matter, the court is really exercising a power of parole, which does not belong to it except as conferred by statute. In the present case, it is clear that the defendants were in effect given a discharge during good behavior. Obviously, the understanding was that they were not to be punished for their past misconduct unless they misbehaved in the future. The entering into such an arrangement was not within the scope of the court's duties.

"A mere difficult question is whether the order made by the court resulted in a loss of jurisdiction with the expiration of the December term of court, when it could no longer be vacated. In jurisdictions where the right of the court to suspend sentence is denied, it is generally held that, when the defendant is set at liberty upon an indefinite suspension, he cannot be further proceeded against, and, if rearrested, is entitled to be discharged. See notes already cited; also 19 Enc. Pl. and Pr. 448; 12 Cyc. 773; note, 41; 25 Am. and Eng. Ency. Law, 314. The following cases bear directly upon this phase of the matter: *Gray v. State*, 107 Ind. 177, 8 N. E. 16; *Com. v. Maloney*, 145 Mass. 205, 13 N. E. 482; *Weaver v. People*, 33 Mich. 296, 1 Am. Crim. Rep. 552; *Grundle v. People*, 33 Colo. 191, 108 Am. St. Rep. 75, 79 Pac. 1022; *Re Flint*, 25 Utah, 338; 95 Am. State Rep. 853, 71 Pac. 531; *People ex rel. Smith v. Allen*, 155 Ill. 61, 41 L. R. A. 472, 39 N. E. 568; *State v. Hockett*, 120 Mo. App. 639, 108 S. W. 599. The principle upon which these cases turn was applied in *Re Beck*, 63 Kan. 57, 64 Pac. 971. There, after conviction upon several counts, the defendant was sentenced upon but one. Later an attempt was made to sentence him upon the other counts, but he was discharged upon *habeas corpus*; the court saying: 'It was competent for the court temporarily to suspend judgment for the purpose of hearing motions for a new trial and in arrest of judgment, also to gain information that would enable the court to impose a just sentence on the defendant, to give the defendant an opportunity to perfect an appeal, or for other proper relief, but an indefinite suspension, or the holding of the sentence over the head of the defendant, to be executed from time to time as the court may see fit, is wholly unauthorized.' (p. 59). The principle is substantially the same as that which forbids a discretionary stay of execution of a sentence after it has been pronounced. *Re Strickler* 51 Kan. 702, 33 Pac. 620; *ex parte Clendenning*, 22 Okla. 108, 132 Am. St. Rep. 628, 97 Pac. 650, annotated in 19 L. R. A. (N. S.) 1041; *Re Peterson*, 19 Idaho 433, 33 L. R. A. (N. S.) 1067, 113 Pac. 729.

"In many of the cases the action of the court, which results in a loss of jurisdiction, is described as the indefinite postponement of a sentence."

From the examination that I have made of the authorities, the above appears

to represent the weight of authority. If I can be of further assistance to you, advise me and I will do my best.

With my best wishes, I am

Sincerely yours,

LEON M. BAZILE,  
*Assistant Attorney General.*

## INTOXICATING LIQUORS—Fees.

RICHMOND, VA., *April 16, 1926.*

MR. WILLIAM B. SANDERS,  
*Attorney at Law,*  
*White Stone, Va.*

MY DEAR MR. SANDERS:

Acknowledgment is made of your letter of April 15, 1926, in which you say:

"Last October I prosecuted in the circuit court of my county a man by the name of Malcolm Ashburn, charged with a felony-prohibition violation. He was convicted and adjudged to pay a fine of \$100 and costs and six months in jail (or in lieu thereof on the road).

"He broke out of jail and is still a fugitive. Of course, \$25 was taxed in the costs for my fee, but he got away without paying anything. Would the State allow me \$10 for my fee in this case under the circumstances?

"I also prosecuted another man last fall charged with a felony-prohibition who was convicted and sent on the road to serve out his time. He has finished his sentence, but is being held now by the road authorities to work out his fine and costs. What should the State allow me as my fee in this last-mentioned case, \$10 or \$25?"

On receipt of your letter, I took the matter up with the Auditor of Public Accounts and he advises me that he will pay you out of the Treasury \$10 in each of the above-mentioned cases. He stated that his office had never paid a fee of \$25 in any case of this character, and, in my opinion, his construction of the law is correct.

Trusting that this gives you the desired information, and with my best wishes, I am

Sincerely yours,

JOHN R. SAUNDERS,  
*Attorney General.*

## ELECTION—Qualification of voters.

RICHMOND, VA., *April 14, 1926.*

HON. R. C. PATTERSON, *Clerk,*  
*Wytheville, Va.*

MY DEAR MR. PATTERSON:

Acknowledgment is made of your letter of recent date in which you call my attention to section 83 of the Code, and then say:

"The town of Wytheville held a special election on January 12, 1926, as to a bond issue, and another special election on March 23, 1926, as to

a special ordinance. Both of these special elections were held in 1926, prior to the regular June election.

"What determines qualifications of voters in these special elections as to the payment of poll taxes?"

"I would also like to know to whom the phrase which is set off by commas and reads as follows, 'or who is otherwise qualified to vote,' refers?"

Section 83 of the Code provides in part:

"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, \* \* \* \*." (Italics supplied.)

It will be seen from the above quoted provision of section 83 of the Code that at special elections held before the second Tuesday in June there are two classes of persons eligible to vote in such elections: first, all persons who were qualified to vote in the preceding regular November election and, second, those persons who, being otherwise qualified to vote, have paid at least six months prior to the second Tuesday in June of that year, all State poll taxes assessed or assessable against them during the three years next preceding that in which such special election is held.

A person who was qualified to vote in the last preceding regular November election was entitled to vote in such special election, although he had not 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 was held. All that was required of such voter was that he should be qualified to vote and should have paid, at least six months prior to the last preceding regular November election, all State capitation taxes assessed or assessable against him during the three years next preceding that in which such last preceding regular November election was held.

On the other hand, there may have been a large number of persons who, being otherwise qualified to vote, were prevented from exercising that privilege in the last preceding regular November election, due to the fact that their capitation taxes had not been paid for the three preceding years at least six months prior to the holding of such regular election. In addition to this, there may have been persons in the county who were not of age when the regular election was held, but have become of age since that time and prior to the holding of the special election, or there may have been persons residing in the county who had not resided therein a sufficient length of time to entitle them to vote at the time the regular election was held, but have resided in the county the required period of time prior to the holding of the special election.

If any of these classes of persons, except a young man coming of age, have personally paid all State poll taxes assessed or assessable against them during the three years next preceding that in which the special election is held, they likewise would be entitled to vote in such election. Of course, in the case of a

young man not being assessed or assessable at any time during the three preceding tax years, his tax would merely have to be paid for the current year prior to registering and voting.

Trusting that this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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## INHERITANCE TAX—Half blood

RICHMOND, VA., *April 13, 1926.*

HON. C. LEE MOORE,  
*Auditor of Public Accounts,*  
*Richmond, Va.*

MY DEAR MR. MOORE:

Acknowledgment is made of your letter of recent date in which you call attention to subsection 1 of section 44 of the Virginia Tax Bill, as amended, imposing a tax on inheritance and which provides for certain exemptions as to brothers, sisters, etc., and to section 5265 of the Code of Virginia, 1919, which section reads as follows:

“Collaterals of the half blood shall inherit only half so much as those of the whole blood; but if all the collaterals be of the half blood, the ascending kindred, if any, shall have double portions.”

You then say:

“In view of the provisions of section 5265 and in the absence of specific exemption in the inheritance tax law to be allowed a brother, sister, niece, or nephew of the half blood, should the exemption allowed be \$4,000, the same allowed a brother, sister, nephew, or niece of the whole blood or half of that amount, or should this kindred of the half blood be allowed only the exemption of \$1,000 provided where the inheritance passes to other than beneficiaries designated as class A and class B?”

That portion of subsection 1 of section 44 of the Virginia Tax Bill, as amended, to which you refer, reads as follows:

“\* \* \* no such gift, bequest, devise or distributive share of an estate which shall so pass to or, for the use of brother, sister, nephew or niece of a decedent, unless its actual value exceed the sum of four thousand dollars, \* \* \* shall be subject to the provisions of this act; \* \* \*”

After careful consideration of the matter, I am of the opinion that section 5265 of the Code and subsection 1 of section 44 of the Virginia Tax Bill, as amended, are not related; that the brother or sister referred to in section 44 of the Virginia Tax Bill, as amended, would include either a half brother or a half sister, as half brothers and half sisters are regarded as and are in fact brothers and sisters, regardless of the relationship being half instead of full, and I am confirmed in this view by the fact that section 44 of the Virginia Tax Bill, as

amended, has provided no machinery which would justify a lesser exemption to the brother or sister of half blood than one of full blood.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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### SCHOOLS—Temporary loans

RICHMOND, VA., *April 13, 1926.*

HON. E. HUGH SMITH,  
*Attorney at Law,*  
*Heathsville, Va.*

MY DEAR HUGH:

Acknowledgment is made of your letter of April 8, 1926, in which you state that the school board of your county has applied to the Peoples Bank of Reedville, of which you are a director and attorney, for a loan of \$9,000, and you wish to know whether or not the board has the authority to make the loan.

On December 23, 1924, I gave an opinion to Robert T. Winston, Esquire, a member of the Hanover county school board, which answers your question. I enclose a copy of this opinion, which you will see is in accord with the conclusion reached by you as set out in the fourth paragraph of your letter.

I am advised by Mr. Winston that in the Hanover case the school board issued bonds equal to the amount borrowed by the board, which bonds represented equal amounts, payable at one, two, three, four and five years after date, with interest payable semi-annually.

It is, therefore, my opinion that until chapter 46 of the Acts of 1926 becomes effective the school boards of the counties have authority, under chapter 352 of the Acts of 1918 and chapter 423 of the Acts of 1922, to borrow money for the purposes authorized in chapter 352 of the Acts of 1918, provided the conditions and limitations imposed by that act are observed. In this connection, I also enclose copies of two opinions given by me on February 7 and April 7, 1924, found in the report of the Attorney General, 1923-1925, pages 347-348.

Unquestionably, chapter 46 of the Acts of 1926 represents the policy of the State with reference to these school loans, and, while I do not think that the approval of the board of supervisors is necessary to the legality of a loan made prior to the taking of effect of chapter 46 of the Acts of 1926, nevertheless I feel that, in view of the policy of the State as evidenced by this act, it would be well to have the board of supervisors give its approval before the loan was made.

Sincerely yours,

JOHN R. SAUNDERS,  
*Attorney General.*

**CHILD LABOR LAW—Dancing contests.**RICHMOND, VA., *April 12, 1926.*

HON. JOHN HOPKINS HALL,  
*Commissioner of Labor,*  
*Richmond, Va.*

MY DEAR MR. HALL:

Acknowledgment is made of your request that I advise you whether sections 1 and 13 of chapter 489 of the Acts of 1922, commonly known as the child labor law, prohibit the holding of the Charleston contest advertised by the News Leader to be held in this city on April 12, 13 and 14 at the Colonial Theater.

Section 1 of the act referred to provides:

"No child under fourteen years of age shall be employed, permitted or suffered to work in, about, or in connection with any gainful occupation.  
\* \* \* "

with certain specified exceptions which do not refer to the matter under consideration.

Section 13 of the act provides, in part:

"\* \* \* no boy under sixteen and no girl under eighteen years of age shall be employed, permitted or suffered to work in any retail cigar or tobacco store, or in any theater, concert hall, pool hall, bowling alley or place of amusement or in any hotel, restaurant, steam laundry, or in any passenger or freight elevator."

It appears from the announcement contained in the News Leader, a copy of which you have just shown me, that the News Leader has offered certain prizes, consisting of silver cups, to be given to those persons, including juveniles, who are the most successful dancers of the Charleston in the proposed contest. No monetary compensation, however, is to be given to any of the contestants, I am advised.

From an examination of the above quoted provisions of the child labor law, while I am frank to say that the question is not entirely free from doubt, I am, nevertheless, of the opinion that the above quoted sections of the law were not intended to prohibit a contest such as the one referred to above.

Yours very truly,

LEON M. BAZILE,  
*Assistant Attorney General.*

**STATE LIBRARY—Replacing of pictures destroyed by fire.**RICHMOND, VA., *April 10, 1926.*

MY DEAR MR. McILWAINE:  
*State Librarian,*  
*Richmond, Va.*

MY EAR DR. McILWAINE:

Acknowledgment is made of your letter of April 8, 1926, in which you state that eleven pictures belonging to the State Library were destroyed in the recent

fire at the Governor's Mansion; that the General Assembly made an appropriation for replacing these pictures, and that you are now in treaty with artists desiring to do thi swork.

You call my attention to the first paragraph of section 582 of the Code, as amended, and then say:

"This is all plain sailing with the exception of the clause 'nor shall any work of art, until so submitted and approved be *contracted* for, \* \* \* ' Does this give the Art Commission the power to name the artists and the compensation, provided the work done is finally received?"

The first paragraph of section 582 of the Code of Virginia, 1919, as amended by the Acts of 1920, reads as follows:

"Hereafter no work of art shall become the property of the State by purchase, gift or otherwise, unless such work of art or a design of the same, together with the proposed location of such work of art, shall first have been submitted to and approved by the commission; nor shall any work of art, until so submitted and approved, be contracted for, placed in or upon or allowed to extend over any property belonging to the State. No existing work of art owned by the State shall be removed, relocated or altered in any way without submission to the commission."

Answering your question, I am of the opinion that this section does not give the Art Commission either the power to name the artists or to fix the compensation. The section, in my opinion, means in a case of this kind that a design of the portrait, together with the proposed location of the same, must be first submitted to and approved by the Art Commission. When this is done, the Library Board, under authority of the appropriation made to it by the General Assembly, will then have the right to select the artist, rovided his design is approved by the Art Commission and, of course, the Library Board would fix the compensation.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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#### MOTOR VEHICLE CARRIERS—Disposition of fine.

RICHMOND, VA., *April 10, 1926.*

HON. C. LEE MOORE,  
*Auditor of Public Accounts,*  
*Richmond, Va.*

MY DEAR MR. AUDITOR:

Acknowledgment is made of your letter of April 9, 1926, with which you enclose a letter from C. W. Smith, Esquire, clerk of the circuit court of Ap-pomattox county, dated April 8, 1926, in which he states that he has in his hands a \$50 fine collected for a violation of the motor vehicle carriers law, namely, chapter 161 of the Acts of 1923, as amended by chapter 222 of the Acts of 1924. Mr. Smith and you wish my advice as to the disposition of this fine, calling my attention to section 8 of chapter 222 of the Acts of 1924, which provides that one-half of the fines collected for violations of this law shall be

credited to the State Highway System and the other half to the highway system of the county in which the offense occurred.

A violation of the motor vehicle carriers law above referred to is declared, by section 8 thereof, as amended, to be a misdemeanor punishable by a fine. Conviction for a violation of this act is, therefore, a conviction for a crime against the laws of the State and the proceeds of said fine must be paid into the Literary Fund, since section 134 of the Constitution expressly provides that "all fines collected for offenses committed against the State" shall be set apart as a permanent and perpetual Literary Fund.

It is, therefore, my opinion that so much of section 8 of the motor vehicle carriers law as provides that the fine shall be disposed of, other than is provided by section 134 of the Constitution, is in conflict therewith and that the fine in question must be paid into the Literary Fund.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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#### WAR MEMORIAL COMMISSION—Members.

RICHMOND, VA., *April 8, 1926.*

HONORABLE HARRY F. BYRD,  
*Governor of Virginia,*  
*Richmond, Va.*

MY DEAR GOVERNOR:

I am just in receipt of your letter of the 7th, in which you request my interpretation of the law providing for the appointment of three members of the War Memorial Commission by the Governor, having special reference to the meaning of the language "who served in the military or naval service of the United States during the World War" as used in the statute.

The War Memorial Commission is created by chapter 405 of the Acts of 1924. Section 1 of this act provides that this commission shall consist of nine members, three to be appointed by the President of the Senate, three by the Speaker of the House of Delegates from the members of those two bodies, respectively, and three by the Governor from among the qualified voters of the State who served in the military or naval service of the United States during the World War.

As to what is meant by military or naval service of the United States during the World War, I am of the opinion that this language applies to all of the qualified voters of the State who were commissioned or enlisted either in the army, navy or marine corps of the United States during the World War. In other words, I do not think the legislature intended to comprehend in this language persons who were neither commissioned nor enlisted in the military or naval service of the United States, but it is my opinion that the act does not limit the appointment to those who were actually engaged in battle.

Yours very sincerely,

JOHN R. SAUNDERS,  
*Attorney General.*

**RECOGNIZANCE—Forfeiture of.**RICHMOND, VA., *April 8, 1926.*

HONORABLE GEORGE F. WHITLEY,  
*Commonwealth's Attorney,*  
*Smithfield, Va.*

MY DEAR MR. WHITLEY:

Acknowledgment is made of your letter of April 7, 1926, in re: Forfeited recognizance.

It appears that one accused of crime was admitted to bail with proper surety and that the surety deposited with the officer taking the recognizance a sum equal to the face of the bond. Default was made, proper proceedings were had forfeiting the recognizance and awarding execution thereon.

You then ask the following questions:

"Two questions I want answered, whether or not the surety is liable for the cost and fees, and if not, can the clerk deduct from the cash deposit, representing the amount of the bond, the cost and fees and remit the balance to the State?"

Your first question would seem to be answered by Code section 4979, which reads as follows:

"A surety in a recognizance may, after default, pay into the court from which the process has issued, or may issue thereon, the amount for which he is bound, with such costs as the court may direct, and be thereupon discharged."

I would say that, in my opinion, the fact that the surety deposited cash to the amount of the face of the bond would not relieve him from such costs as the court may direct under this section, as the deposit of the money would not of itself authorize its payment into the Treasury on default being made. Therefore, when the surety executed the recognizance he was aware that default proceedings would be necessary after the forfeiture of the recognizance, and Code section 4979 would authorize an award of judgment against the surety for "such costs as the court may direct," and for which execution may issue.

As to your second question. It has been the ruling of the Auditor's office, in which ruling I concur, that no costs can be deducted from the face of the bond, and unless these costs can be recovered from the principal or his surety, no authority exists for the payment of the same except the commissions paid to the clerk for handling the fund and remitting it to the Treasury.

With regards and best wishes, I am

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General*

**PARDONS—Pardon of Floyd Thomas.**

RICHMOND, VA., *April 7, 1926.*

*His Excellency, HARRY FLOOD BYRD,*  
*Governor of Virginia,*  
*Richmond, Va.*

MY DEAR GOVERNOR:

Acknowledgment is made of the communication of your assistant secretary of March 29, 1926, in which you forwarded to me for attention the file relating to Floyd Thomas, who, on January 22, 1925, was granted a conditional pardon by Honorable E. Lee Trinkle, then Governor of Virginia.

It appears from the file that Floyd Thomas was convicted in the circuit court of Augusta county in November, 1924, under an indictment for seduction under promise of marriage, and sentenced to confinement in the Penitentiary for a period of four years. Subsequent to that time he married the girl whom he had seduced and, on application by Thomas, supported by the request of the judge of the trial court, the attorney for the Commonwealth and other persons, he was granted a conditional pardon; one of the conditions of the pardon being "that he is to live with his wife and maintain her and their child or children in a manner that is in keeping with people in their condition of life, and be kind and good to them, and in the event of failure of this condition to be kept, this conditional pardon will be revoked and he will have to serve his full sentence."

The pardon also contained the usual condition that the said Floyd Thomas will conduct himself in the future as a good, law-abiding citizen, "and if ever again he be found guilty of a violation of the penal laws of the Commonwealth this pardon shall be null and void."

It appears from the correspondence between your office and Mrs. Thomas that on February 1, 1925, Floyd Thomas deserted her and their child, and that since Christmas, 1925, to the end of March, 1926, he had sent her only \$5 for the support of herself and the baby, but that since February 1, 1925, he has not lived with his wife or the baby. It also appears from the correspondence that Floyd Thomas left her and the baby without cause.

Under the circumstances, I am of the opinion that the conditions of the pardon have been violated by Floyd Thomas. I would, therefore, suggest that you issue a revocation of the pardon similar to the revocation issued by the Governor in the case of Harry Waterfield, and direct the officers charged with the duty of arresting this man, if he be in Virginia, to arrest him for delivery to the Penitentiary authorities so that he may be compelled to serve his term in the Penitentiary.

If the man is not in Virginia, if located, I am of the opinion that he could be returned to Virginia by means of extradition proceedings (25 C. J., section 14, page 259), as a breach of the conditions of a pardon annuls and avoids it and the execution of the original sentence may then be enforced (29 Cyc. 1572 and 29 Cyc. 1574).

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

**TAXATION—Capitation tax list.**RICHMOND, VA., *April 7, 1926.*

HON. D. R. HUNT,  
*Commissioner of the Revenue,*  
*Roanoke, Va.*

MY DEAR MR. HUNT:

Acknowledgment is made of your letter of April 3, 1926, in which you call attention to the trouble that results in your city from the custom of separating the capitation tax lists filed by the treasurer, according to wards. Therefore, you ask me whether it would be practicable to file one general tax list with only four classifications, namely: (1) All of the white men in your city; (2) All of the white women in your city; (3) All of the colored men in your city; (4) All of the colored women in your city who are entitled to be on the tax list.

If section 109 of the Code (Virginia Election Laws, p. 30) contained the only provision which required the list to be arranged alphabetically by magisterial districts or wards, I would be inclined to hold that the same was directory merely and not mandatory, but I find that the same provision is contained in section 38 of the Constitution, and, in view of this, it is my opinion that the list must be arranged alphabetically by magisterial districts in the counties and by wards in the cities. This, of course, results in much confusion, but I do not believe that the saving that would result would justify a violation of the unmis-  
takable terms of section 38 of the Constitution.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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**JUSTICE OF THE PEACE—Serving warrant.**RICHMOND, VA., *April 7, 1926.*

HON. H. CALVIN FARMER,  
*High Constable,*  
*City Hall,*  
*Richmond, Va.*

DEAR SIR:

Acknowledgment is made of your letter of the 5th, in which you say:

- "If a warrant or summons be served by a party other than an officer designated under the statute, can the justice in taxing costs allow a fee for serving same?"

In reply, I beg to say that the service of a warrant or summons is governed by section 6041 of the Code, which provides that the return may be made by a person not a party or interested in the subject matter, who verifies it by affidavit. I can find no statute or other authority for allowing a fee for such services to any person other than the officers mentioned in chapter 135 of the Code.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

**CERTIFICATES OF INDEBTEDNESS—Robertson act.**RICHMOND, VA., *April 6, 1926.*THE COMMISSIONERS OF THE SINKING FUND,  
*Richmond, Va.*

GENTLEMEN:

Acknowledgment is made of the communication of Messrs. Ford and Weaver, representing the board of supervisors of Page county, Va., dated March 31, 1926, addressed to His Excellency, Hon. Harry F. Byrd, Governor of Virginia; Hon. H. G. Shirley, chairman of the State Highway Commission; and the Commissioners of the Sinking Fund; and referred on April 1, 1926, to this office for attention by Hon. Rosewell Page, Second Auditor of Virginia, and president of the Commissioners of the Sinking Fund.

The inquiry has reference to the substitute for Senate Bill No. 161, approved on March 19, 1926, which repeals the act commonly known as the Robertson act, together with its amendments, and provides for the issue and sale of certificates of indebtedness of the Commonwealth to repay the sums advanced to the State under the provisions of the Robertson act, and its amendments, and to provide a sinking fund, etc.

It appears from the communication of Messrs. Ford and Weaver that Shenandoah Iron Works Magisterial District of Page county on December 8, 1925, pursuant to the proper order of the circuit court, held an election in which it was determined that that district should issue bonds not to exceed \$200,000, the proceeds of which were to be advanced to the State Highway Commission pursuant to the terms of the Robertson act, and that the proper order has been entered directing the board of supervisors to carry into effect the wishes of the voters as expressed in the aforesaid election. The communication also states that on March 23, 1926, the board of supervisors of Page county entered into a contract with the said State Highway Commission by which the Commission agreed to receive \$200,000, etc. The communication then refers to section 15 of the substitute for Senate Bill No. 161, and submits for consideration the following legal queries:

"(1) Is your Honorable Commission empowered under said act to issue and deliver to a purchaser under contract with the board of supervisors of said county to purchase said certificates. \$200,000 par value of said certificates of indebtedness contemporaneously therewith receive the purchase price of \$200,000 from said purchaser, said county of Page not having issued previously its bonds for said amount;

"(2) Whereas, section 15 of said substitute of Senate Bill No. 161 provides that money derived from sale of bonds authorized by an election held as above described as follows: '*Provided that such money shall be received by the State Highway Commission prior to the date this act shall become effective,*' the question therefore being, will a simultaneous delivery of certificates and purchase price therefor, pursuant to a previous contract of sale, be a compliance with said section, or will the actual cash have to be paid into the hands of said Highway Commission prior to the effective date of said bill?"

Section 2 of the substitute for Senate Bill No. 161, which was approved on March 19, 1926, authorizes the Commissioners of the Sinking Fund, with the approval of the Governor, to issue and sell certificates of indebtedness in the name

and on behalf of the Commonwealth in an amount equal to the sum heretofore advanced to the Commonwealth under the provisions of the Robertson act and its amendments, "and to be hereafter advanced to and received by the State Highway Commission upon agreements in effect when this act becomes effective, *and upon agreements authorized in section 15 of this act, but not to exceed the sum of seven million five hundred thousand dollars.*" (Italics supplied.)

Section 15 of the substitute for Senate Bill No. 161 above referred to provides as follows:

"If any county or magisterial district in this State has by popular vote in an election held prior to the approval of this act authorized the issue of county or magisterial district bonds to be sold to raise money to advance to the State Highway Commission under the provisions of an act entitled an act to amend and re-enact an act entitled an act to anticipate by counties or otherwise the construction of the State highway system, approved March 15, 1920, approved March 21, 1924, hereinbefore in this act repealed, the State Highway Commission shall have authority to enter into agreements with such counties or magisterial districts for receiving the said money, for expending the same, and for the repayment thereof, subject to the provisions of the aforesaid act, approved March 21, 1924, and of this act, provided that such money shall be received by the State Highway Commission prior to the date this act shall become effective, and provided further, that the State Highway Commission shall not, in entering into agreements authorized in this section of this act, be limited to the amounts specified in the aforesaid act, approved March 21, 1924."

While the title to this act is not as complete as could be desired, I am of the opinion that the money which would be advanced by Page county for the purposes aforesaid would be advanced to the State under the provisions of the Robertson act and its amendments, and, therefore, under the decision of the Court of Appeals construing section 52 of the Constitution, the title of the act is sufficient to include within the authority of section 2 thereof advancements made to the State which are referred to in section 15 thereof.

Answering the specific questions propounded by Messrs. Ford and Weaver, I am of the opinion that the Commissioners of the Sinking Fund are without authority to act as they would be required to act if affirmative answers were given to these questions. My opinion is based on the following reasons:

Section 15 of the act expressly provides that the money advanced "shall be received by the State Highway Commission prior to the date this act shall become effective." This means, in my opinion, that the money must actually be paid into the State Treasury prior to the date on which the act becomes effective, and that an agreement to receive the money entered into between the board of supervisors of Page county and the State Highway Commission would not be a sufficient compliance with the provisions of section 15 of the act. Therefore, unless the money is actually received by the State Highway Commission prior to the date the act becomes effective, it cannot be received after that time.

The certificates referred to in section 2 of the act cannot be issued prior to the date the act becomes effective, and, therefore, the payment of the money into the Treasury to the credit of the Highway Commission and the delivery of the certificates cannot be a simultaneous transaction.

I take it that the third, fourth and fifth queries of Messrs. Ford and Weaver

do not involve legal propositions upon which my opinion is desired, and, therefore, have not attempted to answer them.

Trusting this gives your honorable body the information desired, I am

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

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#### OFFICE—Incompatibility of.

RICHMOND, VA., *April 2, 1926.*

HON. C. R. WARREN,  
*Chatham, Va.*

MY DEAR MR. WARREN:

I beg leave to acknowledge receipt of your letter of the 29th of March, in which you desire an opinion as to whether or not a member of the General Assembly is eligible for appointment to the position of trial justice under the new act creating trial justices in counties.

Of course, you are familiar with section 45 of the Constitution, the latter part of which reads as follows:

“\* \* \* No member during the term for which he shall have been elected shall be appointed or elected to any civil office of profit in the State except offices filled by the election by the people.”

I have not seen the act creating trial justices, but my recollection of it is that these justices are to be appointed by the circuit court for a term of four years. Unquestionably, this is a civil office of profit, and it is one which cannot be filled by the election by the people. A member of the legislature would, therefore, be ineligible for appointment. I wish very much I could give you a different opinion, as you state in your letter that you could obtain this appointment.

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

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#### HOUSE BILLS—Validity of bill appropriating certain money to Jno. E. Ross.

RICHMOND, VA., *March 31, 1926.*

*His Excellency, HARRY FLOOD BYRD,*  
*Governor of Virginia,*  
*Richmond, Va.*

MY DEAR GOVERNOR:

In response to your request of yesterday that you be furnished a written opinion as to the validity of House Bill No. 279, appropriating the sum of \$1,880.72 to John E. Ross, I have examined the bill and the law with reference thereto with care.

The bill in question briefly refers to chapter 382 of the Acts of 1918. This statute authorized the United States to acquire property in this State by purchase,

condemnation, lease, or otherwise, for certain governmental purposes therein enumerated. Section 2 thereof conferred exclusive jurisdiction over any lands, or buildings abut upon the navigable waters of this State, such jurisdiction so and criminal process of the courts of this State within the bounds of said lands so expressly reserved. This section also provided that, whenever such lands or building abut upon the navigable waters of this State, such jurisdiction so ceded shall extend to and include such of the underwater lands adjacent thereto as lie between the line of low water mark and the bulkhead or pierhead line as established at that time or in the future.

Section 3 of chapter 382 of the Acts of 1918 expressly provides that:

"The jurisdiction ceded shall not vest until the United States shall have acquired the title to, or possession of the said lands, or rights, or interest therein, by purchase, condemnation, lease or otherwise; and so long as the said lands, or any rights, or interest therein are held in fee simple by the United States, and no longer, such rights, or interest, as the case may be, shall continue exempt and exonerated, from all State, county and municipal taxation, assessment or other charges, which may be levied or imposed under the authority of this State."

The exemption from taxation contained in this section manifestly refers to the property owned or controlled by the Federal government and to none other.

I am informed by Mr. Warren, one of the patrons of the bill who represents Mr. Ross, that Mr. Ross had a twenty-year lease on the oyster beds in the York river at the time chapter 382 of the Acts of 1918 was passed, that this lease expired in 1922, that from that time until the present Mr. Ross has continued to occupy the oyster beds leased to him in the York river, planting and taking oysters therefrom during the whole of this time, and that the Federal government, although it has notified him to vacate the premises as of October, 1926, has taken no steps to condemn his oyster beds or interfere in any way with his planting and taking oysters from these beds during the years 1918-1926.

This being the case, it is my opinion that by virtue of section 3 of chapter 382 of the Acts of 1918, the Federal government has never acquired exclusive jurisdiction of that part of the river occupied by the oyster beds of Mr. Ross, and therefore that the oyster beds occupied by him in the York river were subject to be rented by the State during the period referred to in the bill. This being true, the bill is in conflict with section 63, subsection 9 of the Constitution, which prohibits the refunding of money lawfully paid into the Treasury of the State by a special, local or private law. •

Under the common law and the provisions of section 3573 of the Code of 1919, the Commonwealth was the owner of the beds of the rivers and creeks within the jurisdiction of the Commonwealth. Being the owner of the bed of the York river subject to the rights of navigation delegated to the Federal government, the Commonwealth had the right to lease the oyster beds in question to Mr. Ross, who, during the life of his lease, acquired a property right in these oyster beds which could not be divested under section 58 of our Constitution, except when justly compensated therefor. No proceeding having been taken for the purpose of condemning Mr. Ross' oyster beds or his interests therein, under the expressed terms of chapter 382 of the Acts of 1918, no control over the same vested in the Federal government.

It is, therefore, my opinion that the State had the right to lease the land, and, having the right to lease the land, had the right to exact a rental thereof.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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## TAXATION—Collection of taxes.

RICHMOND, VA., March 30, 1926.

HONORABLE J. CLEVELAND GRIGSBY,  
*Treasurer of King George County,*  
*Index, Va.*

MY DEAR MR. GRIGSBY:

I am in receipt of your letter of March 26, in which you say:

"The judge of the circuit court of King George county has required me to have an office at the courthouse and attend it regularly by being in it every day. Will you kindly advise me the meaning of the law in section 2410, tax laws of 1924, page 345, where it says that after the first day of December the treasurer shall call upon each person chargeable with taxes, who has not paid same, and collect them? Does this mean a written notice or a personal call? If it means a personal call, and at the same time have to stay in the office every day, as required by the judge, then I would have to have a deputy and two sets of tax books. I want to do the right thing, but then I don't want to be required to stay in my office every day, and then also be required to see all of the taxpayers personally.

"King George is one of the small counties and the commission would not pay a deputy and myself."

In reply, I beg to state that since receiving your letter I have discussed this matter with the Auditor of Public Accounts, and he is of the opinion that that language in the statute which says that the treasurer must call upon the taxpayers means a personal call rather than a notice by letter. I think this construction placed upon it by the Auditor is correct.

I would suggest that you take this matter up with the judge of your circuit court and explain to him the necessity for your doing this, and I am sure he will not expect you to keep your office open daily at the courthouse if you have to make a personal visit to the taxpayers.

Of course, you might write to many of them, and if they respond to your letter, that would save the necessity of calling on these particular taxpayers.

I confess the language in the statute is not very clear, but I think the Auditor is correct.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

**HOSPITALS—World War Veterans.**RICHMOND, VA., *March 30, 1926.*

ADJUTANT J. A. NICHOLAS, JR.,  
201 *State Office Building,*  
*Richmond, Va.*

MY DEAR MR. NICHOLAS:

I beg leave to acknowledge receipt of your letter of the 27th, in which you enclose copy of a resolution adopted by the General Board of State Hospitals, which resolution is in the following language:

“RESOLVED: That before receiving into State hospitals applicants who saw service during the World War, the superintendent of the hospital to which application for admission has been made, be and is hereby directed to request the city or county from which the application is received, to establish the fact as to whether or not the applicant is entitled to hospitalization at the expense of the U. S. government as a beneficiary of the U. S. Veterans' Bureau.”

You then desire to be advised whether or not this resolution is in conflict with the law governing the admission of parties to State hospitals.

Chapter 46 of the Code of Virginia deals with State hospitals for the insane, etc., and prescribes the manner in which persons are admitted to such institutions.

A portion of section 1026 reads as follows:

“All persons who have been legally adjudged insane, epileptic, feeble-minded or inebriate, who have made or may hereafter make application for admission into a State hospital or colony shall be received, so long as there is a vacancy \* \* \*.”

This language is clear and explicit, and, unquestionably, the above resolution is in conflict therewith. It therefore, follows that the General Board of State Hospitals has no right to make any distinction in the case of World War veterans, and it is the duty of the board to admit applicants of this class provided, of course, there is a vacancy.

After these veterans have been admitted to the hospital there is no reason why the board cannot then take up with the United States government the question of admitting them to some Federal hospital, which I am sure can be done.

Yours very sincerely,

JOHN R. SAUNDERS,  
*Attorney General.*

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**ELECTIONS—Residence.**RICHMOND, VA., *March 26, 1926.*

MR. K. W. HICKMAN,  
223 *Governor St.,*  
*Richmond, Va.*

MY DEAR SIR:

Acknowledgment is made of your letter of March 25, 1926, in which you say:

"The question has arisen whether or not I have the right to vote at Leesburg, Loudoun county, Va. .

"I was born and lived at Leesburg until October 1, 1923, at which time I moved my family to Richmond and took charge of the circulation department of the Southern Planter. I have always, and do now pay my capitation taxes there. I do not care to change my place of residence as I feel I am here only temporarily, and expect to finally go back to Leesburg to end my days. If you can get me straight on this subject, I will appreciate it."

I assume from what you say in your letter that, prior to your coming to Richmond, you were a resident of Leesburg, Loudoun county, Va., and voted there. In *Commonwealth v. Williams*, 116 Va. 272, the Supreme Court of Appeals decided that in order to lose one's legal residence for the purpose of voting there must be, first, a change of habitation coupled with, second, the intention to change such residence, and that where a residence had been once legally acquired at a place the same could not be lost except by a combination of the two events above mentioned, namely, removal plus the intention to change your place of residence.

This office has accordingly held that where a legal residence, for the purpose of registering and voting, has once been acquired at a place, that that legal residence may be retained at that place no matter where the voter moves, so long as he intends to keep his legal residence at the place where it was first acquired. Of course, what is one's intention is largely a question of fact. I would say, however, that the payment of one's capitation tax at the place where the legal residence is claimed and declarations to the effect that the legal residence once acquired has not been abandoned or changed should ordinarily be all that is required to show that the legal residence once acquired has not been abandoned or changed, in the absence of more conclusive evidence to the contrary.

For opinions of this office in accord with the views herein expressed, I call your attention to the Report of the Attorney General for the years 1922-1923, page 141, and the Report of the Attorney General for the years 1923-1925, pages 194-151.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

#### GOVERNOR—Appointment of staff.

RICHMOND, VA., March 25, 1926.

*His Excellency*, HARRY F. BYRD,  
*Governor of Virginia,*  
*Richmond, Virginia.*

MY DEAR GOVERNOR:

Acknowledgment is made of your request of recent date that you be advised as to what persons are eligible to appointment on the Governor's staff under section 319 of the Code of Virginia, 1919, as amended by House Bill No. 2, session 1926.

This section so far as is applicable to the question here under consideration provides as follows:

"On and after the first day of February, nineteen hundred and twenty-six, the staff of the Governor and commander-in-chief shall consist of the Adjutant General of the State and such additional aides detailed by the Governor and commander-in-chief from the commissioned personnel of the National Guard of Virginia, the Officers' Reserve Corps or the Naval Reserve Corps, or retired officers of the army or navy of the United States \* \* \* No officer shall be detailed under this section unless he be a qualified voter of the State."

It is my opinion that the above statute limits appointments to the Governor's staff to qualified voters of the State, who belong to the following classes: first, the commissioned personnel of the National Guard of Virginia; second, the Officers' Reserve Corps or the Naval Reserve Corps of the United States, and, third, the retired officers of the army or navy of the United States.

The word "retired," in my opinion, is used in its technical sense and applies only to those officers of the army and navy of the United States who have been retired in accordance with the Federal laws and army regulations relating to the retirement of officers from the army or navy, and, therefore, would not include within the eligibility class officers who were discharged from the army or navy at the conclusion of the World War.

Trusting this gives you the desired information, I am

Sincerely yours,

JOHN R. SAUNDERS,

*Attorney General.*

#### CHILDREN—Legitimation of.

RICHMOND, VA., March 25, 1926.

*His Excellency, HARRY F. BYRD,  
Governor of Virginia,  
Richmond, Va.*

MY DEAR GOVERNOR:

Acknowledgment is made of your letter of March 19, 1926, with which you send me the complete correspondence between your office and Honorable Frank B. Kellogg, Secretary of State, with reference to Momo E. (Myrtle E.) Moore.

Examination of the file as supplemented by the affidavits and additional information furnished since my opinion of February 14, 1925, to Honorable E. Lee Trinkle, then Governor of Virginia, shows that the opinion given by me on the above date was based on an erroneous statement of facts. That opinion was based on the statement that Momo E. Moore was an illegitimate child. The affidavits made by Mr. Aker H. Moore, Mr. Charlie Louis Arbuckle and Corporal Owen M. Parker, all made on July 10, 1925, conclusively establish the fact that Mr. Moore contracted in China a common law marriage with the mother of Momo E. Moore on January 1, 1920.

While common law marriages contracted in Virginia are not valid, a common law marriage contracted outside of Virginia, in those jurisdictions where such marriages are recognized as valid, would be regarded as valid in this State. 38 C. J. 1276-77. I do not know whether a common law marriage contracted in China would be valid under the laws applicable to that country, but, even if the common law marriage which was contracted by Mr. Moore with the mother of

Momo E. Moore was void under the laws of China, I am, nevertheless, of the opinion that on the facts stated in the affidavits above referred to, Momo E. Moore is the legitimate child of Aker H. Moore under the laws of this State, in view of Code section 5270, which reads as follows:

"The issue of marriages deemed null in law, or dissolved by a court, shall nevertheless be legitimate."

It, therefore, follows that Momo E. Moore, on the facts stated in the affidavits above referred to, is the legitimate daughter of Aker H. Moore.

I am furnishing you a carbon copy of this letter for your file so that the original may be transmitted to the State Department.

Sincerely yours,

JOHN R. SAUNDERS,  
*Attorney General.*

#### **AUTOMOBILES—Gasoline tax.**

RICHMOND, VA., *March 23, 1926.*

DR. C. E. CRITCHER,  
*New Church, Va.*

MY DEAR SIR:

Acknowledgment is made of your letter of March 22, 1926, in which you say:

"I am writing to ask if it is legal to buy gasoline in Maryland in quantity and haul it into Virginia for my own consumption without it being subject to the Virginia tax."

The answer to your question is no. The new motor vehicle gas tax law provides that the tax shall be imposed on the use of the gasoline, therefore if the gasoline is used in Virginia the tax must be paid.

I would suggest that you write to Hon. James M. Hayes, Jr., Motor Vehicle Commissioner, for report blanks, etc.

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

#### **INCOMPATIBILITY OF OFFICE—Can assistant general registrar act as notary public.**

RICHMOND, VA., *March 23, 1926.*

THOMAS J. NOTTINGHAM, Esq.,  
*General Registrar,*  
*Norfolk, Va.*

DEAR SIR:

Acknowledgment is made of yours of the 18th, in which you say:

"The young lady in my office filling the position of stenographer and clerk, and in my absence as assistant general registrar, draws only a small salary. I am writing to inquire if there is any law to prevent her being appointed a notary public, so she can increase her pay a little."

As far as I can find there is no law prohibiting an assistant general registrar from being appointed a notary public.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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#### **OPTOMETRY—Practice of.**

RICHMOND, VA., *March 19, 1926.*

HON. R. B. STEPHENSON,  
*Covington, Va.*

MY DEAR MR. STEPHENSON:

I beg leave to acknowledge receipt of your letter of the 17th. In this you state that Mr. R. L. Sammons proposes to sell spectacles in your county by sample, that he will not attempt to make any examination of the eye, but will carry around with him a lot of sample spectacles, and any one who desires to buy same may try on these spectacles and order through Mr. Sammons.

You desire to be advised whether or not this is a violation of the law. I have read sections 1624 and 1638 of the Code, to which you refer in your letter. Section 1624 defines what constitutes the practice of optometry, and section 1638 specifies who are excluded from the nine preceding sections which relate to the practice of optometry.

Among the class exempted by this section are persons who sell spectacles, eyeglasses or lenses, either on prescriptions from physicians or duly qualified optometrists, or as merchandise from a permanently located or established place of business. The question, therefore, arises whether or not Mr. Sammons is selling these spectacles as merchandise from a permanently located or established place of business. If he is, and simply exhibits the samples to purchasers of the spectacles and later on fills the orders which are given him, he is not violating the revenue laws, but, if on the other hand, he is in any way testing the eyes of the purchasers, he will be practicing optometry as defined in section 1624.

It is very doubtful if he is violating the revenue laws. However, I would suggest that you write Dr. J. W. Preston, who is secretary of the State Board of Medical Examiners, and he will advise you whether he is guilty of violating the law of practicing optometry.

With best wishes, I am

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

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#### **TAXATION—British subjects.**

RICHMOND, VA., *March 18, 1926.*

MR. R. I. SHIPLEY,  
*Broadway National Bank,*  
*Richmond, Va.*

MY DEAR MR. SHIPLEY:

I am just in receipt of your letter of March 17, to which I will reply at once. In this you state that you have been assessed \$1.50 poll tax, and have been requested to pay this amount. You further state that you are a British subject, although at present residing in Richmond, and inasmuch as you have not the

privilege of voting, you desire to be advised whether you are liable for the payment of this poll tax.

In reply, I will state that section 173 of the Constitution of Virginia provides that the General Assembly shall levy a State capitation tax of, and not exceeding, one dollar and fifty cents per annum on every male resident of the State not less than twenty-one years of age (females now included), except those pensioned by this State for military service.

You will see from the provisions of this section of the Constitution that this tax is levied on every citizen regardless of the fact whether he or she shall exercise the right of suffrage. While it is true that no one can vote without paying all capitation taxes as required by law, the fact that a person is not a qualified voter does not exempt him from the payment of this tax.

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

#### VIRGINIA STATE PENITENTIARY—Countersigning checks.

RICHMOND, VA., March 17, 1926.

MAJOR R. M. YOELL, *Superintendent,*  
*The State Penitentiary,*  
*Richmond, Va.*

DEAR MAJOR YOELL:

Acknowledgment is made of yours of yesterday, in which you say:

"On the first of each month the Superintendent of the Penitentiary draws a voucher on the State Treasurer for the amount of money appropriated under the budget for the State convict road force and the Penitentiary. This voucher is countersigned by the chairman or vice-chairman of the State Prison Board, this money is then deposited in one of the local banks and checks issued against the local bank to pay the accounts made by the Penitentiary and the State convict road force. These checks at the present time are countersigned by the chairman or vice-chairman of the State Prison Board. There are usually six or eight hundred checks per month, and if one member of the board has to countersign these checks, it takes up quite a good deal of time. The State Prison Board at their meeting yesterday instructed me to inquire of you if it would not be proper for the checks on the local bank to be signed by the Superintendent and countersigned by any member of the State Prison Board, and thus divide this work among all the members of the board.

"They desire also to know if the same procedure could not be followed with the State Farm.

"The only thing I find in the Code is section 5037 and it appears to me that this relates to money drawn from the Treasurer and not to checks issued against local banks."

In reply, I beg to say that section 5037 of the Code provides only for approval by the board of all expenditures. Section 5027 provides that "said board shall have general supervision over the Penitentiary, prison farm and the officers thereof, and see that the laws of their government are observed."

I do not find any specific requirements for the countersigning of checks, but it is, of course, within the power of the board to provide for such countersigning.

I see no reason why the board may not designate any one of its members to countersign them.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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**JUSTICE OF THE PEACE—Fees in lunacy cases.**

RICHMOND, VA., March 17, 1926.

HON. B. W. DODSON, *Judge,*  
*Juvenile and Domestic Relations Court,*  
*Route 1, Danville, Va.*

MY DEAR JUDGE:

Acknowledgment is made of your letter of yesterday, in which you say:

"We have a question before the board of supervisors as to the compensation of a justice in a lunacy case. I contend that a justice is entitled to \$1.00 for issuing the warrant, \$2.00 for sitting in the case, and the same as a juror for mileage. Some members of the board of supervisors contend that we cannot get but \$2.00 in all; others have no set opinion, and Mr. P. J. Hundley, our Commonwealth's attorney, seems to be in doubt.

"Now, as an official of the county and State, and as a personal favor to me, won't you give me a ruling in this matter and let us know just where we stand? I understand that some counties are paying \$2.00 and no mileage, others \$2.00 and mileage, and still others \$3.00 and mileage."

In reply, I beg to say that, in my judgment, the fees of a justice of the peace, sitting with two physicians to constitute a commission of lunacy, under section 1021 of the Code, is entitled to receive \$2.00 for his services as a member of such commission, and also the same mileage that is allowed witnesses summoned to testify before grand juries.

The compensation of justices for issuing warrants is controlled by section 3507 of the Code, in which \$1.00 is allowed in counties and towns and in cities of less than 25,000.

It seems to me that if it had been the intention of the legislature to deprive a justice of a fee for issuing the warrant in a lunacy case, it would have provided in section 1021 that the fee of \$2.00 should include the issuance of the warrant.

Section 1017 provides that the justice "shall issue his warrant" under which the suspected person is arrested and brought before him, and further that he shall summon two physicians, who, with himself, shall constitute the commission. The warrant in such cases is by section 1018 described as "the warrant of arrest."

Hoping this will give you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

**REGISTER OF LAND OFFICE—Duties concerning taking an inventory of furniture in the Governor's house.**

RICHMOND, VA., *March 12, 1926.*

COLONEL B. O. JAMES,  
*Secretary of the Commonwealth,  
Richmond, Va.*

DEAR COLONEL:

Acknowledgment is made of your letter of the 11th instant, in which you say:

"The Auditor of Public Accounts has just brought to my attention the provisions of section 404 of the Code of 1919, which section, as you will observe, deals with the duty of the Register of the Land Office concerning the taking of an inventory of the furniture in the Governor's house and the filing of said inventory with the Auditor of Public Accounts.

"You will also observe that this section of the Code appears in chapter 26, which deals with the duties of the Register of the Land Office and Superintendent of Public Buildings and Grounds, and since, by virtue of chapter 386 of the Acts of 1924, the office of Register of the Land Office was abolished and the duties of that office passed to the Secretary of the Commonwealth and by virtue of the same chapter the Superintendent of the State Office Building became Superintendent of Grounds and Buildings, it, therefore, appears to me that the duties required of the Register of the Land Office, as set forth in section 404 of the Code, should be performed by the Superintendent of Grounds and Buildings rather than by the Secretary of the Commonwealth.

"Since there appears to be some doubt in the Auditor's mind as to who should perform these duties, I would appreciate your furnishing me an opinion as to what interpretation should be placed on section 404, in view of the fact that chapter 386 of the Acts of 1924 became effective on the death of Colonel John W. Richardson, late Register of the Land Office."

I have carefully examined chapter 26 of the Code in connection with chapter 386 of the Acts of 1924. It is evident that the Register of the Land Office, who was ex-officio Superintendent of Public Grounds and Buildings, had two distinct lines of duties, one dealing with the registration of land titles and the like, and the other relating to public grounds and buildings.

When the legislature abolished the office of Register of the Land Office in 1924, it provided that the powers and duties required of the Register should be performed by the Secretary of the Commonwealth. These powers and duties evidently must be construed to refer to those in connection with the land office. The same act transferred the duties of the Register in connection with the grounds and buildings to the Superintendent of the State Office Building.

It is clear that the duty of taking inventory of property in the Governor's house is among those that were intended to be transferred to the Superintendent of the State Office Building, who is the Superintendent of Grounds and Buildings. Any other construction would create a divided authority over one of the principal buildings in the Capitol Square.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

**TAXATION—Joint owners.**RICHMOND, VA., *March 11, 1926.*

MR. R. O. CRADDOCK,  
*Treasurer of Halifax County,*  
*Halifax, Va.*

MY DEAR MR. CRADDOCK:

I beg leave to acknowledge receipt of your favor of the 2nd inst., in which you desire my opinion on the following question:

"On May 10, 1908, R. R. Motley and wife conveyed to Caleb G. Robinson and Irene V. Robinson, his wife, a tract of land in Meadville district, Halifax county, Va., a tract of land containing 366½ acres. This deed was recorded June 9, 1908, in Deed Book 104, page 492. The taxes on this land for the year 1925 with penalty added is \$102.18. Of this amount, Irene V. Robinson has paid \$51.09, same being one-half of the tax. There is no personal property assessed in the name of Caleb G. Robinson for taxation, but there is some assessed for taxation in the name of Irene V. Robinson.

"The point I would like to know is this: Have I under the law a right to distrain and sell the personal property assessed in the name of Irene V. Robinson for the balance of the tax on this tract of land, which is owned by her and her husband jointly."

In reply, will say that, inasmuch as these parties are joint owners of the real estate in question, there is no question in my mind but that the Commonwealth has the right to collect the taxes due thereon from either party.

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

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**AUTOMOBILES—License.**RICHMOND, VA., *March 10, 1926.*

HONORABLE JOHN H. PALMER,  
*Civil and Police Justice,*  
*Suffolk, Va.*

MY DEAR JUDGE:

Acknowledgment is made of your letter of March 5, 1926, in which you said that a man was found operating a motor truck on February 26 with last year's license tags thereon. You say that the defense made is that no license was applied for as the machine was being repaired, and that after repairs were completed application was made on February 15, 1926, for a license and the money to pay for the same was remitted to the Motor Vehicle Commissioner; that prior to the issuing or receipt of the license the defendant operated the truck and claims that he had a right to do this under the license issued last year. You then say:

"Do you know of any law that empowers him to do so? Is there any act, under the circumstances, that will permit the company to run its truck before the license is actually granted? Can I escape imposing the fine?"

Replying to your questions, will say that I do not know of any law that authorizes one to operate his automobile in February, 1926, with 1925 license tags thereon, even though a few days before he may have applied for a license which he has not yet received. As I read chapter 90 of the Code, as amended, the facts narrated in your letter constitute a violation of the law.

Trusting this gives you the desired information, I am

Very truly yours,

JOHN R. SAUNDERS,

*Attorney General.*

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**CLAIMS—Payment of.**

RICHMOND, VA., March 10, 1926.

HON. C. LEE MOORE,  
*Auditor of Public Accounts,*  
*Richmond, Va.*

MY DEAR MR. AUDITOR:

Acknowledgment is made of your letter of recent date in re: the payment of Messrs. S. H. Allen, Victor Parks, F. B. Brunyate and George M. Payne, assistant assessors of lands for the city of Norfolk.

I have read your letter and examined the file with care, and it is my opinion that the proper course for you to pursue is to decline to pay these claims to either the gentlemen above mentioned or to the city of Norfolk until the matter has been adjudicated in court and the party entitled to receive the same finally determined.

Yours very truly,

JOHN R. SAUNDERS,

*Attorney General.*

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**GAME LAWS—Violation of.**

RICHMOND, VA., March 10, 1926.

HON. C. LEE MOORE,  
*Auditor of Public Accounts,*  
*Richmond, Va.*

MY DEAR MR. AUDITOR:

Acknowledgment is made of the account of Honorable Frank P. Moncure, which you referred to my office for an opinion.

It appears that the Commonwealth's attorney and certain officers of King George county were prosecuted for a violation of the hunting laws. The Commonwealth's attorney of King George county not being in a position to act, the judge of the circuit court appointed Honorable Frank P. Moncure, Commonwealth's attorney of Stafford county, to prosecute these cases. On the trial of the cases the defendants were dismissed. The circuit court of that county has certified fees to the extent of \$25 for Mr. Moncure, these fees representing \$5.00 in each of the five cases. You ask me to advise you whether you are permitted to pay these claims inasmuch as section 2396 of the Code provides that no officer is to receive fees out of the Treasury in the cases referred to in that section.

Section 2396 of the Code of 1919 provides, in part:

"Upon any presentment made, indictment found, or information filed in a prosecution under the revenue laws, the court may award a *capias* or other legal process against the defendant, returnable to the same or the next term of the court. In all actions of debt or prosecutions for any violation of the revenue laws, the attorney for the Commonwealth, in case there be a judgment for the Commonwealth, shall be entitled to a fee of ten dollars, to be taxed in the bill of costs and paid by the defendant. No attorney or officer shall be entitled to the payment of any fees out of the Treasury for services rendered in any proceedings authorized by this chapter. \* \* \*"

You will notice that, while the language of this section is broad enough in some parts to apply to all prosecutions for violation of the revenue laws, the prohibition of the payment of the fee out of the Treasury to the Commonwealth's attorney is limited to those cases where services are rendered in proceedings authorized by the chapter of the Code in which section 2396 thereof is found, namely, chapter 96 thereof.

Chapter 96 of the Code has no reference to prosecutions for violation of the game laws. Therefore, it is my opinion, that the above quoted provision from section 2396, prohibiting payments out of the Treasury, does not apply to prosecutions for violation of the hunting laws. The account, therefore, is properly charged against the State Treasury.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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#### **FIREARMS—Sale of cap pistols.**

RICHMOND, VA., *March 10, 1926.*

THE EDWARDS MANUFACTURING CO.,  
*Cincinnati, Ohio.*

GENTLEMEN:

Acknowledgment is made of your letter of recent date with reference to the sale of toy cap pistols in this State.

Section 4697 of the Code of Virginia, 1919, makes it unlawful to sell, barter, exchange, furnish, or dispose of by purchase, gift, or any other manner, any toy gun, pistol, rifle, or other toy firearm, if the same shall by means of powder or other explosive discharge blank or ball charges, to any person under the age of twelve years.

The violation of this statute carries with it a fine or jail sentence, or both. Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

**EQUALIZATION BOARD—Notice by publication.**RICHMOND, VA., *March 5, 1926.*

HON. PHILIP WILLIAMS,  
*Commonwealth's Attorney,  
Woodstock, Va.*

DEAR MR. WILLIAMS:

Acknowledgment is made of your letter of February 25, in which you say:

"The board of equalization of Shenandoah county has conferred with me in regard to the time it shall make final review of the land assessment and notify taxpayers, whose assessment has been changed, as to the date and place of a hearing.

"It seems from the statute (chapter 397 of the Acts of 1924) that often the commissioner of revenue makes out and delivers three copies of his original land book, and has delivered the original to the board of equalization; that it is then that said board must review the book and give notice by publication of the time and place, and also specifically notify taxpayers whose assessments have been increased. I have advised the board to this effect, but upon consideration it would seem that the provision of the statute is contrary to common sense and to efficient work in carrying out the equalization. For, after the copies of the land books have been delivered by the commissioner of revenue, one of which goes to the Auditor, any and all changes made by the board after the publication and notices above mentioned, would have to be noted and written on the said copies which would be already delivered. Of course, the totals would be changed by such corrections. It would seem that the final corrections made by the board of equalization should be made before the commissioner of revenue delivers his copies, but, as the statute seems to expressly provide otherwise, the corrected assessments made by the board to the contrary, may be held to be illegal, and a great deal of trouble might ensue through disgruntled taxpayers attacking the assessments in the court."

I have taken this matter up with the Auditor of Public Accounts, and he has shown me a letter in reply to questions similar to those which you ask, in which he says:

"Your understanding of the law as set out in your letter agrees with my construction of the law.

"Some of the local board of equalization are, however, now giving notice by publication that it will hear grievances and complaints, also serving notice on taxpayers whose assessed valuations have been increased, desiring to complete the work at one time, and I think it would be legal to follow that course.

"Should your board prefer to go on and complete its work now, there is no objection to this being done, but bear in mind notice by publication should be had and notice should be given to taxpayers whose assessed valuations have been or will be increased."

I may add that my opinion is in accord with that of the Auditor.  
Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General*

**INTOXICATING LIQUORS—Pardon of Kelly Hall.**RICHMOND, VA., *March 4, 1926.*

HONORABLE HARRY F. BYRD,  
*Governor of Virginia,*  
*Richmond, Va.*

MY DEAR GOVERNOR:

I am just in receipt of yours of March 3 relative to application of Kelly Hall for a pardon. I have carefully examined the papers in connection with this case, and I note that both the Commonwealth's attorney and the trial judge recommend this pardon, in addition to a number of other citizens of Scott county.

Section 25 of the prohibition law provides that it shall be unlawful for a person to drive or run any automobile, car, truck, engine or train while under the influence of intoxicants, and further provides a penalty for so doing, and in addition a revocation of his right to drive any such vehicle for a period of one year from date of judgment.

The papers in this case show that Kelly Hall, while he may have been drunk, was not actually driving the car, therefore I cannot see how the jury arrived at its verdict. I am of the opinion that this is a case which deserves executive clemency, and I concur in the recommendation of the Commonwealth's attorney and the circuit judge, namely, that you relieve Hall of the jail sentence.

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

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**TAXATION—Real Estate.**RICHMOND, VA., *March 4, 1926.*

MR. W. P. GRAY, *Secretary,*  
*Russell County Live Stock and*  
*Agricultural Association, Inc.*  
*Lebanon, Va.*

MY DEAR MR. GRAY:

I beg leave to acknowledge receipt of yours of recent date. In this you state that the Russell County Live Stock and Agricultural Association, Inc., owns a tract of land within the corporate limits of the town of Lebanon, Va., which is occupied and used for fair purposes, and that it has been conducted as an agricultural and school fair combined.

You then desire to be advised whether or not this real estate is subject to taxation. I have carefully examined section 2272 of the Code of Virginia, which defines what real estate is exempt from taxation. I do not find that real estate owned by an agricultural fair association is exempt. Of course, if the real estate in question belongs to the county of Russell or the town of Lebanon it would be exempt from taxation.

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

**WAR MEMORIAL COMMISSION—Authority of.**

RICHMOND, VA., *March 4, 1926.*

HON. MORGAN R. MILLS, *Chairman,*  
*War Memorial Commission*  
*Senate Chamber,*  
*Richmond, Va.*

DEAR SENATOR MILLS:

Acknowledgment is made of your letter of March 3, 1926, in which you say:

"As you recall, the legislature at its session of 1924 created a War Memorial Commission. The act creating this Commission (chapter No. 405, Acts of 1924) imposed on the Commission certain duties and vested it with certain authority.

"Enclosed you will find the report of the War Memorial Commission to the General Assembly of Virginia, dated February 3, 1926, which gives an account of our stewardship. Please examine this report and advise me, as chairman of this Commission, whether the actions of the Commission have been within the authority conferred on it by law."

I have examined with care the enclosed report of the War Memorial Commission, presented by you as chairman of that Commission to the General Assembly of Virginia, published as Senate Document No. 10, as well as chapters 189 and 405 of the Acts of 1924, which create a War Memorial Commission and provide for the erection of a memorial of a monumental or non-utilitarian type to the soldiers, sailors, marines and women of Virginia who served in the World War.

After examination of the above-mentioned report and the above-mentioned Acts of the General Assembly of Virginia, it is my opinion that the actions of the War Memorial Commission therein referred to have been in accordance with the letter and the spirit of chapters 189 and 405 of the Acts of 1924.

You will recall that on January 27, 1925 (Report of the Attorney General, 1923-1925, page 393-395), I advised the Commission with reference to its actions in selecting a site and as to its rights and powers in the selection and erection of a suitable war memorial. It is unnecessary for me to repeat here what I said there. Subsequent to that time your Commission submitted to me for approval the contracts between it and the architects and sculptor, submitting the plans for the memorial which were selected. I examined these contracts and, after certain changes therein were made, which I suggested, returned the same to you as chairman of the War Memorial Commission on January 8, 1926, with a letter written on that date, in which I said, in part:

"I beg leave to return herein the several contracts which you submitted to me for inspection. I have carefully examined these contracts. They all seem to be in proper form, and I see no legal objection to either of them."

Trusting this gives you the desired information, I am

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

**GAME AND FISH—Fish ladders.**RICHMOND, VA., *March 3, 1926.*

HON. GEORGE BOWLES,

*House of Representatives,  
Richmond, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of several days ago in which you call my attention to chapter 329 of the Acts of the Extra Session of 1887, and request me to give you the benefit of my opinion as to whether a bill should be introduced in the General Assembly which has for its object the requirement that the Chesapeake and Ohio Railway Company erect and maintain fish ladders on the dams owned by it across the James river between Lynchburg and Richmond.

I have examined the act referred to in your letter with care. The preamble recites that certain citizens, on account of damage sustained from the erection of certain dams, had petitioned the General Assembly to have these dams owned by the Richmond and Alleghany Railroad Company destroyed or removed, and that the Richmond and Alleghany Railroad Company had agreed to this, "provided there can be secured such protection as would warrant the very large outlay which the destruction or removal of the dams will involve." Thereupon it was provided that certain dams should be removed, and that when these dams were removed the Richmond and Alleghany Railroad Company and its successor company "shall be forever released from the obligation to build or keep up fishways or ladders into or upon such of its dams as it may be authorized to maintain."

Aside from any question as to the legal right of the Commonwealth to abrogate what appears to be a contract between it and the Richmond and Alleghany Railroad Company, which is now the Chesapeake and Ohio Railway Company, it is my opinion that the introduction or passage of any act proposing to compel the Chesapeake and Ohio Railway Company to erect and maintain fish ladders would be a gross breach of faith on the part of the Commonwealth, a position which I am sure the General Assembly of Virginia would be unwilling to assume.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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**CONVICT ROAD FORCE—Negligence of.**RICHMOND, VA., *March 3, 1926.*

MAJOR R. M. YUELL,

*Superintendent of The Penitentiary,  
Richmond, Va.*

MY DEAR SIR:

Acknowledgment is made of your letter of March 3, 1926, with which you enclose the correspondence in reference to the loss of five cattle because of their drinking from a can containing white lead, which was negligently exposed by certain members of the State convict road force at one of the camps in Giles county. You further state that the owner of the cattle is willing to take the sum of \$300 in settlement of this loss, although they were worth a sum much larger.

You then say:

"I would like to ask if you would give me a letter stating this is the proper course to pursue, provided the Governor approves the action of the Board of Directors and the Superintendent of the Penitentiary,"

who has authorized the payment of this sum.

As I advised you in my conversation this morning, there is no legal liability upon the State for this loss. On the other hand, the members of the convict road force being prisoners of the State, it is my opinion that a moral responsibility does rest upon the State to make good this loss.

I have, therefore, examined the general appropriation bill with reference to the State convict road force and section 2081 of the Code, and it is my opinion that there is no legal prohibition against the expenditure of this sum in view of the moral responsibility resting upon the State, provided the Board of Directors of the Penitentiary and the Governor approve the payment of this claim.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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#### INTOXICATING LIQUORS—Claim of Chilton Malting Company.

RICHMOND, VA., *March 1, 1925.*

HONORABLE JOSEPH A. CHITWOOD,  
*Roanoke, Va.*

MY DEAR SIR:

Relative to your letter of recent date, in which you enclose a petition in favor of the Chilton Malting Company, a corporation, v. the Commonwealth of Virginia, in which petition the said Chilton Malting Company alleges that the Commonwealth of Virginia is indebted to it in the sum of \$1,218.64. In this petition you ask that the Auditor of Public Accounts shall fix the date of the hearing of said claim, and therein certain reasons are alleged why the Auditor should pay this account.

I would state that the Auditor and I have carefully considered this petition, and he is of the opinion, in which I concur, that by virtue of the provisions of sections 15 and 16 of the Virginia Prohibition Law it would not be legal for him to pay this account. You will see from an examination of these two sections of the law that it is the duty of all officers charged with the enforcing of the prohibition law to seize malt wherever it is found other than in a private home and to destroy the same. I do not think that this is such a claim as can be maintained against the Commonwealth of Virginia, and certainly I could not advise him to pay it. It is needless, therefore, for me to sign the stipulations which you sent with the petition.

I would further add that time and again malt has been seized under similar conditions, and this is the first time that any shipper has claimed any compensation from the Commonwealth. I am, therefore, returning your petition and stipulations of counsel.

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

**JAILS AND PRISONERS—Authority and power as to health conditions.**RICHMOND, VA., *February 26, 1926.*

DR. ENNION G. WILLIAMS,  
*State Health Commissioner,*  
*Richmond, Va.*

DEAR SIR:

Acknowledgment is made of your letter of the 22nd, in which you say:

"Several days ago we received a letter signed by a prisoner in the Nansemond county jail. As has been our custom with such letters, we referred it to the State Board of Public Welfare.

"I enclose copy of a letter from the prisoner and a copy of a letter from Mr. Arthur W. James, special agent of that board, in regard to this letter. He apparently puts the responsibility for the jail's condition, with special reference to venereal diseases and tuberculosis, upon the State Board of Health. We have never assumed any supervision of jail conditions, and this is the first time any responsibility for such conditions has been placed upon us.

"I would respectfully request that you, as our legal advisor, would let us know if we have any responsibility for the conditions existing in the county or city jails, and if so, to what extent have we the authority and power to correct the same, and how we should proceed to exercise this authority. If the conditions complained of exist, it is certainly a disgrace, and if we have any responsibility, we want to exercise our authority to the fullest extent.

"If the responsibility is not clearly defined in the law, we should like to have this determined while the legislature is in session."

In reply, I beg to say that section 1 of chapter 179 of the Acts of 1910 gives the State Board of Health power "to make, adopt, promulgate and enforce reasonable rules and regulations from time to time requiring and providing for the thorough sanitation and disinfection of all passenger cars, sleeping cars, steamboats and other vehicles of transportation in this State, and also of all convict camps, penitentiaries, hotels, schools and other places used by or open to the public: \* \* \*"

Under section 1497, local boards of health are required to report to the State Board of Health all cases of infectious and contagious diseases, and it is made the duty of the State Board of Health to co-operate with the local boards for the purpose of preventing the spread of such diseases.

Section 1554c provides for a report by the superintendent of any penal institution to the State Board of Health of cases of venereal diseases.

Section 1543 provides that courts may remove from jail persons suffering from contagious and infectious diseases when requested to do so by the jailor or jail physician.

Section 2859 makes it the duty of the boards of supervisors of the counties and the councils of cities, with the approval of the judges, to prescribe rules for the government of prisoners in jails.

Upon further consideration of these various statutes, it is apparent that the responsibility for conditions in jails rests upon boards of supervisors and councils. Clearly it is the duty of the jail physicians, the local boards of health and the State Board of Health to co-operate with the boards and councils to secure sanitary conditions in jails. In practically all cases this result can be accomplished

by an appeal to the boards of supervisors and councils, and when they refuse to act, to the proper courts.

It is obvious that the State Board of Health cannot remove prisoners from jail or otherwise segregate them except by and through orders of the proper courts.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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### JAILS AND PRISONERS—Authority of Governor to pardon.

RICHMOND, VA., *February 25, 1936.*

SENATOR ALFRED C. SMITH,  
*State Senate Chamber,  
Richmond, Va.*

DEAR MR. SMITH:

Acknowledgment is made of your letter of yesterday, in which you ask that I advise you whether the Governor has the authority to conditionally pardon a convict who has been previously conditionally pardoned by another Governor and has been recommitted to the Penitentiary by reason of the forfeiture of the condition of the first pardon and a revocation thereof by the Governor.

Section 73 of the Virginia Constitution, among other things, provides that the Governor shall have power, "except when the prosecution has been carried on by the House of Delegates, to grant reprieves and pardons after conviction; to remove political disabilities consequent upon conviction for offences committed prior or subsequent to the adoption of this Constitution, and to commute capital punishment; but he shall communicate to the General Assembly, at each session, particulars of every case of fine or penalty remitted, of reprieve or pardon granted, and of punishment commuted, with his reasons for remitting, granting or commuting the same."

The question to be determined, therefore, is whether one who has been recommitted to the Penitentiary for breach of a previous conditional pardon stands in a different position with reference to the pardoning power of the Governor from a convict who has not been previously conditionally pardoned by the Governor.

I do not find from an examination of the authorities where a similar case has before arisen, but it is stated in 29 Cyc., page 1574:

"Upon the revocation of a pardon for a breach of one of its conditions, the legal status of the person pardoned must be regarded the same as it was before the pardon was granted."

I am of the opinion that the above quoted statement from Cyc. is correct and, this being true, the Governor would have the authority to again conditionally pardon a convict who had been previously conditionally pardoned and subsequently recommitted to the Penitentiary for breach of the condition of the first pardon,

provided the Governor felt that the case was one which called for the exercise of the executive clemency.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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### SLOT MACHINES—Legality.

RICHMOND, VA., February 20, 1926.

MR. R. L. CLANTON,  
*Altavista, Va.*

MY DEAR MR. CLANTON:

Acknowledgment is made of your letter of February 19, 1926, with the enclosure, which I have examined.

In my opinion, the machines referred to are gambling devices within the meaning of the Virginia statute, as decided by the corporation courts of Danville, Norfolk and Richmond and by the Supreme Court of Indiana in *Ferguson v. State*, 42 L. R. A. (N. S.) 720, 99 N. E. 806 (1912).

Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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### CONSTITUTIONAL LAW—Constitutionality of bills amending section 109 of the Code and 108a of Virginia Election Laws.

RICHMOND, VA., February 18, 1926.

HON. E. M. McCLURE,  
*Chairman City Democratic Committee,  
Richmond, Va.*

MY DEAR MR. McCLURE:

Acknowledgment is made of your letter of February 18, 1926, with which you send me two proposed bills—one to amend and re-enact section 109 of the Code, and the other to amend section 108a of the Virginia election laws, as amended by the Acts of 1924, p. 647.

It is my opinion that the bill seeking to amend section 109 of the Code is in conflict with section 38 of the Virginia Constitution and would, therefore, be void. See *Zigler v. Sprinkel*, 131 Va. 408.

I am also inclined to the belief that the proposed amendment to section 108a of the Virginia election laws would also be invalid as seeking to delegate to the registrar the duties which are placed by the Constitution on the treasurer and the clerk. As this bill, however, is a local bill, I would suggest that you submit it to the city attorney of Richmond and get his opinion thereon. In this connection see section 38 of the Virginia Constitution.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

**CAPITATION TAX—Delinquent.**RICHMOND, VA., *February 17, 1926.*

HON. EIVENS TILLER,  
*Treasurer of Dickenson County,*  
*Clintwood, Va.*

MY DEAR SIR:

I beg leave to acknowledge receipt of your letter of recent date, in which you submit the following question for an opinion:

"Can a taxpayer whose capitation tax has been returned delinquent for the year 1923 or 1924 properly or legally present himself to the county treasurer who returned the above capitation tax and pay for the year 1923 or 1924, as the case may be, on a special assessment as though his capitation tax had been omitted for said year, thereby leaving the delinquent capitation tax unpaid in the clerk's office?"

If you will examine section 2419 of the Code of Virginia, you will see that it provides that such taxes must be collected by the clerk of the court and not by the treasurer.

Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

**INTOXICATING LIQUORS—Fees of officer.**RICHMOND, VA., *February 16, 1925.*

JUDGE CHARLES J. HARKRADER,  
*Bristol, Va.*

MY DEAR JUDGE HARKRADER:

I am just in receipt of yours of the 15th, in which you desire to be advised what is the fee to be paid an officer for making an arrest for intoxication. In reply, I will state that in my opinion the fee is \$5.00, and where more than one officer makes the arrest the fee should be divided.

This has been the ruling of this office ever since the passage of the prohibition law and, so far as I am advised, is generally followed by most of the officers in the State.

Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

**SCHOOLS—Funds.**RICHMOND, VA., *February 16, 1926.*

MR. J. B. FRIERD, *Clerk,*  
*Charlotte County Public Schools,*  
*Drakes Branch, Va.*

MY DEAR MR. FRIERD:

I beg leave to acknowledge receipt of yours, in which you desire to be advised whether or not it is legal to use district funds for schools raised in one district for payment of teachers in another district.

In reply, I will state that I am of the opinion that this not lawful. The situation might be remedied by having the board of supervisors make a higher levy for the county and reduce the district levy. Of course, it is legal to use county funds for the payment of teachers in any district.

With kindest regards, I am

Yours very truly,

JOHN R. SAUNDERS,

*Attorney General.*

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**CONSTITUTIONAL LAW—Bill authorizing and empowering the State Geological Commission to assist in the establishment of a national park and to appropriate funds therefor.**

RICHMOND, VA., *February 15, 1926.*

HONORABLE HARRY F. BYRD,  
*Governor of Virginia,*  
*Richmond, Va.*

MY DEAR GOVERNOR:

I acknowledge receipt of yours of this date, in which you enclose copy of Senate Bill No. 167, which bill "authorizes and empowers the State Geological Commission to assist in the establishment of a national park and to appropriate funds therefor." You desire to be advised whether or not this is constitutional.

In reply, I will state that, in my judgment, there can be no doubt that the provisions of the bill are clearly in contravention of sections 184 and 188 of the Constitution. Section 184 of the Constitution provides that—

"No debt shall be contracted by the State except to meet casual deficits in the revenue, to redeem a previous liability of the State, to suppress insurrection, repel invasion, or defend the State in time of war. No scrip, certificate, or other evidence of State indebtedness shall be issued except for the transfer or redemption of stock previously issued, or for such debts as are expressly authorized in this Constitution."

Section 188 provides:

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

While it is true that section 5 of the bill expressly provides that the certificates of indebtedness which are proposed to be issued by the State Geological Commission constitute no liability or obligation upon the State or any department or agency thereof, yet section 7 of the bill provides that an appropriation of \$200,000 is to be made by the State to be applied on these certificates of indebtedness. In other words, the bill clearly by indirection seeks to obligate the State to the liquidation of a debt created by the State Geological Commission, which is an agency of the State and which is expressly prohibited by the provisions of section 184 of the Constitution.

Again, the only source from which the State derives its revenues is from

taxation, and section 188 of the Constitution prohibits the levying of any greater amount of taxes or revenue than is required for the necessary expenses of the government or to pay the indebtedness of the State. The appropriation of \$200,000 is not a necessary expense of the government, nor is it to pay any indebtedness of the State.

Yours very sincerely,

JOHN R. SAUNDERS,  
*Attorney General.*

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**TAXATION—Required of administrator of estate.**

RICHMOND, VA., *February 15, 1926.*

HON. C. LEE MOORE,  
*Auditor of Public Accounts,*  
*Richmond, Va.*

MY DEAR MR. AUDITOR:

Acknowledgment is made of your communication of recent date with which you refer to me a letter from Messrs. Harman and Harman, attorneys at law, Tazewell, Va., in re: estate of R. Haven White, deceased.

It appears from the letter of Messrs. Harman and Harman to you that R. Haven White, deceased, was killed in a railroad accident and left no estate, and that his father, Joseph H. White, qualified as administrator of the deceased's estate for the purpose of instituting action against the deceased's employer. It further appears from this letter that the employer had offered to settle the alleged liability by paying to the father \$1,500 when he had properly qualified as administrator. On the strength of this, the clerk required Mr. Joseph H. White, when he qualified, to pay a tax of \$1.50. Messrs. Harman and Harman, as attorneys for Mr. White, take the position that the clerk was in error in requiring the payment of this tax, which was paid under protest, and request a refund of the same.

I have examined section 12 of the Virginia Tax Bill, as amended, with care, and it is my opinion that this section imposes a minimum tax of \$1.00 on every qualification whether or not the decedent has any estate, and I am informed by you that this has been the construction placed on this statute by your office. I am further of the opinion, however, that any additional tax is dependent upon the existence of an estate at the time of the qualification, and that, where the decedent has no estate, an additional tax cannot be exacted. I would, therefore, suggest that fifty cents be refunded to Mr. Joseph H. White, or to Messrs. Harman and Harman, his attorneys.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

**LICENSES—To practice architecture.**

RICHMOND, VA., February 11, 1926.

CHARLES M. ROBINSON, ESQ., *Chairman,*  
*State Board for the Examination and Certification*  
*of Professional Engineers, Architects and Land Surveyors,*  
*Times-Dispatch Building,*  
*Richmond, Va.*

DEAR SIR:

Acknowledgment is made of your letter of this date, in which you say:

"The Architectural Section of the State Board for the Examination and Certification of Professional Engineers, Architects and Land Surveyors has made a ruling in reference to the issuing of certificates to practice architecture under the so-called 'Grandfather's' clause, section 7, as follows:

"The board has interpreted the law to apply to every one alike.

"Any one applying for a certificate under form 'A' who has practiced architecture as the principal means of livelihood for a period of six years prior to June 14, 1924, is entitled to a certificate without examination.

"The practice of architecture has been defined as making plans, specifications and details, and superintending buildings in his own name or the name of a firm or association of which he is a member, and does not apply to a builder, a draftsman, an employee or any one working for a salary. An architect's license from a city or county will be considered as evidence of the fact, but is not conclusive evidence unless supported by other evidence.

"The board does not consider that they have the right under the law to consider experience or efficiency of the applicant in lieu of the one essential requirement which was evidently written into the law to prevent some one being deprived of the livelihood enjoyed by him prior to the passage of the law."

"The board desires to have your opinion as to whether or not this ruling will stand in law."

In reply, I beg to say that section 3145g of the Code of Virginia, 1924, which provides that any one "who shall satisfy the board that he has been engaged in the practice of professional engineering or architecture for not less than six years, etc.," clearly places upon the board the duty of judging the matter of what constitutes the practice or architecture. This, of course, involves matters of fact rather than law, and the board, being experts in such matters, is in a better position to define a practitioner of architecture than is this office.

However, in the absence of any better definition than the one which your board has adopted, I am constrained to believe that it is reasonable and would be upheld by the courts. At any rate, no injustice would result from the application, since any person who is qualified to practice architecture could readily pass the examination which your board is required to give by chapter 26a of the Code of 1924.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

## JUVENILE COURTS—Filing of reports of juvenile and domestic judges.

RICHMOND, VA., *February 11, 1926.*

HON. G. TAYLOR GWATHMEY,  
*Clerk of Norfolk County,*  
*Portsmouth, Va.*

DEAR MR. GWATHMEY:

Acknowledgment is made of your letter of the 8th, in which you say:

"The juvenile and domestic relations judge of this county has filed with me a report similar in form to that filed by the justices of the peace under sections 2550, 2551, 2552 of the Code. Because of the peculiar character of this court, we both had some doubt as to how his report should be filed, and because of this he has not filed any report heretofore, but having collected some fines he wanted to make return to me in the usual form of a justice of the peace under the above sections of the Code.

"There seems to be no provision about this matter made under chapter 81 of the Code, governing the juvenile and domestic relations courts, and there is a question in my mind of the propriety of putting on the record of the reports of the justices the other cases in which fines are not paid, as for instance, where cases are dismissed, where cases are put on probation, or juveniles are committed to the State Board of Public Welfare, or committed to the Society for the Prevention of Cruelty to Children.

"The intent and spirit of the act governing this particular court is, as stated in the act, "upon the theory that the welfare of the child is the paramount concern of the State, etc.." and it does not seem to the writer that where juveniles are hauled into his court and dealt with there in a humane spirit that this ought to be recorded as the reports of other justices are recorded. Moreover, there is a great deal more of this kind of certificates than there are cases of fines, and if I put all of these dismissals and orders for probation, etc., on the book, it will entail a good deal of expense to the State, as the State would pay me for entering such certificates in the same manner as I enter like certificates from justices as to the name of each person tried, etc., under section 2550.

"Will you kindly advise whether the whole of this report of the juvenile and domestic judge must go in the record of the justices' reports in the ordinary manner, so that I may know how to deal with this matter in my office?"

In reply, I beg to say that I concur in your opinion that the intent and spirit of the act is to prevent unnecessary mortification to juvenile offenders, such as would result from having reports as to their cases filed among public records. Where fines are assessed, however, I see no reason why they should not be reported in accordance with sections 2550-2, inclusive.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

**LICENSE—To aliens.**RICHMOND, VA., *February 10, 1926.*

MISS LILLIAN BURROUGHS,  
2633 Adams Mill Road,  
Washington, D. C.

DEAR MADAM:

Your letter of January 25, addressed to the Secretary to the Governor of Virginia, was referred by him to the Commissioner of Labor and by the last-named official referred to this office.

I beg to say that the laws of Virginia permit any alien not an enemy to acquire by purchase or descent and to hold real estate which may be transmitted in the same manner as real estate held by citizens. (Code of Virginia, section 66.) Section 3331 provides that:

"Any nonresident person not a citizen of the United States shall pay the sum of twenty dollars for a State license; but any person not a citizen of the United States who owns real estate in this State and who has actually resided in this State for a period of at least five years, shall, for the purposes of this chapter, be considered a citizen of this State, and shall pay the tax required of citizens of this State."

No license is required in this State for non-commercial fishing. We have no prohibition against aliens owning dogs or other animals.

Hoping this will give you the desired information, I am

Respectfully yours,

JOHN R. SAUNDERS,  
*Attorney General.*

**LICENSE—Merchant's license—Chickens.**RICHMOND, VA., *February 10, 1926.*

K. L. WOODY,, ESQ.,  
*Commonwealth's Attorney,*  
*Charlotte C. H., Va.*

DEAR MR. WOODY:

I have yours of the 9th instant, in which you say:

"A question of the proper license tax to be paid by a citizen of this county has been presented to me, and I am writing for your opinion on the question.

"A Mr. Gibson is engaged on a rather large scale in the business of raising chickens. He has a truck with which he makes regular trips to Richmond, carrying his own chickens and eggs and purchasing others on the way from country merchants and others.

"These he carries to Richmond and sells to the merchants there.

"I am of the opinion that for this he should take out the usual merchant's license. As I understand it, the peddlers' license contemplates an itinerant vendor rather than one who gathers his stock up from place to place.

"In addition to this, whenever he leaves for Richmond he takes orders for the merchants in his vicinity for fruit, such as oranges, apples, bananas, etc. For instance, one merchant will tell him to bring back a crate of

oranges, another, a hamper of bananas. When he gets to Richmond and has sold his stock he goes down on Cary street and purchases the things which have been ordered, and bringing them back, charges a profit on the cost price to pay him for the hauling.

"As I now see it, this comes within the 'sale by sample' class, and no license is required. In other words, it seems to me the only license necessary is the usual merchant's license.

"Before advising Mr. Gibson, however, I would like to feel sure that I was right, and would appreciate it if you would write me your opinion on this question."

In reply, I beg to say that it appears to me that Mr. Gibson comes within the exception contained in the last paragraph of section 46 of the tax laws, which says:

"All other property held by such merchant, or firm, or corporation, engaged in mercantile business, not offered for sale as merchandise, shall be separately listed and taxed as other property. The sums required by this section to be paid when the license is taken out shall be collected in the same manner that the amount required to be paid for other licenses are collected. Dealers in coal, wood, or ice, paying license tax under this section, may peddle the same from vehicles without paying additional tax. But nothing in this section shall be so construed as to require a license of any person who may canvass any county or corporation to buy lambs, pigs, calves, fowls, eggs, butter and such like small matters of subsistence designed as food for man, but any person who shall keep a place of business for the purpose of selling such articles in, or within a half mile of, any city or town in the State, shall take out license therefor, as hereinbefore prescribed; provided, that dealers in coal and wood in cities of forty thousand inhabitants or more, who peddle the same from vehicles, shall pay an additional tax of fifty dollars for each wagon thus used."

As he sells to merchants and not to consumers, he cannot be required to pay a peddler's license, but he is liable to be taxed upon the capital employed in the business, which would, of course, include the value of the truck.

If he merely charges a sum sufficient to compensate him for the hauling of the goods which he brings from Richmond, I cannot see that he should be taxed upon those transactions.

After a conference with the Auditor, I am confirmed in my opinion, which concurs with yours, that the usual merchant's license will cover his activities.

With best regards, I am

Yours very truly,

JOHN R. SAUNDERS.

*Attorney General.*

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## INTOXICATING LIQUORS—Jurisdiction of mayors in prohibition cases.

RICHMOND, VA., *February 6, 1926.*

P. H. KENNEDY, ESQ.,  
*Sheriff of Wise County,  
Big Stone Gap, Va.*

DEAR SIR:

Acknowledgment is made of yours of the 2nd, in which you say:

"The town officers of Big Stone Gap, Va., have been exceeding their jurisdiction by making arrests four or five miles from said town limits and carrying prisoners before the mayor and fining them and applying said fines to the credit of the town. I am satisfied that the Commonwealth is losing considerable amount of revenue as well as the State officers. There is considerable complaint about this, and I will appreciate your advice concerning same."

In reply, I beg to say that the jurisdiction of mayors in prohibition cases is governed by section 34 of the Virginia Prohibition law as follows:

"Enforcement of city ordinance, territory contiguous to cities. Nothing in this act shall be construed as conflicting with the jurisdiction of any mayor or police justice in the enforcement of city or town ordinances, prohibiting the manufacture, sale or distribution of ardent spirits. For the enforcement of such ordinances, the mayor or police justice shall have jurisdiction over the territory contiguous to the city or town within three miles of the city or town limits, provided said three-mile limit does not interfere with the jurisdiction of the mayor or police justice of any other city or town, and where there is less than six miles between any city or town, and another city or town, the jurisdiction of the mayor or police justice of either city or town shall extend only to one-half the distance between said cities and towns.

"In any prosecution before a mayor or police justice, the commissioner of prohibition and the attorney for the Commonwealth of the city or town shall be notified by the said mayor or police justice, in time to attend said trial, and the said attorney for the Commonwealth and the commissioner, his deputies and inspectors, shall have the same power in respect to such cases that they have in cases before the circuit or corporation court."

You will observe that the Commonwealth's attorney has authority in such matters and should take appropriate action to prevent town officers from exceeding their jurisdiction in such cases.

Yours very truly,

JOHN R. SAUNDERS,

*Attorney General.*

#### JUDGMENTS—When final.

RICHMOND, VA., February 5, 1926.

*His Excellency, HARRY FLOOD BYRD,  
Governor of Virginia,  
Richmond, Va.*

MY DEAR GOVERNOR:

Acknowledgment is made of your request of this morning with reference to the application of counsel for Louis Watkins for a stay of execution in his case, in order to give them time to apply to the Court of Appeals for oral argument or a rehearing of Watkins' application for writ of error.

It appears that this man was convicted in the hustings court of the city of Richmond of murder in the first degree, and sentenced to be electrocuted. On January 29, 1926, the Court of Appeals entered an order in which it is stated that the judgment of the hustings court was plainly right and for that reason the writ was rejected, the effect of which the order recites "is to affirm the judgment of said hustings court." The court adjourned on February 1, 1926, without appli-

cation having been made to it by Watkins, or his counsel, for a rehearing of the matter.

Section 6348 of the Code of Virginia, 1919, as amended, provides, in part, when a writ of error is presented to the court:

"\* \* \* If the court shall deem the judgment, decree, or order complained of plainly right, and reject the petition on that ground, the order of rejection shall so state, and no other petition therein shall afterwards be entertained. \* \* \*"

It is my opinion that when the court adjourned on February 1, 1926, its judgment in this case refusing the writ and affirming the judgment of the hustings court of the city of Richmond became final, and that the court is without jurisdiction to entertain a motion for further hearing on the writ at this time.

Yours very truly,

LEON M. BAZILE,  
*Assistant Attorney General.*

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**JAILS AND PRISONERS—Can party secure relief for part payment of fine and costs for violation of prohibition law—Serving time for non-payment of fine and costs.**

RICHMOND, VA., *February 5, 1926.*

MAJOR R. M. YOEELL,  
*Superintendent of the Penitentiary,*  
*Richmond, Va.*

DEAR SIR:

Acknowledgment is made of yours of yesterday, in which you say:

"Section 5¼ of chapter 345, found on page 575 of the Acts of 1922, prescribes the penalty for non-payment of fine and costs for violation of the prohibition law. I would appreciate it very much if you would give me a written opinion as to whether a man may pay a fractional part of his fine and costs and secure any relief, or whether he must pay the entire fine and costs before he can be relieved of the penalty imposed for non-payment of said fine and costs.

"Section 2095 of the Code of Virginia prescribes how a man may work out his fine and costs in other cases. I would also like to know whether he can pay a fractional part and receive relief or does he have to pay the entire fine and costs before he can be relieved of serving for non-payment of same.

"We are having cases like the above come up frequently and would like to have your opinion so as to be on the safe side."

Replying to your first question, I would say that, in my judgment, a person sentenced to jail under section 5¼ of chapter 345 of the Acts of 1922, which is the same as section 8 of the Virginia Prohibition Law of 1924, must pay the entire fine and costs in order to be discharged, unless transferred to the roads as provided by section 2075 of the Code, in which event section 2095 of the Code would apply.

As to your second question, under section 2095 of the Code, a person shall be required to work out the full amount of fine and costs at the rate of 50 cents per

day for each day so held to labor, Sundays excepted, and shall be entitled to a credit of 25 cents for each day of his confinement, whether he labors or not. It is my opinion that this section applies to all persons sentenced to the chain gang or the road force, whether they are guilty of violating the prohibition law or any other law.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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**JAILS AND PRISONERS—Confinement in penitentiary for failure to give bond.**

RICHMOND, VA., *February 2, 1926.*

MAJOR R. M. YUELL,  
*Superintendent Virginia State Penitentiary,*  
*Richmond, Va.*

MY DEAR MAJOR YUELL:

I am just in receipt of your letter of February 2 relative to the case of Jim Mickens, who is now in Camp No. 7, Fairfax county, Va., and who was sentenced on September 11, 1925, in Caroline county to serve six months with a fine of \$50 and \$42 costs for violating the prohibition law. This man was also required by the court to give bond in the amount of \$1,000 with good security that he would not violate the prohibition law for a period of twelve months.

You state in your letter that this party's time expires on February 8, 1926, and the clerk of the court advises you that up to the present time no bond has been given. You then request me to advise you whether you should hold this man six months or return him to the jail in Caroline county.

I am of the opinion that the proper thing for you to do is to return him to Caroline county and deliver him to the sheriff, in order that the court may pass upon the question.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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**INTOXICATING LIQUORS—Physicians' prescriptions; payment of costs when a case is appealed from the mayor.**

RICHMOND, VA., *February 2, 1926.*

HON. R. O. MORGAN, *Mayor,*  
*Richlands, Va.*

DEAR SIR:

Acknowledgment is made of yours of January 20, in which you say:

"We are having quite a lot of trouble with men drinking alcohol rum. They get prescriptions from the physicians, in order to get it, and I don't think the physicians or druggists care what they do with it. Sometimes the men that drink it get the prescriptions and sometimes they get some one else to get them.

"Can any action be taken against the physicians and druggists, and also against other whom the drinkers employ to get their prescriptions for them?"

"In prohibition cases does a mayor have a right to make the defendant pay the costs when the hearing is had when the case is carried on to court?"

In reply, I beg to say that physicians or druggists who prescribe or sell bathing fluids to persons whom they have good reason think are using it for beverage purposes are violating the prohibition law. Men who are employed to get prescriptions for other people, as well as those who employ them, may also be prosecuted.

Answering your other questions, when a case is appealed from the mayor to the circuit court, the question of costs in the mayor's court is decided on the appeal, and, therefore, the costs cannot be collected by the mayor in advance.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

#### **ELECTIONS—Eligibility of voters.**

RICHMOND, VA., *January 30, 1926.*

MR. J. B. GROTZ,

*Box 18,*

*Selma, Va.*

DEAR SIR:

Acknowledgment is made of your letter of January 28, 1926, in which you state that a special election will be held on February 9 for the purpose of electing a town council and mayor.

This matter is governed by section 83 of the Code, Virginia Election Laws, page 16. You will note that this statute says that where the special election is 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." Except in cities of not less than 100,000 nor more than 160,000 inhabitants, persons qualified to register may register at any time except when the registration books are closed, as provided by section 98 of the Code, Virginia Election Laws, pages 22-23.

Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

#### **SLOT MACHINES—Legality of.**

RICHMOND, VA., *January 26, 1926.*

HON. A. D. WATKINS,

*Commonwealth's Attorney,*

*Farmville, Va.*

MY DEAR SIR:

I beg leave to acknowledge receipt of your letter of January 22, 1926,

relative to the legality of slot machines. In your letter you state that a number of these machines are now being installed in your county, the character of which is fully described in your letter. You also enclose a copy of my opinion, which I gave the Auditor of Public Accounts in October, 1921.

I beg leave to advise that since this opinion was rendered a number of the circuit courts in the State have decided that slot machines of the character defined in your letter are gambling devices, and the use of them has been precluded in the circuits of these judges.

I would further state that the corporation courts of the cities of Norfolk and Danville have also decided that these machines are gambling devices, and the chief of police have barred their use in these cities. In the city of Richmond a test case was heard before Judge Edwin P. Cox, who was presiding in the absence of Judge D. C. Richardson, in which the party operating the machine was convicted. A motion for a new trial is pending before Judge Cox at this time. However, the chief of police of the city has stopped the use of these machines.

Under these circumstances, I would suggest that you, as Commonwealth's attorney, notify the operators of these machines that, unless they discontinue their use at once, you will institute prosecutions against them. In this connection I call your attention to the case of *Ferguson v. State*, 42 L. R. A. (N. S.) 720, Ann. Cas. 1915C, 172, and to the annotations appended to this case in the above-mentioned reports.

I am enclosing a copy of my letter to Mr. Thompson, as he is representing the vending machine company.

With my kind personal regards and best wishes, I am

Very sincerely yours,

JOHN. R. SAUNDERS,

*Attorney General.*

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#### **SCHOOLS—Taxes—Constitutionality of.**

RICHMOND, VA., *January 26, 1926.*

HON. CHARLES H. FUNK,  
*Commonwealth's Attorney,*  
*Marion, Va.*

DEAR SIR:

Acknowledgment is made of yours of the 21st, referring to a section of the charter of the town of Marion relating to school taxes.

I note that you have not been able to see this provision in the amended charter of 1920; but you say that it provided "that the county treasurer should refund to the town the amount of county school tax paid on property located in the town." I have been unable to find this provision in the charter (chapter 457, page 683, Acts 1920). However, subsection 4 of section 14 has this provision:

"The county school board of the county of Smyth shall apportion to the town of Marion as its proportion of the county school funds that amount of money which shall have been paid in by receipts and property located within the town of Marion to such county school fund."

It is true that section 136 of the Constitution provides that the local school authorities may use the school money as the public welfare may require. I do

not construe this language, however, as prohibiting the legislature from directing how such money may be used for school purposes. The charter of 1920 is a special act, which I think it was within the power of the legislature to pass.

The county unit law (chapter 423, page 737, Acts 1922) in the last sentence of section 4 says:

"Nothing in this act shall be construed to affect the present plan of levying district as well as county school taxes \* \* \*."

Therefore, the charter of 1920 is not affected by the Act of 1922 nor, so far as I know, by any subsequent act. The general act, which is chapter 29, page 32, Acts 1923, as amended by chapter 175, page 288, Acts 1924, does not amend such a special act as the Marion charter of 1920. Of course, it would be within the power of the legislature to provide that charter provisions in conflict with this act were repealed, but it has not so provided.

In other words, it is my judgment that section 136 and the general acts passed in pursuance thereto do not conflict with such special acts as town charters granted by the General Assembly. Of course, much may be said pro and con as to the advisability of such a provision as that of the Marion charter relating to school taxes, but at this time I am discussing only the legality of this provision.

Yours very truly,

JOHN. R. SAUNDERS,  
*Attorney General.*

#### INTOXICATING LIQUORS—Fees of police officers.

RICHMOND, VA., *January 25, 1926.*

HON. M. ANDERSON MAXEY,  
*Commonwealth's Attorney,*  
*Suffolk, Va.*

MY DEAR SIR:

Acknowledgment is made of your letter of January 22, 1926, in which you say in part:

"Recently two parties were arrested in an automobile at the same time by a Suffolk policeman. One was charged with transporting intoxicating liquor and the other with being drunk.

"These parties were given separate trials by our local police justice and both found guilty. Please advise me if, under these circumstances, the arresting officer is entitled to one fee under section 4675 (47) of the Code of Virginia, or is he entitled to two fees, one for each of the parties arrested."

The last paragraph of section 46 of the prohibition law, which is the same as section 4675 (47) of the Code of Virginia, 1924, provides as follows:

"For making an arrest for the violation of any of the provisions of this or other prohibition laws of the State, the officer making such arrest, if the defendant is convicted, shall be paid a fee of ten dollars, to be taxed as a part of the costs against such defendant, and if two or more officers

united in making such arrests, then provided the fee for arrest for intoxication shall be five dollars, said fee shall be apportioned among them."

It is my opinion that in the cases referred to in your letter the officer making the arrest would be entitled to a fee of ten dollars to be collected from the defendant who was convicted of transporting ardent spirits, and to a fee of five dollars to be paid by the defendant, who was convicted of being drunk.

Trusting this gives you the desired information, I am

Very truly yours,

JOHN. R. SAUNDERS,  
*Attorney General.*

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#### OUSTER PROCEEDINGS—Services rendered in.

RICHMOND, VA., *January 21, 1926.*

HON. C. LEE MOORE,  
*Auditor of Public Accounts,*  
*Richmond, Va.*

MY DEAR MR. AUDITOR:

Acknowledgment is made of your request of today with reference to the account of H. W. McKinney, sheriff of Appomattox county, for \$11.20, for services rendered by him in summoning twenty-eight Commonwealth witnesses in the ouster proceeding of the *Commonwealth v. E. M. Drinkard*. The proceeding was in the circuit court of Appomattox county, and Mr. Drinkard was a member of the board of supervisors of that county, I am informed.

It is my opinion that an ouster proceeding under sections 2705 and 2706 of the Code of Virginia, 1919, is a Commonwealth proceeding, and, therefore, that the sheriff's services rendered in summoning the witnesses for the Commonwealth was a service performed for the benefit of the Commonwealth for which he should be paid.

Yours very truly,

JOHN. R. SAUNDERS,  
*Attorney General.*

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#### INTOXICATING LIQUORS—Fee of Commonwealth's attorney.

RICHMOND, VA., *January 21, 1926.*

MRS. BESSIE M. WILLS, D. C.,  
*Circuit Court of Southampton County,*  
*Courtland, Va.*

DEAR MADAM:

Acknowledgment is made of yours of the 19th, in which you say:

"Please advise what, in your opinion, would be the fee received by the Commonwealth's attorney in a prohibition case where the defendant was convicted at the final hearing and the attorney for the Commonwealth was not present at the preliminary hearing, and all costs are paid by the defendant."

In reply, I beg to say that section 46 of the Virginia Prohibition Law provides for a fee of \$25 "where a conviction is had on the final hearing." Of course, if a fee has been allowed at the preliminary hearing, it is credited upon the fee of \$25. This office has consistently ruled that on a final hearing where a conviction was obtained the Commonwealth's attorney is entitled to \$25, to be taxed against the defendant, whether the Commonwealth's attorney was present at the preliminary hearing or not.

Yours very truly,

JOHN. R. SAUNDERS,

*Attorney General.*

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**TAXATION—Church property rented out for secular purposes.**

RICHMOND, VA., January 21, 1926.

F. F. HURT, Esq., *Treasurer,*  
*Richlands, Va.*

DEAR SIR:

Acknowledgment is made of yours of the 15th, in which you say:

"A church denomination has bought some property here, with the view some time possibly of erecting a church on same. At the present time there is a large rooming house on this lot and for some years they have been renting this property and are continuing to do so even now.

"They seem to think that, as it is church property and belongs to a religious denomination, it is not taxable.

"Our town has tax against this property for some years back, and would like to know just what the legal status is relative to the collection of this tax."

In reply, I beg to say that, though church property and other property used exclusively for religious purposes is exempt from taxation, such exemption does not apply to property which is merely owned by a church denomination and rented out for secular purposes.

Yours very truly,

JOHN. R. SAUNDERS,

*Attorney General.*

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**INTOXICATING LIQUORS—Payment of account of Commonwealth's attorney for information furnished resulting in confiscation and sale of a still.**

RICHMOND, VA., January 21, 1926.

JUDGE FREDERICK W. COLEMAN,  
*Fredericksburg, Va.*

MY DEAR JUDGE COLEMAN:

I beg leave to acknowledge receipt of yours of the 20th enclosing an account of Commonwealth's Attorney S. S. Powell, of *Spotsylvania county v. Commonwealth of Virginia.*

In reply to your letter, I am clearly of the opinion that these items cannot be paid out of the public treasury. In the first place, the law does not require

or contemplate that the Commonwealth's attorney shall file any information for the sale of a still or any apparatus used in the manufacture of liquor. The only information which the Commonwealth's attorney is required to file is where an automobile, boat, vehicle or other conveyance is seized when used in the transportation of ardent spirits. So far as the still is concerned, the law expressly provides that it shall, when seized by any officer, be turned over to the commissioner, who, after mutilating it shall sell same for junk after he has reported the same to me.

I have examined section 31 of the prohibition law, and it is my opinion that this section furnishes no authority for the account in question. I would further add that I have discussed this account with the clerk in the Auditor's office, who handles accounts of this nature, and he is of the same opinion that I am.

Very truly yours,

JOHN. R. SAUNDERS,  
*Attorney General.*

### SCHOOLS—Vaccination of children.

RICHMOND, VA., *January 20, 1926.*

HON. PHILLIP WILLIAMS,  
*Commonwealth's Attorney,*  
*Woodstock, Va.*

MY DEAR MR. WILLIAMS:

Acknowledgment is made of your communication of yesterday in which you state that certain children of your county have been excluded from the public schools by action of the school board on account of the fact that they have not been vaccinated. You then ask me to advise you whether the parents of these children can be prosecuted, under the compulsory education law, for failure to send their children to school.

Section 1529 of the Code of 1919, by implication at least, authorizes the school board to exclude pupils from school who have not been vaccinated.

Section 722a of the Code of Virginia, 1924, so far as is applicable to children who may be required to attend school, provides as follows:

"Every parent, guardian, or other person in the State of Virginia, having control or charge of any child, or children, who have reached the eighth birthday and have not passed the fourteenth birthday, shall send such child, or children, to a public school, or to a private, denominational or parochial school or have such child or children taught by a tutor or teacher in a home, and such child, or children, shall attend regular such school during the period of each year the public schools are in session and for the same number of days as in the public schools. The period of compulsory attendance shall commence at the beginning of the school which the pupil attends. \* \* \*

Section 722d of the Code of Virginia, 1924, so far as is applicable to the question here under consideration, provides as follows:

"Any parent, guardian, or other person having control of a child, who fails to send such child to school *as required by this act*; or

\* \* \*

"Any person who commits any offense under this act for which no specific penalty is provided herein, shall be guilty of a misdemeanor and on conviction shall be fined not exceeding twenty-five dollars." (Italics supplied.)

You will see from a reading of section 722a of the Code of Virginia, 1924, that parents or guardians having control or charge of a child, or children, within school age, are required to send such child or children, first, to a public school; or, second, to a private, denominational or parochial school; or, third, to have such child or children taught by a tutor or teacher in the home.

The fact that a child, or children, have been excluded from the public schools under authority of law does not, in my opinion, relieve the parent or person having control of such child, or children, from seeing that the same are educated as required by law. Therefore, it is my opinion that the parents or guardians of the children referred to are required to have these children educated either in a private school or by a tutor or teacher in the home, and their failure to do so constitutes a violation of the law which is a misdemeanor.

Parents or guardians are required to send their children to school. As the law requires that they shall be vaccinated before admission in public schools, it imposes the duty and obligation upon the parent or guardian to see that such vaccination is effected, and they cannot defend themselves from prosecution by not sending their children to school upon a plea that they were excluded from school for the reason that they had not been vaccinated. If such a defense could be made, it would practically nullify the compulsory education law in all cases where the parent or guardian arbitrarily refused to allow vaccination of their children or wards.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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**SCHOOLS—Liability of school board in transportation of children in automobile trucks.**

RICHMOND, VA., *January 18, 1926.*

MR. H. F. GREEN,  
*Amelia C. H., Va.*

DEAR SIR:

Acknowledgment is made of yours of the 9th, in which you say:

"The school board of Powhatan county are debating the question of whether or not they are liable in the transporting of the school children to and from school in automobile trucks. In discussing this matter with them they asked me to write to you for an opinion, and if liable, they want insurance protection, and if not liable, they do not wish to entail the expense."

In reply, I will say that it is my opinion that the school board has no liability in this matter.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

**GAME AND INLAND FISHERIES—Right to shoot rabbits on owner's property.**

RICHMOND, VA., January 16, 1926.

HON. C. W. WILLIAMS,  
*Department of Game and Inland Fisheries,*  
*Roanoke, Va.*

DEAR CLARENCE:

I have yours of the 15th, in which you say:

"The board of supervisors of Giles county closed the season legally on rabbits December 31, 1925. Of course, this ruling does not prevent a man shooting rabbits on his own property, but in my opinion, he is not allowed to dispose of them for compensation.

"A party in Giles county last week put fifteen rabbits on sale, advising that they were killed on his own property. Kindly advise this office if this party violated the game law or not."

I concur in your opinion that the right to shoot rabbits on one's own property during the closed season does not carry with it the right to dispose of them for compensation.

Yours very truly

JOHN R. SAUNDERS,  
*Attorney General.*

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**STATUTES—Inspection of books of Anti-Saloon League.**

RICHMOND, VA., January 8, 1926.

HON. ALBERT O. BOSCHEN,  
*Richmond, Va.*

MY DEAR SIR:

I beg leave to acknowledge receipt of your letter of recent date addressed to Hon. William F. Smyth, State Accountant, and to me, as Attorney General of Virginia, which is as follows:

"The General Assembly of Virginia at its session in 1924 enacted a law, see Acts of General Assembly, chapter 355, page 515, which imposed upon you gentlemen the duty of inspectors of books of persons, firms, or corporations and associations soliciting subscriptions or contributions to any cause or thing, with certain exceptions, etc.

"Under this law the Anti-Saloon League is subject to your inspection, as this law seemed to be aimed at the Anti-Saloon League, because their friends were the only ones fighting the bill. The bill was offered by Wilbur Hall, of Loudoun county.

"As such inspectors, I request you to inspect the books of the Anti-Saloon League, and find out for me, and please furnish me with a list of the contributions, or subscriptions; also the disbursements, and the amount of the salary paid to the Mr. David Hepburn, and all others, and the capacity in which they are employed.

"This information is very important, and I am asking you in writing, although I talked with Col. John R. Saunders over the phone on yesterday. Col. Saunders seems to think this information was of no importance by the manner he treated my request.

"Now that I may proceed properly, that I may have this information, I am making my request in writing. I desire to have this information by the 13th day of January, at which time the 1926 General Assembly will meet, of which I will be a member.

"I shall await that time, and if the information is not furnished, I shall proceed to obtain same by resolution in the House, which I trust will not be necessary."

As the statute referred to in your letter is a short one, I deem it advisable to quote it in full.

"1. Be it enacted by the General Assembly of Virginia, That every person, firm, corporation or association soliciting subscriptions or contributions to any cause or thing, except as hereinafter provided, shall keep adequate books showing all sums of money collected and how, to whom, and for what disbursed. Receipts shall be kept itemized to as great an extent as may be practicable, and disbursements shall in all cases be itemized and not shown merely by totals.

"The books aforesaid shall be kept at some reasonably accessible place within the limits of this State and shall at all times be open to the inspection of the State Accountant and the Attorney General of Virginia. The books herein mentioned, however, need not be preserved for a longer period than two years after solicitation has ceased.

"2. This act shall not apply to subscriptions or contributions solicited by any church or other purely religious body or congregation, or political party nor shall it apply in any case where less than one hundred and twenty-five persons are jointly or severally solicited for subscriptions or contributions; nor to purely business enterprises.

"3. Nothing herein contained shall be construed as making lawful any act or omission which is now unlawful, or as decreasing the liability, civil or criminal, of any person, firm, or corporation or association, imposed by existing laws.

"4. Any person, firm, corporation, or association failing to keep the books required by this act, or otherwise violating the same, shall be subject to a fine of not exceeding five hundred dollars, and for each week's failure, after the first conviction, a further fine of five hundred dollars shall be imposed on every subsequent conviction. Prosecutions of unincorporated associations under this act shall be against the officers thereof."

While it is true that paragraph two of the act in question requires that all books kept by persons, firms, corporations or associations embraced in its provisions shall be kept at some reasonably accessible place within the limits of the State and shall at all times be open to the inspection of the State Accountant and the Attorney General of Virginia, I cannot agree with you that the act imposes upon either the State Accountant or myself the duty to give such detailed information as you request in your letter.

My construction of the act to which you call my attention is that the purpose of the provision which permits only the State Accountant and the Attorney General to inspect the books is that the State Accountant shall see that the books are accurately kept, and that the Attorney General shall have an opportunity to ascertain whether the "subscriptions" referred to in the act have been improperly solicited or illegally expended.

However, I will state that I have made a very thorough inspection of the books of the Anti-Saloon League, and find that they are being carefully kept. All contributions and expenditures are properly accounted for, and I find no illegal disposition made of the funds of the league. The books have been regularly

audited by an expert accountant for a number of years, and a report of this audit filed annually with the executive committee of the legate.

It will be observed from a reading of the act in question that it embraces every person, firm, corporation or association, except a church or other purely religious body or congregation, or a political party soliciting subscriptions or contributions to any cause or thing. Such being true, I cannot believe that the legislature of Virginia intended to impose upon the State Accountant and the Attorney General the duty of obtaining and giving such information as you request in your letter.

Very sincerely yours,

JOHN R. SAUNDERS,  
*Attorney General.*

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**TAXATION—Estate of nonresident.**

RICHMOND, VA., *January 7, 1926.*

MR. WILLIAM F. LONG,  
*Attorney at Law,*  
*Charlottesville, Va.*

MY DEAR MR. LONG:

I beg leave to acknowledge receipt of your letter of January 1, the contents of which I have carefully noted.

Section 44½ of the tax bill provides that all personal property within the jurisdiction of the State and any interest therein, belonging to persons whose domicile is without the State, shall, upon the death of the owner, be subject to a tax of 2 per centum of its actual value for the support of the State government, upon its transfer, payment or delivery to the executor, administrator or trustee of the estate of said deceased.

It, therefore, follows that a 2 per centum transfer tax should be paid on the \$50,000 in personal property belonging to the estate of the nonresident mentioned in your letter. The only other tax which should be paid by this estate is the inheritance tax on the real estate.

I would add that I have discussed this matter with the Auditor, and he concurs in this view.

I am enclosing your blank forms, which were handed me by the Auditor, although I presume you already have these.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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**INTOXICATING LIQUORS—Fee of town attorney in the prosecution of cases under State prohibition law.**

RICHMOND, VA., *January 7, 1926.*

HON. JOSEPH F. WILLS, *Secretary,*  
*Louisa, Va.*

MY DEAR SIR:

Acknowledgment is made of your letter of December 31, 1925, in which you ask for my opinion on the following statement of facts:

"The town of Louisa has adopted the prohibition ordinance in accordance with the prohibition act of 1924, and a question has arisen as to whether a lawyer, who has been appointed town attorney by the town council and who has acted as prosecuting attorney for the town in other cases and who acts as prosecuting attorney in prohibition cases, is entitled to the fees allowed the Commonwealth's attorney for the prosecution of cases under the State prohibition law."

If you will examine sections 34, 37 and 46 of the Virginia Prohibition Law, you will see that it is made the duty of the attorney for the Commonwealth to enforce all of the provisions of a town prohibition ordinance and to conduct all prosecutions and proceedings thereunder, for which it is provided in section 37 of the prohibition law that the same fees shall be taxed against the defendant as would be taxed upon final conviction in a prosecution had by the Commonwealth for a similar violation of the prohibition laws of this State, anything in the charter or ordinance of any city or town to the contrary notwithstanding.

Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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#### GAME AND INLAND FISHERIES—Hunting without license.

RICHMOND, VA., *January 4, 1926.*

HON. FREDERICK W. COLEMAN, *Judge,*  
*Fredericksburg, Va.*

MY DEAR JUDGE COLEMAN:

In your letter of December 24 to me you say in part:

"I want to get your views on a little case that is before me for trial. The case is this: On November 10, 1925, without a license five gentlemen went geese hunting and on the morning November 11 shot and killed some geese. On the 15th of November they procured licenses from the county clerk. The local game warden heard about this hunting about the 16th of November and upon examination found that licenses had been issued on the 15th of November, and thereupon dropped the matter. A game warden in the adjoining county heard of this hunting and swore out a warrant, had these gentlemen brought before a J. P., who, after hearing the evidence, dismissed the case, whereupon the warden appealed to my court.

"Now the contention of the State is as I am advised—

"(1) That the 'hunting license' is not retroactive.

"(2) That the hunting license must first be procured before a person can hunt.

"(3) That this case involving a violation of the revenue laws is appealable by the Commonwealth.

"The defendants contend—

"(1) That the hunting license is retroactive.

"(2) That the license having been issued and the respective amounts paid no revenue is involved and hence no appeal for the State."

The language of Code section 4931 is that a writ of error, "if the case be titled to an appeal in this case, which involves the third contention made by the

Commonwealth and the second contention made by the defendants.

Section 8 of the Virginia Constitution provides in part:

"That no man shall be \* \* \* put twice in jeopardy for the same offense, but an appeal may be allowed to the Commonwealth *in all prosecutions for the violation of a law relating to the State revenue.*" (Italics supplied.)

The language of Code section 4931 is that a writ of error, "if the case be for the violation of law relating to the State revenue," shall lie for the Commonwealth.

In *Bailey v. Commonwealth*, 124 Va. 800, the defendant was tried before three justices of the peace of Southampton county upon a warrant charging him with hunting foxes without license. The justices dismissed the warrant. The Commonwealth appealed to the circuit court, which held that the defendant had not violated the law, and thereupon the Commonwealth appealed to the Supreme Court of Appeals, which court reversed the case. In this case, however, the license tax was not paid prior to the issuance of the warrant.

Examination of the language of section 8 of the Constitution and section 4931 of the Code convinces me that the Constitution was intended to authorize an appeal by the Commonwealth in any prosecution for the violation of the law relating to the State revenue whether or not the question of revenue was involved, and that the General Assembly in providing for appeals in such cases has used language equally as broad.

The Supreme Court of West Virginia, under a constitutional provision and a statute which provided that "in cases relating to the public revenue the right of appeal shall belong to the State as well as the defendant," held in the case of *State v. Hotel McCreery Company* that the State was entitled to an appeal from the decision of a lower court dismissing a prosecution against a corporation for selling liquor without authority of law, where it was shown that the revenue license required for the sale of liquor had been obtained by the corporation and the tax paid. The contention of the State in that case was that a corporation was not authorized to have such a license, that the license issued to it was void, and that sales made by such corporation were made in violation of the law.

This case is reported in 68 W. Va. 130; 69 S. E. 472, and Ann. Cas. 1912A, 966. The contention made by the defendants was that the indictment was not for selling liquor without obtaining the license and paying tax; that the tax had been paid, and that the State was not vindicating its rights to revenue by prosecution, and the case did not relate to the public revenue, as the State was neither suing for the recovery of revenue nor indicting for selling liquor without paying tax, and that, although the State was vindicating its law, the case did not involve revenue, and, therefore, no authority on the part of the State to appeal existed.

The court said, speaking through Brannon, J.:

"\* \* \* We grant readily that but for the provision above quoted granting the State a right of writ of error it would have none; but the plain purpose of the provision of the Constitution and statute was to change this rule and grant the State a writ of error in matters relating to the revenue. This is a remedial statute and should receive a liberal construction. We have always been accustomed to consider chapter 32 in all of its provisions as relating to the revenue. In the grave and important matters, so essential to State government, for which that chapter provides, it is right that the State should have a right to vindicate her laws as given in

that statute. It provides for many licenses. It provides for privileges under those licenses. It provides for liquor license and prohibits the grants of same in certain cases, and inflicts fines and other punishments for the infraction of the important provisions of that chapter on which rests the revenue largely and the morals and peace and order of the State. The State ought to have the power to vindicate her broken law as contained in that chapter. The State is interested not only in the recovery of her revenue, but she is interested in enforcing her law, made for such high purposes. She is interested in process by appeal to successfully vindicate the policy enacted by that statute withholding license to sell liquors from a corporation. She chooses not to intrust a corporation with the license. She cannot adequately punish a corporation as she can an individual by imprisonment in jail or penitentiary. But let her reason be whatever it may, thus she has written her law. Suppose we say that she cannot appeal in such a case. Then she cannot enforce her statute adequately, if there should be an erroneous decision in the lower court. We ought not to so hold if we can help it. Suppose a licensed saloonist sells liquor to a minor or on Sunday, or to a person drunk at the time of sale. Is it possible that she cannot have appeal in such cases to enforce her law under the provision above quoted? In those cases she is not suing for license tax any more than in this case. She has in those cases received her money for license; but that does not debar her from this court. We think the case under chapter 32 relates to the revenue for the purposes of appellate jurisdiction."

I am, therefore, convinced that if the prosecution in this case had been instituted in the circuit court an appeal would lie at the instance of the Commonwealth from the decision of the circuit court dismissing the prosecution. Unfortunately for the Commonwealth, however, that is not the position which it occupies in the case referred to in your letter. The above quoted provision of section 8 of the Virginia Constitution is not self-executing, as the language of the Constitution unquestionably contemplates, provision being made, for the allowance of an appeal to the Commonwealth by some action of the General Assembly.

You will see that the language of the Constitution is that "an appeal may be allowed to the Commonwealth" in prosecutions for the violation of a law relating to the State revenue. This language, in my opinion, contemplates provision made for such an appeal by action of the General Assembly, and this conclusion is supported by the language of the court in *Commonwealth v. Perrowe*, 124 Va. 805, 814, where it is said:

"\* \* \* under both section 8 and section 88 of the Constitution the legislature may allow the Commonwealth an appeal in any criminal case involving the revenue law, regardless of the degree of punishment \* \* \*."

See also *Newport News v. Woodward*, 104 Va. 58, 61.

Examination of section 4931 of the Code of 1919 shows that this section refers not to appeals from justices of the peace, but to appeals from courts of record to the Court of Appeals.

Section 4989 of the code of 1919, which provides for appeals from justices of the peace to the circuit or corporation court, allows an appeal to any person convicted by a justice, but confers no similar right on the Commonwealth in cases involving prosecutions for the violation of a law relating to the State revenue.

It, therefore, follows that if section 8 of the Bill of Rights is not self-executing, and the Court of Appeals has certainly very strongly intimated in *Commonwealth v. Perrow*, *supra*, that it is not, then no appeal in a revenue case would lie from a decision of the justice to the circuit or corporation court, for the reason that the General Assembly has failed to make provisions for such appeal, and this is the conclusion at which we have arrived.

You will recall that *Commonwealth v. Bailey*, 124 Va. 800, which was decided on the same day that *Commonwealth v. Perrow*, *supra*, was decided, was a case in which the prosecution originated in the justice court and was from that court appealed by the Commonwealth to the circuit court, and also appealed by the Commonwealth from the circuit court to the Court of Appeals. This question, however, was not considered by the court in its opinion. An examination of the record in that case shows that this question was not raised, and, therefore, probably was not considered by the court. The question not having been raised and the Court of Appeals not having passed on it, I do not believe that *Commonwealth v. Bailey*, *supra*, could be regarded as an authority in support of the contention made by the Commonwealth in this case.

After reading section 3337 of the Code of 1919, as amended, I think that the second contention made by the Commonwealth, namely, that the hunting license must be first procured before a person can hunt, is sound. This section expressly declares that it shall be unlawful for any person to hunt, with certain exceptions, "without first obtaining a license permitting him to do so." This sentence is followed by the provision that any person violating this section shall be deemed guilty of a misdemeanor.

I am also of the opinion that a hunting license is not retroactive, and that one who has violated the law in hunting without a license cannot avoid a prosecution for the violation of the statute by subsequently obtaining a license.

Thus it is said in 25 Cyc. 638:

"\* \* \* that a license has been taken out and paid for is no defense to a prosecution for acts done prior to the actual issue of the license, even where the license was antedated so as to cover the unlicensed period."

I have examined the cases of *Elsberry v. State*, 52 Ala. 8, 10, and *State v. Raymond*, 12 Mont. 226, and these cases support the above-quoted statement from Cyc.

In *Elsberry v. State*, *supra*, the court said, in holding that the subsequent taking out of a license did not relate back so as to relieve one from a prosecution for acts done before the license was obtained:

"\* \* \* Such a mode of condonation would probably tempt many a person to experiment in the chances of carrying on business without license, with a view to escape altogether the contribution he ought to make to the revenues of the State. In this cause, there is no evidence whatever of such an intention. But the pardoning power in this State is not intrusted to revenue collectors."

I must apologize to you for the length of this letter, but I became so much interested in the constitutional question I am afraid my enthusiasm ran away with me. I also wish to apologize for not having written you on Saturday, but

I was delayed in returning from Norfolk, and found it impossible to give the question the attention which it deserved until today.

Very sincerely yours,

LEON M. BAZILE,  
*Assistant Attorney General.*

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**VETERINARIAN—State entitled to information concerning tests of blood from fowls.**

RICHMOND VA., *December 23, 1925.*

DR. J. G. FERNEYHOUGH,  
*State Veterinarian,*  
*Richmond, Va.*

MY DEAR DR. FERNEYHOUGH:

Acknowledgment is made of your letter of December 22, 1925, in which you say in part:

"I have been informed of the fact that the Veterinary Department of the State Agricultural and Mechanical College, at Blacksburg, Va., has been for some time testing blood from fowls for the Division of Markets of the Department of Agriculture for the purpose of locating animals which are affected with the infectious disease known as bacillary white diarrhoea. The Division of Markets has in mind the issuing of official health certificates for such animals as give negative results to said test.  
\* \* \* \*

"On December 16, 1925, I wrote Hon. G. W. Koiner, Commissioner of Agriculture, and requested that he have the Division of Markets furnish me a record of the results of said tests, especially giving me the names and addresses of all poultry owners when the said poultry was pronounced diseased as a result of the test applied.

"It appears that my letter was referred to Mr. J. H. Meeks, of the Division of Markets, and under date of December 21, Mr. Meeks wrote me (copy of letter enclosed), but failed to give me the information which I requested.

"May I ask that you please write Commissioner Koiner, and also Hon. J. B. Watkins, rector of the Board of Visitors of the State Agricultural College, stating definitely whether or not I am entitled to the information for which I have asked?"

I have examined sections 906-920 of the Code of Virginia, 1919, with care, and it is my opinion that you, as the State Veterinarian, are entitled to have the information requested by you, and it is also my opinion that it is the duty of the Commissioner of Agriculture and the Director of the Division of Markets, and also the Veterinary Department of the State Agricultural and Mechanical College at Blacksburg to furnish you and the members of the State Live Stock Sanitary Board this information.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

**AUTOMOBILES—Constitutionality of statute authorizing cities to impose additional license tax on motor vehicles.**RICHMOND, VA., *December 16, 1925.*

MR. T. J. WRIGHT,  
4601 *Virginia Ave.*,  
*Newport News, Va.*

MY DEAR SIR:

Acknowledgment is made of your letter of December 15, 1925, in which you make certain inquiries with reference to section 2152 of the Code of 1919, authorizing cities to impose an additional license tax upon motor vehicles owned by residents of said city, etc.

This statute authorizes cities, towns and counties to impose a local license tax in addition to the State license on automobiles. So far as I can see, there is nothing unconstitutional about the statute. The fact that the counties have not seen fit to exercise the power conferred on them by the statute would not make the exercise of the power conferred on the cities by the same act a violation of the Constitution. The Court of Appeals construed this statute in *Portsmouth v. D. Pender Grocery Co.*, 138 Va. 828 (1924), and *Portsmouth v. Miller, Rhoads and Schwartz*, 138 Va. 823 (1924).

Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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**INSURANCE—Life insurance moneys subject to payment of burial expenses of insured.**RICHMOND, VA., *December 29, 1925.*

HON. J. R. McCARL, *Comptroller General*,  
*Claims Division, General Accounting Office*,  
*Washington, D. C.*

In Re: FWE-911 0117643

DEAR SIR:

Acknowledgment is made of yours of the 21st, in which you say:

"It is requested that you advise this office whether or not the laws of the State of Virginia make life insurance moneys subject to payment of the burial expenses of the insured.

"This information is requested in connection with a claim now before this office."

In reply, I beg to say that section 5390 of the Code of Virginia provides for the payment of funeral expenses and costs of administration before other creditors are paid out of the estate of a deceased person. Life insurance moneys accruing under policies made payable to the estate of the insured are, therefore, subject to burial expenses.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

**MARRIAGE—Consent for marriage of a minor.**RICHMOND, VA., *December 29, 1925.*

E. W. OGLE, ESQ.,  
*Clerk of Court,*  
*Hillsville, Va.*

DEAR SIR:

I have yours of the 21st, in which you say:

"The statute provides that a minor must have the consent of his or her father, if living, if not, the guardian, if there be one, but if no guardian or father, then the mother, to unite in marriage; but in the case of a father and a mother and no guardian, and a decree for a divorce having been granted and the custody and care of the children vested and given to the mother, whose consent should be given?"

In my judgment, the proper party in this case to give consent is the mother, who is the guardian under the court's decree.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

**LICENSE—Garage.**RICHMOND, VA., *December 30, 1925.*

HON. L. W. WOOD,  
*Charlottesville, Va.*

MY DEAR MR. WOOD:

I am just in receipt of your letter of December 28th. You state in your letter that a number of residents of Charlottesville have been constructing on their own properties private garages and renting the same to individuals, turning over the key to the occupant or tenant.

You further state that one of your local judges bought a large brick building and divided the floor space into stalls and rents them monthly to car owners, giving to each owner of a car a key to the door on one floor and on the other floor leaving the door open.

You then desire to be advised whether or not under the provisions of sections 2149 and 2150 of the Code of Virginia this party is required to pay a garage license. I am of the opinion that he is not required to pay a garage license.

After receiving your letter I discussed this matter with the Auditor of Public Accounts, and he gave me a copy of an opinion which he had rendered Mr. J. J. Taylor, commissioner of the revenue of Wise county, a copy of which I am herein enclosing.

With kindest personal regards and the compliments of the season, I am

Sincerely yours,

JOHN R. SAUNDERS,  
*Attorney General.*

**GAME AND INLAND FISHERIES—Oysters—Employment of nonresidents.**RICHMOND, VA., *December 17, 1925.*MR. B. B. FITCHETT,  
*Franktown, Va.*

MY DEAR MR. FITCHETT:

I am in receipt of a letter under date of December 14 signed "Oyster Inspector, District No. 24, Northampton county," but no name.

As you and Captain Badger are inspectors in that district, I presume the letter came from one or the other. I am, therefore, writing you, and if I am mistaken you can forward the latter to Captain Badger.

In your letter you ask to be advised whether a resident captain is permitted under the provisions of the oyster law to employ in part or in whole a non-resident crew, and if he does so, is he liable to a penalty for so doing? I have just talked with Colonel Lee, Commissioner of Fisheries, relative to this matter, and his opinion is, in which I concur, that if a party is a resident of Virginia and owns a vessel, he has a perfect right to employ nonresidents to work on his vessel. However, the nonresidents would not be permitted to obtain an oyster license, nor are they permitted to tong for oysters. Of course, there is other work aboard the vessel which they can do, and would not by so doing violate the law.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.***OFFICERS—Election of treasurer of city of Roanoke.**RICHMOND, VA., *December 28, 1925.*HON. LAWRENCE S. DAVIS, *Treasurer,*  
*Roanoke, Va.*

MY DEAR SIR:

Acknowledgment is made of your letter of December 22, 1925, in which you say in part:

"I wish to submit to you the following statement of facts and ask your official opinion thereon.

"At the November, 1925, election Mr. J. H. Frantz and Mr. Joseph Engleby were candidates for the office of treasurer of Roanoke city. Mr. Frantz received the greatest number of votes, but Mr. Engleby filed a contest. Upon the hearing of the contest, the corporation court of Roanoke city declared the election null and void because of certain promises made by Mr. Frantz for the purpose of influencing voters. The court also declared that Mr. Engleby was not entitled to the office.

"For the past four years and a number of preceding terms, I have held the office of treasurer of Roanoke city as provided by the Constitution of Virginia, and also have for the past ten years or more, by special arrangement with the city council, acted as city treasurer for the purpose of collecting the city taxes.

"I have been informed that the city council of Roanoke proposes to elect Mr. Frantz to act as treasurer of the city of Roanoke, and also as collector of city taxes, on the theory that a vacancy will exist in both offices on the first day of January, 1926.

"The question that I wish you to pass upon is whether or not, in view of the above circumstances, a vacancy will occur in the office of city treasurer on the first day of January, 1926, which vacancy could be filled by the city council of Roanoke, or whether, under the provision of the law, that I hold office until my successor is elected and qualified, I continue to hold over."

Section 129 of the Code of Virginia, 1919, as amended, provides, in part, as follows:

"\* \* \* On the Tuesday after the first Monday in November, nineteen hundred and twenty-one, and every four years, thereafter, the qualified voters of each of the cities of this Commonwealth shall elect \* \* \* a city treasurer, \* \* \* whose term of office shall begin on the first day of January next succeeding their election, and continue for four years thereafter. \* \* \*"

Section 33 of the Virginia Constitution provides as follows:

"The terms of all officers elected under this Constitution shall begin on the first day of February next succeeding their election, unless otherwise provided in this Constitution. All officers, elected or appointed, shall continue to discharge the duties of their offices after their terms of service have expired until their successors have qualified."

The treasurer of the city of Roanoke is an officer elected under the Constitution of 1902 (see section 120 thereof).

It will, therefore, be seen that under the law the treasurer of the city of Roanoke is elected for a term of four years and until his successor has qualified. The law provides that a successor may be chosen by election by the people once in four years. In your case this was attempted to be done in the November, 1925, election. A Democratic candidate was nominated for this election, and was opposed by another candidate. Although the Democratic nominee received the highest number of votes in the November, 1925, election, his election was declared invalid because, while as a candidate for the office, he made certain offers or promises in violation of the law. His opponent in the November, 1925, election was likewise declared not entitled to the office. It, therefore, follows that at the November, 1925, election, the means provided by law for the choice of your successor, no successor was chosen. The question then arises at this time whether, no successor having been chosen in the manner prescribed by law, a successor may now be chosen.

Section 267 of the Code, under which the election for treasurer in Roanoke was declared invalid, provides that, if the court is of opinion there has been no valid election of any person, "the proceedings shall be in conformity with section one hundred and thirty-six."

Section 136 of the Code authorizes the filling of offices only when a vacancy occurs, and, therefore, in my opinion, the last sentence of section 267 of the Code has application only to those cases where at the time the court declares there has been no valid election of any person a vacancy exists in the office for which the election was held. If on the first day of January, 1926, there is a vacancy in the office of the treasurer of the city of Roanoke, then the office may be filled as provided by section 136 of the Code. If, on the other hand, there is

no vacancy in that office on that day, no authority exists for appointing your successor.

Fortunately, I am saved the trouble of having to determine this question by the decision of the Court of Appeals in *Chadduck v. Burke*, 103 Va. 694 (1905), in which a question similar to the question here involved was considered and determined by the court. In that case John M. Chadduck held the office of superintendent of the poor, whose term of office was extended by the new Constitution until January 1, 1904. The statute authorizing the filling of this office provided that the county judge, upon the recommendation of the board of supervisors, should, between the passage of the Act of the 18th day of December, 1903, and the 1st day of January, 1904, appoint for each county in which he held court, one superintendent of the poor. The statute further provided that the judge, in his discretion, could reject the recommendation, and, unless the board recommended another suitable person in the opinion of the judge, within thirty days after the first recommendation had been rejected, the judge could fill the office by his own appointment in term or in vacation.

On December 31, 1903, the board of supervisors recommended one Burke, who, on January 11 following, was rejected by the judge, and by the same order, without any further recommendation by the board, the court proceeded to appoint Chadduck to the office for a term of four years beginning January 1, 1904. On April 19, 1904, the circuit court, having succeeded to the powers of the county court, proceeded, on the recommendation of the board of supervisors, to appoint the said Burke to fill the office, which Chadduck held and to which he was re-appointed by the county court.

The court first had to determine the question whether the county court had any authority to appoint Chadduck in the first instance. It was contended that the court had this authority because Chadduck's term expired on January 1, 1904, and that, when his appointment was made on January 11, 1904, there was a vacancy in the office which the judge was authorized to fill under section 106 of the Act of December 18, 1903, authorizing the court, where a vacancy occurs in any county office, to fill the same.

In its holding the court said, in part (pp. 698-699):

"It is said that the word 'vacancy,' as applied to an office, has no technical meaning; that an office is vacant or not, according to whether it is occupied by one who has a legal right to hold it and to exercise the powers and perform the duties pertaining thereto. A vacant office is one without an incumbent. Vacancy in office is one thing and term is another. An office may be vacant and filled many times during a term of four years; but it cannot become vacant at the end of a term where the incumbent is authorized to hold over, for the instant the successor is duly appointed and has qualified he becomes entitled to the office, and there has been no hiatus at all. So long, therefore, as an office is supplied with an incumbent, in the manner provided by the Constitution or law, who is legally qualified to exercise the powers and perform the duties which appertain to it, the office is not vacant. Section 106 of the act under consideration, contemplates and has reference alone to vacancies occurring during the term of an office, by death, resignation, removal and the like. It does not refer to nor contemplate the filling of an office for the ensuing term, upon the expiration of the preceding term; that was fully provided for by section 95 of the same act, which has already been adverted to.

"The regular term of the plaintiff in error expired, under the law, on the 1st day of January, 1904, but he was just as fully authorized by

law to hold the office and exercise the powers and perform the duties appertaining to it after that time, until his successor had been duly appointed and qualified, as he was before the expiration of his regular term. Indeed, the period between the expiration of his term and the qualification of his successor is as much a part of the incumbent's term of office as the fixed statutory period, when the law provides that he shall hold until his successor qualifies."

Having determined that no vacancy existed in the office, the court held that the county court was without authority to appoint Mr. Chadduck to succeed himself as was attempted to be done by the order of January 11, 1904.

The court next had to consider the effect of the appointment of Mr. Burke by the circuit court on April 19, 1904, to succeed Mr. Chadduck. The court held that the sole power of the circuit court to make an appointment was found in section 95 of the Virginia Code, 1904, and also held that that section as amended only conferred on the circuit court, or the judge thereof, with respect to the office of superintendent of the poor, to appoint in November, 1907, on the recommendation of the board of supervisors, a suitable person to fill the office for the ensuing term beginning January 1, 1908, and to fill vacancies that occur in that office prior to or after November, 1907.

Therefore, the court said (p. 701):

"\* \* \* the only power the circuit court or the judge thereof had, until November, 1907, touching the office in question, was to fill any vacancy that might occur therein. And inasmuch as no vacancy existed in the office on the 19th day of April, 1904, the order appointing Roy C. Burke was invalid, and of no effect."

It, therefore, follows I am of the opinion that there will be no vacancy in the office of the treasurer of the city of Roanoke on January 1, 1926, because, as a result of the election held in November, 1925, being declared invalid, you will hold over under the provisions of section 33 of the Constitution and no vacancy will exist on that day.

I am further of the opinion that no authority exists for appointing or electing a successor except in the manner prescribed by section 129 of the Code of 1919, as amended, and section 18 of the charter of the city of Roanoke, both of which provide that:

"\* \* \* On the Tuesday after the first Monday in November, nineteen hundred and twenty-one, and every four years thereafter, the qualified voters of each of the cities of this Commonwealth shall elect \* \* \* a city treasurer \* \* \*."

For the foregoing reasons section 39 of the charter of the city of Roanoke (Acts of 1924, pp. 746-47) has no application to the question here involved, since that section, like section 136 of the Code, as amended, relates only to a vacancy in the office of the treasurer. No vacancy existing in this case, as I have said, neither section 136 of the Code, as amended, nor section 39 of the charter of the city of Roanoke has any application to the case here under consideration.

Trusting that this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

**INTOXICATING LIQUORS—Fees of Commonwealth's attorneys when five men are jointly indicted and all convicted.**RICHMOND, VA., *December 18, 1925.*

HON. JEFF F. WALTER,  
*Commonwealth's Attorney,*  
*Accomac, Va.*

MY DEAR SIR:

Your letter of December 17, 1925, addressed to Hon. C. Lee Moore, Auditor of Public Accounts, has been referred to me for attention. In this letter you say in part:

"Please advise me as to what fee I am entitled to when five men are jointly indicted for a violation of the prohibition law, and they are all convicted and they all pay their fines and costs."

The answer to this question is governed by section 46 of the prohibition law and, in my opinion, the attorney for the Commonwealth in such a case would be entitled to a fee of \$25 to be paid by each defendant convicted and taxed against each defendant as a part of the costs. In other words, in this case the fees to be taxed as costs in your favor would aggregate the sum of \$125.

Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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**INTOXICATING LIQUORS—Jurisdiction of police justices.**RICHMOND, VA., *January 9, 1926.*

K. S. FRENCH, ESQ.,  
*Narrows, Va.*

DEAR MR. FRENCH:

I have yours of the 8th, in which you say:

"I am at a loss to know just what my jurisdiction is, outside of the corporate limits of our town, but within three miles of same. Section 34 of the Layman act specifies that police justices of cities and towns shall have jurisdiction within three miles of the corporate limits in case of manufacture, sale and distribution of ardent spirits. Please advise me if I have jurisdiction in other cases under the Layman act, such as driving an automobile while under the influence of liquor, parties having liquor in their possession, parties being intoxicated, etc."

In reply, I would say that section 34 of the Layman act applies only to towns and cities having ordinances prohibiting manufacture, sale and distribution of ardent spirits and the power of the mayor to enforce such ordinances within the three-mile radius is limited to cases of manufacture, sale and distribution, and not to the illegal possession or to parties being intoxicated. As to these cases, the county authorities have sole jurisdiction under the State law.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

**TAXATION—Eligibility for capitation tax.**RICHMOND, VA., *December 17, 1925.*

HON. S. R. CURTIS, *Treasurer,*  
*Lee Hall, Va.*

MY DEAR MR. CURTIS:

Acknowledgment is made of your request that you be advised as to the certificate that should be filed by a person seeking to obtain a license, who has not been assessed with and at the time of his application for the license is not assessable with a State capitation tax.

Infants, as you know, are not assessable with a State capitation tax. Non-residents of Virginia are also not assessable with a State capitation tax, and persons coming to Virginia with the intention of becoming residents of this State are assessable with a State capitation tax for the first time on the first of February occurring next after they moved to Virginia. For example, one moving to Virginia on February 8, 1925, would be assessable with a State capitation tax for the first time as of February 1, 1926.

You will observe that chapter 276 of the Acts of 1924 expressly provides in section 2 thereof that "the requirements of this act \* \* \* shall not be applicable to any person who, under the laws of this State, was not legally assessable with a State capitation tax for the preceding tax year, as aforesaid."

Therefore, where a person was not legally assessable with a State capitation tax for the preceding tax year, all that is necessary for such person to do is to file a certificate that he was not legally assessable with a State capitation tax for the preceding tax year, giving reason therefor.

Trusting that this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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**REAL ESTATE—Advertisement offering persons who buy property certain premiums, is not a violation of law.**RICHMOND, VA., *December 12, 1925.*

MR. W. B. RUDD, *Secretary,*  
*Virginia Real Estate Commission,*  
*Richmond, Va.*

MY DEAR SIR:

Acknowledgment is made of your letter of December 7, 1925, with which you send me a letter from Commissioner R. A. Poff, of Roanoke, Va., dated December 5, 1925, and a proposed advertisement by R. L. Norwood, "Realtor," 405 Terry Building, Roanoke, Va., in which he proposes to publish as an advertisement coupons offering persons, who buy property from him, certain premiums for doing same.

I have examined chapter 461 of the Acts of 1924, creating the Virginia Real Estate Commission, and it does not appear to me that the proposed advertisement would be a violation of this act.

I am returning Commissioner Poff's letter, but retaining the proposed advertisement for our files.

With my best wishes, I am

Yours very truly,

LEON M. BAZILE,  
*Assistant Attorney General.*

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#### CROP PEST COMMISSION—Tuber moth.

RICHMOND, VA., December 15, 1925.

DR. W. J. SCHOENE, *State Entomologist,*  
*State Crop Pest Commission,*  
*Blacksburg, Va.*

MY DEAR SIR:

Acknowledgment is made of your letter of December 14, 1925, in which you say:

"The suggestion has been made that the Crop Pest Commission write a regulation to prevent the growing of the second crop of potatoes for the purpose of aiding in the control and eradication of a potato pest known commonly as the tuber moth.

"The authority of the Crop Pest Commission to write regulations is delegated in section 871 of the Code (1919).

"I presume that ere this you have learned of the very serious losses suffered by potato growers in Eastern Virginia as a result of the work of the tuber moth pest, and it appear that something radical may have to be done in order that the business of growing potatoes may be continued. We will appreciate an opinion from you on this question."

I have examined section 871 of the Code of Virginia, 1919, with care, and it is my opinion that this section authorizes the Board of Crop Pest Commissioners to pass such a rule or regulation as is referred to in your letter, provided such rule or regulation is directed toward the control, eradication or prevention of the dissemination of the pests referred to so far as may be possible.

Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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#### LICENSE—Hunting.

RICHMOND, VA., December 15, 1925.

MR. WILLIAM I. WINFIELD, *J. P.,*  
*Stony Creek, Va.*

MY DEAR SIR:

In response to your letter of December 14, 1925, I am sending you herewith copies of sections 3334 and 3337 of the Code of Virginia, 1919, as amended, which will answer your first question. You will see from these sections that one who hunts on the premises of another, unless he be a relative or a tenant, is not entitled to hunt thereon without a license.

In answer to your second question, Confederate veterans are required to obtain a license before hunting, unless their hunting is confined to their own land or to land which is rented by them and on which they reside.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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#### **AUTOMOBILES—Damages recovered.**

RICHMOND, VA.. *November 9, 1925.*

DR. ENNION G. WILLIAMS,  
*State Health Commissioner,*  
*Richmond, Va.*

MY DEAR DR. WILLIAMS:

I have examined with care the file in the case of *Commonwealth v. A. L. Charnock*, of Willis Wharf, with reference to the damage cause of an automobile owned by the State and operated by your department as the result of a collision between your car and the car operated by Mr. Charnock.

It appears from this file that Mr. Charnock was wholly to blame for the collision, which fact he denies, however. It also appears that he has offered to pay \$100 in settlement for the damage done to the automobile. The measure of damages which the State would be entitled to recover in an action against Mr. Charnock would be the difference between the value of the State's automobile before the collision and its value after the collision. It is my opinion that the offer made represents substantially what the State would recover in a litigation with Mr. Charnock.

I, therefore, recommend that this offer be accepted in satisfaction of the State's claim for damages against Mr. Charnock for his injury to the State's car.

Of course, the State is without authority to make settlement for any injury that may have been occasioned to the occupants of its car at the time of the collision.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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#### **ROAD FORCE—Sentence of male prisoners.**

RICHMOND, VA.. *November 2, 1925.*

MR. F. G. DAWSON,  
*Attorney at Law,*  
*Charlottesville, Va.*

MY DEAR SIR:

I am just in receipt of your letter of October 30, which is as follows:

"Section 8 of the Prohibition Act of 1924 directs that whenever a fine, or a jail sentence, or both are imposed under that act, the defendant shall be sentenced to the State convict road force. No exception is made in the case of women, and I will be obliged if you will advise me how the

courts can impose any other sentence on women, if convicted, under a mandatory statute; and by what authority they could be held in jail, if sentenced to the road force."

If you will examine section 2073 of the Code of 1919, you will find that it provides that only male prisoners are sentenced to the State convict road force, hence the court would have no authority to sentence a woman to work on this force.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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**MILITARY FUND—Amount deposited to credit of.**

RICHMOND, VA., November 19, 1925.

MAJOR B. H. BAYLOR, *Assistant,*  
*Adjutant General's Office,*  
*Richmond, Va.*

MY DEAR MAJOR BAYLOR:

Acknowledgment is made of yours of the 17th, enclosing papers in the case of *Captain Rudolph Bumgardner v. Commonwealth of Virginia*, with check of William W. Crump for the sum of \$240.09, payable to the Adjutant General of Virginia, with the request that I "make a ruling as to this amount being deposited to the Military Appropriation of Virginia."

It appears from the documents and correspondence which you enclosed that by a final decree of the court it was ascertained that the sum of \$789.32 was in the hands of Captain Rudolph Bumgardner, late manager of the Valley Riflemen Military Organization of Staunton, which had been disbanded. It is further ascertained by the court that of that amount the sum of \$347.73 was not a military fund, but was raised by said company for its own purposes and was ordered to be paid to a committee appointed by said company, or its attorneys, leaving the amount of \$240.09, after the deduction of certain counsel fees, to be returned to the Adjutant General of Virginia.

In a letter dated July 31, 1923, from Adjutant General W. W. Sale to Captain Bumgardner is found the following language:

"As these moneys were allowed the Valley Riflemen from public military funds as public military agents of the State and for public military purposes, it is the opinion of this office that any balance that remains should be returned to this office to be used as public military funds."

The same letter states that this unit has been allowed the amount of \$3,566.86.

It is my judgment that the amount of this check, having been allotted out of the military fund for military purposes, may properly be deposited in the Treasury of Virginia to the credit of the military fund.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

**AUTOMOBILES—Tax on motor vehicle fuels.**RICHMOND, VA., *November 23, 1925.*

HON. P. H. DREWRY,  
*Attorney at Law,*  
*Petersburg, Va.*

MY DEAR PAT:

Acknowledgment is made of your letter of November 14, 1925, with reference to chapter 107 of the Acts of 1923, as amended, imposing a tax on motor vehicle fuels and providing for the collection of the same.

You say in part:

"If a retailer in gasoline buys it from a foreign corporation, say, for instance, the Standard Oil Company, and has it shipped from out of the State into the State direct from the foreign shipper, the retailer in Virginia only pays the price of the gas. The retailer then sells to you and me, and we pay the tax, and on a certain day of the month the retailer makes his report to the State authorities.

"If, however, the retailer wishes to buy from a home corporation instead of a foreign one he has to pay, not only the price of the gasoline at the time it is bought, but also has to pay the tax on the entire quantity. This results in an unfair discrimination against the home dealer and probably holds back the formation and development of companies in Virginia, which might be formed if they could get home business. Not only is this true, but the retailer buying from the domestic corporation, if he did not have to pay the tax, could leave that much more money in the banks in his home town, which would be to the advantage of the several localities.

"The disadvantage, of course, and the only disadvantage as far as I can see, is that it would necessitate a little more work on the inspectors of the State department which handles this matter. The government is not run for the convenience of government employees, but for the comfort and convenience and facility of the business of the people of the State.

"I believe this matter could be reached very easily by a regulation of the Motor Vehicle Department probably based upon a permissive ruling by your department that such a regulation might be made. I have examined the statute in the case, and the wording of the same seems to me to be sufficiently ambiguous to allow of a construction which would permit such a regulation as I have above suggested be made."

I have examined section 2 of this act with care, and it is my opinion that the scheme outlined by you is not authorized by this law. The only reason why the tax is not imposed on the seller of gasoline imported into the State from without the State is because such gasoline may be imported under the commerce clause of the Federal Constitution in interstate commerce, and becomes subject to tax only when sold in Virginia.

Section 2 of this act, however, expressly levies a tax on the motor vehicle fuels sold and delivered within the State of Virginia. This means, of course, the initial seller. It is my opinion, therefore, that the law contemplated the imposition of the tax on the initial vendor of the gasoline, and the plan outlined by you would be unauthorized by law.

Trusting that this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

**AUTOMOBILES—Recordation of lien.**RICHMOND, VA., *November 10, 1925.*

HON. JAMES M. HAYES, JR.,  
*Motor Vehicle Commissioner,*  
*Richmond, Va.*

DEAR SIR:

Acknowledgment is made of your letter of recent date, with which you enclosed a letter from the Virginia Automobile Dealers' Association, of this city.

You ask to be officially advised whether a lien recorded in your office under the automobile title law is sufficient to protect such automobile from the claims of others, or whether the lien must be also recorded in the chancery court in order to protect a lien holder.

Under the provisions of section 28 of chapter 407 of the Acts of 1924, nationally known as the Virginia Prohibition Law, the recordation of a lien in your office would not be sufficient to protect such an automobile from forfeiture proceedings when the same was used in the transportation of ardent spirits, as the prohibition act expressly provides that, in order for the lienor to recover the car, he must show that prior to the commission of the offense he has "duly recorded in the county or corporation in which the debtor resides the instrument creating such lien and that said innocent owner has perfected his title to the vehicle, if the same be an automobile, by proper transfer in the office of the Secretary of the Commonwealth, as provided by law."

It is also probable that section 5189 of the Code of 1919, as amended, would require the docketing of liens against automobiles or the recording of the same in order to afford one protection under such section.

Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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**TAXATION—Property is assessable in Virginia.**RICHMOND, VA., *November 19, 1925.*

HON. J. S. HUDNALL,  
*Commissioner of the Revenue,*  
*Heathsville, Va.*

MY DEAR MR. HUDNALL:

I am just in receipt of your letter of November 17, which is as follows:

"Will you be kind enough to give me a ruling on the following case? In case of an individual residing in Virginia, but whose business is in another State, said business being incorporated, but the entire stock being owned by the individual and his wife, no other persons holding any, and the corporation doing all its business outside the State of Virginia:

"(1) Is the stock in said corporation assessable in Virginia to the individual and his wife?

"(2) Must dividends on such stocks be assessed in Virginia as income?

"(3) Must salary from said corporation be reported by the individual as income?"

All three of your questions must be answered in the affirmative, unless the corporation referred to is a corporation duly chartered under the laws of Vir-

ginia. I would further state that I have discussed the matter with the Auditor and he concurs in this view.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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**REAL ESTATE COMMISSION—Employment of detective.**

RICHMOND, VA., *November 9, 1925.*

VIRGINIA REAL ESTATE COMMISSION,  
*Richmond Trust Building,  
Richmond, Va.*

GENTLEMEN:

Acknowledgment is made of your communication of recent date, in which you enclosed your file in re the employment of a detective by Mr. Robertson, one of the members of your Commission, for the purpose of investigating real estate conditions at Virginia Beach.

It appears from this file and information furnished me by Mr. Rudd, your secretary, and Mr. Charles C. Bowe that Mr. Robertson was advised prior to the employment of this detective that the commissioner was without authority to provide for his compensation.

You now request me to advise you whether the Commission is authorized to pay the detective for the services which he rendered under these circumstances, at the request of Commissioner Robertson.

I have examined with care chapter 461 of the Acts of 1924, providing for the creation of your Commission, and it is my opinion that your Commission was without authority to employ a detective for the purpose disclosed by this correspondence, and is likewise without authority to pay for the services which were rendered at the instance of Commissioner Robertson.

The only remedy that I can suggest is that the matter be reported to the General Assembly and, if it be so disposed, it can provide for the payment of the detective who was employed.

I am returning your file herewith.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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**PRISONERS—Time allowed for confinement in jail.**

RICHMOND, VA., *November 10, 1925.*

MAJOR R. M. YOEUELL, *Superintendent,  
State Penitentiary,  
Richmond, Va.*

DEAR MAJOR YOEUELL:

Acknowledgment is made of your communication of recent date, in which you enclosed certain correspondence relating to the time spent in jail by A. T. Reynolds, of Patrick county, who is now confined in the penitentiary for the murder of his son (133 Va. 760).

It appears from the jailer's certificate that Mr. Reynolds was confined in jail prior to his conviction from December 19, 1920, until February 9, 1921, when he was granted bail at the direction of the Court of Appeals; second, that after he was convicted he was confined in jail from May 25, 1921, until November 10, 1921, while his case was pending on appeal in the Supreme Court of Appeals; third, that after his case was affirmed by the Court of Appeals he was confined in jail from September 17, 1922, until September 26, 1922. You ask to be advised whether Mr. Reynolds is entitled to credit for any of these periods which he served in jail.

Section 5019 of the Code of Virginia, 1919, provides:

"The term of confinement in jail or in the penitentiary for the commission of a crime shall commence and be computed from the date of the judgment, unless such judgment is suspended at the instance of the defendant."

In the note to this section the revisors stated that the object of the revision was to prevent the allowance of credit for time spent in jail by one awaiting his trial and for the time spent in confinement by one pending an appeal.

In 1920 this section of the Code was amended so as to allow credit in cases involving jail sentences, but the amendment did not extend to persons sentenced to the penitentiary. In 1924 this section of the Code was again amended so as to allow one sentenced to confinement in the penitentiary credit spent in jail while awaiting trial or pending an appeal.

As Mr. Reynolds was confined in the Patrick county jail during the years 1920 and 1921, he is not entitled to credit for that time, as the statute expressly provided that no such allowance should be made. He is entitled, however, to an allowance for the period between September 17, 1922, and September 26, 1922, when he was confined in the Patrick county jail after his case had been affirmed by the Court of Appeals.

While, as I have said, the statute, as prepared by the revisors and as enacted in the Code of 1919, provides that no such credit should be allowed for such time spent in jail, it will be seen from an examination of section 5019 of the Code, as amended by Acts of 1924, that the General Assembly has returned to the more humane policy declared by the legislature of 1916, and a person confined in jail under circumstances similar to those in the case of Mr. Reynolds would now be entitled to credit for such time.

Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,

*Attorney General.*

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**INTOXICATING LIQUORS—Whether town is liable for costs in prosecution under prohibition ordinance.**

RICHMOND, VA., November 23, 1925.

HON. J. POWELL ROYALL,  
*Commonwealth's Attorney,  
Tazewell, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of November 21, 1925, in which

you request me to advise you whether a town is liable for costs in a prosecution under a prohibition ordinance authorized by the Virginia Prohibition Law, where the accused under that ordinance is acquitted.

In response thereto, I call your attention to the article on municipal corporations, 28 Cyc. 820-821, where it is said:

"Whether the proceedings be considered as civil or criminal the municipality is not liable for costs, no matter whether defendant prevails or not, unless there is a statutory provision imposing such liability. The costs are no part of the penalty, unless so provided by law. The costs of amendments and continuances may be taxed against the party on whose application they are allowed."

Trusting that this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,

*Attorney General.*

#### **GAME AND INLAND FISHERIES—Stockholders in oyster business.**

RICHMOND, VA., November 23, 1925.

MR. W. W. ROWELL,  
2310 West Ave.,  
*Newport News, Va.*

MY DEAR SIR:

I beg to acknowledge receipt of your letter of recent date, which is as follows:

"Please advise me if it is lawful for a nonresident to hold stock in an incorporated oyster planting firm. See Code section 3253 and 3254."

If you will examine section 3224 of the Code, you will find that under certain conditions it is lawful for nonresidents to be stockholders in a corporation engaged in oyster business in this State.

I would suggest that you read this section, as its provisions are very clear and you will find that your question is fully answered.

Yours very truly,

JOHN R. SAUNDERS,

*Attorney General.*

#### **STATE HOSPITALS—Construing Code sections.**

RICHMOND, VA., October 31, 1925.

DR. J. H. BELL, *Superintendent*  
*State Colony for Epileptics and Feeble-Minded,*  
*Colony P. O., Near Lynchburg, Va.*

MY DEAR SIR:

Acknowledgment is made of your letter of October 27, 1925, in which you call attention to section 1024 of the Code relating to the duties of sheriffs and sergeants as to persons committed to State hospitals. You quote a part of this section and then ask the question:

"Does the phrase, 'Nearest or most convenient railroad station or steamboat landing,' refer to the station most convenient for the superintendent or for the authorities who have custody of the patient?"

Section 1024 of the Code of 1919, as amended, so far as is applicable to the question here under consideration, provides as follows:

"\* \* \* All persons applying for admission to any hospital or colony shall be, when so required by the superintendent of such hospital or colony delivered to the agent of such hospital or colony *at the nearest or most convenient railroad station or steamboat landing to be designated by such superintendent*, at the expense of the county or city of the person committed, provided, however, that the station or landing so designated by the superintendent shall not involve a travel at the expense of any such county or city of a greater distance by rail or boat than twenty-five miles from the nearest railroad station or boat landing at the courthouse of the county or city of commitment or of the residence of the person committed. \* \* \*

(Italics supplied.)

In my opinion, the nearest or most convenient railroad station or steamboat landing is the one which is the nearest or most convenient to the superintendent, so long as the station or landing designated does not involve a travel at the expense of such county or city of a greater distance by rail or boat than twenty-five miles from the nearest railroad station or boat landing at the courthouse of the county or city of commitment or the residence of the person committed.

Yours very sincerely,

JOHN R. SAUNDERS,  
*Attorney General.*

#### MARRIAGES—Prohibition of certain individuals.

RICHMOND, VA., *October 27, 1925.*

MR. H. A. KEEP,  
*Box 970,*  
*Lowell, Mass.*

MY DEAR SIR:

I am in receipt of your letter of October 24.

The laws of Virginia prohibit the following marriages:

"No man shall marry his mother, grandmother, step-mother, sister, daughter, granddaughter, half-sister, aunt, son's widow, wife's daughter or her granddaughter, or step-daughter, brother's daughter, or sister's daughter. \* \* \*

If a man cannot marry his son's widow, it, therefore, follows, of course, that he cannot marry his son's divorced wife.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

**INTOXICATING LIQUORS—Fees of officers.**

RICHMOND, VA., November 25, 1925.

HON. R. B. STEPHENSON,  
*Commonwealth's Attorney,*  
*Covington, Va.*

MY DEAR MR. STEPHENSON:

Acknowledgment is made of your letter of November 24, 1925, in which you say in part:

"Under section 28 of the Layman Prohibition Law, page 22, it is provided that 'for every information filed under this section there shall be allowed to the attorney for the Commonwealth a fee of \$25, and to the officer making the seizure and arrest a fee of \$25, which shall be taxed as cost.'

"This section provides further that these fees shall be paid out of the proceeds of sale of such automobile and the net balance turned over to the literary fund.

"Frequently, when automobiles are confiscated and sold the amount derived from the sale is not sufficient to pay the costs and fees. I should like to have your opinion as to whether the sheriff and myself have a right to tax these fees up against the Commonwealth. Apparently, this is intended, as it is further provided in the act that in the event the automobile or other vehicle is not confiscated the fees for seizure and filing the information shall be one-half of the amounts named above. Will you please advise me whether my interpretation of this section is correct?"

Section 28 of the Virginia Prohibition Law, so far as is applicable to the question here under consideration, provides as follows:

"For every information filed under this section there shall be allowed to the attorney for the Commonwealth a fee of twenty-five dollars and to the officer making the seizure a fee of twenty-five dollars, which shall be taxed as cost. All fees herein prescribed, and costs incident to the seizure and forfeiture of an automobile or other vehicle under this act, or any other prohibition law of the State, including commissions and cost of advertising, shall be deducted out of the proceeds of sale of such automobile or other vehicle, and the net balance turned over to the literary fund. In the event such seized automobile or other vehicle is not confiscated, the fees to the officer making such seizure and the attorney for the Commonwealth, filing such information and conducting such prosecution, shall be one-half of the amounts herein stated, which fees shall be taxed against the Commonwealth, and paid in the manner now provided by law."

You will see from the above quoted provision of section 28 that the officer making the seizure and the attorney for the Commonwealth are to be paid by the Commonwealth only in those cases where the automobile is not confiscated. It follows from this, that where the automobile is confiscated and does not bring a sufficient amount at the sale to pay the officer making the seizure and the attorney for the Commonwealth, that there is no authority for taxing the costs against the Commonwealth. This has been the ruling of the Auditor's office, and I concur therein. I, therefore, regret to say that I cannot concur in the construction placed on this section by you.

Section 28 of the prohibition law expressly provides that the fees prescribed for the officers incident to the seizure shall be deducted out of the proceeds of

the sale of the automobile or other vehicle, and the fact that the General Assembly provided that such costs were to be taxed against the Commonwealth only where the vehicle was not confiscated, shows an intent on the part of the General Assembly, in my opinion, that such fees were not to be paid out of the treasury in any case where the vehicle was confiscated, whether it brought enough to pay the fees or not.

In response to the last paragraph of your letter, I am of the opinion that the wording of section 28 of the prohibition law is such as would prevent the funds derived from the sale of forfeited automobiles from being pooled and the costs deducted from the joint fund. The language of the act is such, in my opinion, as to require settlement for the costs to be made out of the proceeds of the sale of the vehicle against which such costs are taxed.

Trusting this gives you the desired information, I am

Very truly yours,

JOHN R. SAUNDERS,

*Attorney General.*

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### SCHOOLS—Levy of taxes.

RICHMOND, Va., November 10, 1925.

MR. JAMES G. HENNING, *School Trustee*,  
1436 East Main Street,  
Richmond, Va.

MY DEAR MR. HENNING:

Acknowledgment is made of your letter of October 28, 1925, in which you say:

"The Chesterfield county school board have discussed from time to time the school unit system, that is regarding levying a tax for school purposes to go in a general fund instead of a separate district fund. I understand that, according to the law, this is optional with the board of trustees, yet when adopted, any district which has any outstanding bonds or obligations must lay a special levy over and above the levy for school purposes to take care of their respective obligations. Kindly give me promptly your opinion regarding this matter, also the chapter and the Acts of the Assembly, as well as the page on which it may be found. I am under the impression there has been no change since the 1922 session."

Section 1 of chapter 398 of the Acts of 1920, authorizing the laying of school taxes, provides as follows:

"Be it enacted by the General Assembly of Virginia that each county, city, town, if the same be a separate school district, is authorized and required to raise sums by a tax on property of not less than fifty cents nor more than one dollar in the aggregate on the hundred dollars of the assessed value of property in any one year to be apportioned and expended by the local school authorities of said counties, cities, towns and districts in establishing and maintaining such schools as in their judgment the public welfare may require."

The language of the above quoted provision of chapter 398 of the Acts of 1920 must be read and construed in connection with section 136 of the Constitution. This section of the Constitution, so far as is applicable, provides:

"Each county, city, town, if the same be a separate school district, and school district is authorized to raise additional sums by tax on property, not exceeding in the aggregate in any one year a rate of levy to be fixed by law. \* \* \*"

The language of section 136 of the Constitution "each county, city, town, if the same be a separate school district, and school district" is found in section 136 of the Constitution as originally adopted and in this section as amended at the election held on November 8, 1920.

It would, therefore, seem that the Constitution contemplates that local taxes should be assessed both by the county and the school district. The language "if the same be a separate school district" used in the first part of section 136 of the Constitution manifestly qualifies the word "town."

It is, therefore, my opinion that in laying the local levies both a county and district tax should be laid.

I have examined chapter 423 of the Acts of 1922 creating county school boards and, in my opinion, there is nothing in this act which conflicts with the opinion herein expressed. Indeed section 4 of this act expressly provides:

"Nothing in this act shall be construed to affect the present plan of levying district, as well as county school taxes nor to affect the obligations of any district for bond issues for school purposes or other debts peculiar to that district."

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

#### **ELECTIONS—Eligibility of voters.**

RICHMOND, VA., November 16, 1925.

HON. HERBERT I. LEWIS,  
*Commonwealth's Attorney,*  
*West Point, Va.*

MY DEAR SIR:

Acknowledgment is made of your letter of recent date, the first paragraph of which reads as follows:

"The question may arise before me as Commonwealth's attorney as to the construction of the term in the State election laws where no person can vote in an election unless he is an actual resident of the precinct where he seeks to vote, unless, of course, he has not been out of the precinct more than thirty days. This provision of the statute further provides that where the vote of a registered elector is challenged, he is required to make affidavit that he is an actual resident of the precinct and, of course, if he makes this affidavit before the judges, and he is not in fact an actual resident and his attention has been called to it, he then commits perjury and, of course, is liable to an indictment."

Your inquiry evidently pertains to Mr. Roger T. Brooks, who voted in West Point at the regular election held on November 3, 1925, at which time I was present and advised the judges that he had a perfect right to vote in West Point. The facts upon which this opinion was based are as follows:

When I got out of the bus at West Point that afternoon en route to Richmond, Mr. Brooks spoke to me and asked me if I would go with him to the voting precinct, stating that the judges had refused to let him vote. This I cheerfully agreed to do. In the presence of the judges, I elicited from Mr. Brooks the following information: that at the present time he and his family were temporarily occupying certain property belonging to his sister, just across the river from West Point and located in the county of King and Queen, but claimed West Point as his legal residence; that he was taking care of the property for his sister; that he had been a resident of West Point for a number of years before moving to the King and Queen side, and that when he did so his purpose was to retain his legal residence in West Point to which he expected to return at some future time; that he paid his capitation taxes in the town of West Point; that he voted in the August primary, 1925, and that he had always claimed West Point as his legal residence and had never formed an intention to abandon it.

Based upon these facts, I was, and am, clearly of the opinion that Mr. Brooks is a legal resident of West Point and, being otherwise qualified, was entitled to vote in the election held on November 3, 1925, and so advised the judges on that occasion. The only question raised by the judges was the question of legal residence.

The meaning of legal residence as used in our election laws has been construed by the Court of Appeals in *Williams v. Commonwealth*, 116 Va. 272 (1914), with which case, of course, you are familiar. In that case the court said, page 277:

“\* \* \* A legal residence once acquired by birth or habitancy is not lost by temporary absence for pleasure, health or business, or while attending to duties of a public office. Where a man has two places of living, which is his legal residence is to be determined largely, where the right to vote or hold office is involved, by his intention. *When he acquires a new legal residence he loses the old, but to effect this there must be both act and intention.* \* \* \*” (Italics supplied.)

It, therefore, follows that where a man has once acquired a legal residence in one place, for the purpose of registering and voting, he can lose that legal residence only by the combination of two acts—first, removal; and, second, with the intention of abandoning the legal residence acquired in the place from which he has moved with the intent to acquire a new legal residence in the place to which he has moved.

I am of the opinion that the words “actual resident,” used in section 175 of the Code of Virginia, mean legal residence as used in section 18 of the Constitution, and as defined by the Court of Appeals in *Williams v. Commonwealth*, *supra*.

I would add that this has been the consistent ruling of this office for many years, as will be seen from the reports of the office, copies of which you have.

Yours very truly,

JOHN R. SAUNDERS,  
Attorney General.

## PUBLIC RECORDS—Disposition of.

RICHMOND, VA., November 4, 1925.

HON. WM. CRUMP TUCKER,  
*Civil Justice,*  
*Richmond, Va.*

DEAR SIR:

Acknowledgment is made of your letter of recent date, with which you sent me a copy of a communication received by you from Mr. W. H. Wyatt, Jr., high constable of the city of Richmond, dated October 3, 1925. You then request my views upon the subject of Mr. Wyatt's letter to you, which reads as follows:

"On December 31, 1925, my term of office as High constable expires. All of the records of this office is the property of the State or city from January 1, 1918, the date on which the West fee bill went into effect (see my letter to you of April 20, 1921, in answer to yours of March 28, 1921). The law, as I understand, has always required all judgments to be entered in execution books, indexed and filed, and they are complete in this office from January 1, 1906, up to the present date. Those from January 1, 1918, belong to the city or State, and those from January 1, 1906, to January 1, 1918, are my personal property. It cost me considerable money to produce these execution books and to keep them up to date as I have done, and other records and indexes pertaining to this office. I shall dispose of same on or before December 31, 1925. They are indispensable in the conduct of this office and the civil justice court.

"If you think the court will be interested in the purchase of these records, I would be glad to hear from you at once, otherwise, I will be governed accordingly."

The question to be determined is whether the records referred to by Mr. Wyatt are public records or his personal property. The matter, in my opinion, is settled by the decision of the Court of Appeals in *Coleman v. Commonwealth*, 25 Gratt. (66 Va.) 865, 881 (1874). In that case the court had occasion to determine what constituted a public record and, in expressing its opinion, discussed the subject at some length. The result of the court's examination of the matter was to hold that a public record must be a written memorial intended to serve as evidence of something written, said or done, made by a public officer authorized by law to make it, but that such authority need not be derived from express statutory enactment and that whenever a written record of the transactions of a public officer in his office is a convenient and appropriate mode of discharging the duties of his office, it is not only his right, but his duty, to keep that written memorial, whether expressly required so to do or not, and that, when kept, it becomes a public document and record belonging to the office and not to the officer. In so holding, the court said, speaking through Bouldin, J., p. 881:

"What then is a public record?

"Mr. Bouvier tells us in his *Law Dictionary*, 2 Vol., p. 429, that it is 'a written memorial made by a public officer authorized by law to perform that function, and intended to serve as evidence of something written, said or done.' It must be 'a written memorial,' must be made by 'a public officer,' and that officer must be 'authorized by law' (not *required*) to make it. These elements must, at the least, combine to make the record a public record. Do they exist in this case? Before proceeding to answer that question, it may be well to consider a little further the nature of a public

record, and the power of a public officer to make it. He must have authority to make it; but that authority need not be derived from express statutory enactment. Whenever a written record of the transactions of a public officer in his office, is a convenient and appropriate mode of discharging the duties of his office, it is not only his right, but his duty to keep that memorial, whether expressly required so to do or not; and when kept it becomes a public document—a public record belonging to the office and not the officer; is the property of the State and not of the citizen, and is in no sense a private *memorandum*."

It was certainly proper for the high constable of the city of Richmond to enter the judgments in execution books, in which books a history of the transactions with reference to said judgments occurring in his office was kept. To facilitate the work of the office, it was right and proper that these execution books be indexed. The value of these records to the office is indicated by Mr. Wyatt's statement in his letter to you that "they are indispensable in the conduct of this office and the civil justice court." This being true, the records referred to are the written records of the transactions of a public officer in his office and represent a convenient and appropriate mode of discharging the duties of his office, which it was not only his right, but his duty to keep, and, when kept, as he states they were, they became public documents and records "belonging to the office and not to the officer."

It is, therefore, my opinion that the records referred to by Mr. Wyatt belong to the office of the high constable and not to Mr. Wyatt, and that he is without authority to dispose of the same.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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#### AUTOMOBILES—Tax on.

RICHMOND, VA., November 10, 1925.

MONROE TRANSFER AND STORAGE CO.,  
*Hampton, Va.*

GENTLEMEN:

Acknowledgment is made of your letter of October 15, 1925, in which you request me to advise you as to the proper construction of section 2152 of the Code of Virginia, 1919.

This section has been construed recently by the Court of Appeals in *Portsmouth v. Miller, Rhoads and Schwartz*, 138 Va. 823 (1924), and *Portsmouth v. D. Pender Grocery Co.*, 138 Va. 828 (1924). The syllabus of the latter case reads as follows:

"Section 2152 of the Code of 1919 permits the imposition of an additional local license upon motor vehicles 'by the city, town or county in which such machine is,' but limits the number of such local licenses to one for each machine; that is, it provides that no person shall be required to pay a license tax in more than one city or county. Therefore, a corporation with its principal office in one city, which operates a chain of cash and carry stores in several other cities and makes deliveries by truck to such stores from its warehouse located in the city where its principal office is,

and pays the local license tax upon such trucks in that city, cannot be subjected to any other local license taxes by the cities in which such deliveries are made."

Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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**COMMISSIONER OF REVENUE—Duty to secure returns.**

RICHMOND, VA., *October 5, 1925.*

HON. E. V. BARLEY,  
*Examiner of Records,*  
*Fincastle, Va.*

MY DEAR MR. BARLEY:

Acknowledgment is made of your letter of September 30, in which you say:

"On June 20 last I was called upon to attend the circuit court of Bath county in connection with a case for the correction of an alleged erroneous assessment made by the commissioner of the revenue upon my report. At that time I saw Mr. J. R. Criser, commissioner of the revenue of Bath county, and requested him to deliver to me the interrogatories of taxpayers so that I might review them with respect to intangible personal property, money and income pursuant to the provisions of Code section 2255 as amended in 1924 (Virginia Tax Laws, p. 279).

"Upon review of these interrogatories I discovered that the commissioner of the revenue has failed to obtain a return from Mrs. Mildred E. Dunn for the year 1925, although Mrs. Dunn had been assessed with taxes upon intangible personal property, money and income for the year 1924. In pursuance of the provisions of Code section 2255, I called upon Mrs. Dunn through Captain William McKee Dunn, her husband, to make a return to me as examiner of records, showing the amount of her intangible personal property, money and income liable to taxation in the State of Virginia.

"With Mr. E. Warren Wall, counsel for the State Tax Commission, I interviewed Mr. Dunn, and he advised that he had acquired a home in the city of Washington and claimed that as his residence since he spent the greater part of his time there and since he was unfavorably impressed with the administration of the tax laws in Bath county, Virginia. Upon further reflection, however, he stated that he would not claim Washington as his residence, but would see that his wife made a return to me as examiner of records for the Nineteenth Judicial Circuit. He stated further that most of his wife's intangible property consisted of stocks in foreign corporations which were not listed on the stock exchanges and that quotations as of February 1 would be hard to obtain. He further stated that he would endeavor to secure quotations and made an engagement with Mr. Wall and myself for August 15.

"On August 15 Mr. Wall and I again conferred with Captain Dunn, who stated that he had been unable to secure the quotations or data upon which to base his return, but promised to do so in a very short time and to let me have the return so that it might be included in my report to the commissioner of the revenue.

"In the meanwhile, Mr. J. C. Criser, commissioner of the revenue of Bath county, had approached Captain Dunn with reference to making his return to him. During my absence from the State, while I was undergoing

treatment at Battle Creek Sanitarium, Mr. Criser secured Mrs. Dunn's return and proceeded to extend the tax and levies upon the property reported by her.

"In my view, the commissioner of the revenue failed in the duty imposed upon him by section 2255 in that he did not secure Mrs. Dunn's return and lay the same before me as examiner of records on or before June 1, 1925, and that after June 1 the duty was imposed upon me by this section to secure the return in question. And further, Mr. Criser, knowing that I was using my best efforts to secure said return, exceeded his authority when he accepted the return of Mrs. Dunn after June 1.

"The question, therefore, is whether or not I now have the right to call upon Mrs. Dunn for her return and to report the same to the commissioner of the revenue for assessment."

In reply, I beg to say that section 2255 of the Code of Virginia, as amended by chapter 395, page 572, of the Acts of 1924, is as follows:

"Interrogatories to be returned by each commissioner of the revenue to the examiner of records. It shall be the duty of each commissioner of the revenue on June 1 of each year to submit to the examiner of records of his circuit all interrogatories of taxpayers received by him. It shall be the duty of the examiner of records thereupon to examine and review such interrogatories with particular reference to the returns of intangible personal property, money and income, and it shall be the further duty of the examiner of records to call upon every taxpayer who may not have properly returned to the commissioner all of his intangible personal property, money and income, and to require such taxpayer to make return of the same, and for this end the examiner of records may summon before him by registered letter or otherwise the taxpayer or any other person to answer under oath questions touching the ownership and value of all intangible personal property, money and income of any and all taxpayers."

After a careful consideration of this section, I am constrained to hold that you now have the right to call upon Mrs. Dunn for her return and to report the same to the commissioner of the revenue for assessment.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

#### **SLOT MACHINE—Legality of.**

RICHMOND, VA., *October 30, 1925.*

HON. A. WILLIS ROBERTSON,  
*Commonwealth's Attorney,*  
*Lexington, Va.*

MY DEAR SENATOR ROBERTSON:

Acknowledgment is made of your letter of your letter of October 28, 1925, with which you return my letter to you of October 24, which in some way was not signed by me. This letter was prepared by one of my assistants and submitted to me, and in some way I overlooked signing the same.

Of course, I could not undertake to say that all slot machines are illegal, or attempt to determine that any particular machine is illegal, without being in possession of all the facts connected with the machine and its operation. I

will say, however, that it is my opinion, in view of the authorities cited in the annotations to *Ferguson v. State*, found in 42 L. R. A. (N. S.) 720, Ann. Cas. 1915C 172, that machines of the character described in the opinion in that case are illegal in this State, and have been so held to be illegal, I am advised, by the corporation courts of the cities of Danville and Norfolk and the hustings court of the city of Richmond.

Sincerely yours,

JOHN R. SAUNDERS,  
*Attorney General.*

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**AUTOMOBILES—Damage inflicted by child.**

RICHMOND, VA., *October 30, 1925.*

HON. SAM'L L. ADAMS,  
*Attorney at Law,*  
*South Boston, Va.*

MY DEAR MR. ADAMS:

Acknowledgment is made of your letter of October 27, 1925, with reference to the parent who permits a child to operate his automobile in a reckless manner, causing injury to the public.

The Illinois Appellate Court held in *People v. Clink*, 216 Ill. App. 357 (1920), that an automobile may be so used as to show intent to inflict bodily harm or death, and intention may be implied from highly dangerous and reckless conduct resulting in injury; therefore, an automobile may be an instrument of an assault with a deadly weapon, and the reckless driver may be subjected to the penalties of the criminal law. In that case, the court held that a fine of \$1,000 for an assault with an automobile was not excessive.

It would seem to me that from the facts narrated in your letter the boy in question could be proceeded against as a juvenile delinquent in the juvenile and domestic relations court of your county. I have not had an opportunity to look into the civil liability of the parent in this case, but I would suggest your investigating the civil liability of the parent if you represent any of the parties injured. It seems to me that on principle the parent who entrusts the operation of his car to his infant child, knowing that such child is habitually reckless in the operation of the same, ought to be held accountable for damage inflicted by that child.

I am frank to say that I have not had an opportunity to test the accuracy of my opinion on this point, and merely suggest it for your consideration.

With my best wishes, I am

Very sincerely yours,

JOHN R. SAUNDERS,  
*Attorney General.*

**CIRCUIT COURT—Powers of judges.**RICHMOND, VA., *October 30, 1925.*

HON. MARCUS A. COGBILL,  
*Commonwealth's Attorney,*  
*Chesterfield, Va.*

MY DEAR SIR:

Acknowledgment is made of your letter of October 28, 1925, in which you say:

"Following my conversation with you on yesterday relative to the power and authority of the judge of the circuit court to designate several places throughout a county for the trial justice to sit, and at your suggestion, this letter is written to request you to give me your opinion as to the above. It is not necessary, it seems, for me to set out in full in this letter the reasons for my request.

"In order to assist you in finding the various sections of the acts relative to the law governing the case in question, I refer you to the Acts of Assembly of Virginia of 1924, pages 401 and 701, and the Acts of 1922, page 650.

"I will appreciate an early opinion if it be convenient to you."

I have examined with care chapter 272 of the Acts of 1924 and chapter 463 of the Acts of 1924 amending sections 1 and 3 of chapter 388 of the Acts of 1922, as well as the remaining sections of chapter 388 of the Acts of 1922. These acts confer no authority upon the judge of the circuit court to designate several places throughout the county for the trial justice to sit.

Section 4 of chapter 388 of the Acts of 1922 and section 13 of chapter 272 of the Acts of 1924 expressly require the board of supervisors to provide suitable quarters for the court of such trial justice and for his clerk at the county seat, or at some point convenient thereto. These acts, however, give to the trial justice jurisdiction throughout his county, and, in my opinion, the trial justice would possess the authority to hold his court at such convenient places throughout the county as he deems necessary. As I have said, however, I find nothing in the law which would authorize the circuit court to fix the places at which the trial justice shall hold his court.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

**LICENSE—Right to kill rabbits and squirrels.**RICHMOND, VA., *November 2, 1925.*

DEPARTMENT OF GAME AND INLAND FISHERIES,  
*Blue Ridge Division,*  
*Roanoke, Va.*

GENTLEMEN:

I beg leave to acknowledge receipt of your letter of October 30, in which you say in part:

“Is it your opinion that if a land owner calls in another party to kill these animals, whether he be a tenant, farm hand, friend, resident, or non-resident, should he have a hunter's license in order to kill hares and squirrels at the request of the land owner?”

In reply, will say that I am of opinion that a tenant or farm hand residing on the land owner's property can kill rabbits and squirrels without a license, but a friend or any other person who does not reside on the land cannot do this without first obtaining a license.

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

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**RAILROAD CARRIERS—Transportation of employees and household goods.**

RICHMOND, VA., *October 23, 1925.*

HON. C. M. CHICHESTER, *Counsel,*  
*State Corporation Commission,*  
*Richmond, Va.*

MY DEAR MR. CHICHESTER:

I am just in receipt of your letter of October 21 with enclosure.

The paper enclosed states that the telegraphers employed on the Chesapeake and Ohio railway have an agreement with the carrier reading as follows:

“Employees exercising seniority rights to new positions or vacancies which necessitate a change of residence will receive free transportation for themselves, dependent members of their families and household goods, when it does not conflict with State or Federal laws.”

It further states that the legal department of the Chesapeake and Ohio has ruled that it is illegal for that carrier to transport household goods in Virginia for their employees, but that the matter was taken up with Honorable Oscar L. Shewmake, while he was a member of the State Corporation Commission, and he expressed an opinion that it was not illegal for the railroad company to provide for free carriage for their employees, together with their household goods, between points on their line in this State. In this connection Mr. Shewmake cites section 3918 of the Code of Virginia.

I would state that I fully concur in Mr. Shewmake's opinion, and I do not know of any provision in the statute laws of Virginia, or the Constitution, which makes it illegal for the Chesapeake and Ohio to transport household goods belonging to its employees between points on their railroad line in this State. I do not think there can be any doubt about this proposition.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

**LICENSE—Renewal embalming.**RICHMOND, VA., *October 23, 1925.*

MAJOR L. T. CHRISTIAN,  
*Park Avenue and Boulevard,  
Richmond, Va.*

MY DEAR MAJOR:

I beg leave to acknowledge receipt of your two letters of October 17, to which I will make a separate reply.

I have carefully noted the correspondence which you enclose relative to Carl Walters, who desires a renewal of his embalmer's license. I also note the Commonwealth's attorney, Mr. Easley, of Halifax, and Senator Booker, who represents that county in the State Senate, both recommend this man and state that he is a good citizen.

Section 1721 of the Code of Virginia, among other things, provides that if the laws of the State have been violated by an applicant then the application for renewal shall be referred to the board for its action, which board may grant or refuse such renewal, as the facts may warrant, subject to the right of appeal to the corporation court of the city or circuit court of the county in which the applicant resides.

The only thing in this correspondence which seems to be damaging to Walters is the fact that he made misrepresentations to the board in stating that he was working elsewhere, when in fact he was in the penitentiary. I would state that this is a matter which addresses itself to the sound discretion of your board, and, in my judgment, it would have the right to either grant or refuse this party his license.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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**LICENSE—Practice of embalming.**RICHMOND, VA., *October 23, 1925.*

MAJOR L. T. CHRISTIAN,  
*Park Avenue and Boulevard,  
Richmond, Va.*

MY DEAR MAJOR:

I beg leave to acknowledge receipt of your letter of October 17, in which you submit the following for an opinion:

"Under section 1719 of the Code of Virginia, has the board the power to require a reasonable educational standard as one of the qualifications of persons applying for license to practice embalming in this State, say an eighth grammar school grade?"

I do not think the statute would permit the board to require the educational standard mentioned in your letter of an applicant applying for an embalmer's

license. I have carefully examined section 1721, which deals with this question, and I do not find any provision therein which authorizes the board to require the educational standard, or qualification, mentioned in your letter.

Yours very truly,

JOHN R. SAUNDERS,

*Attorney General.*

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### ELECTIONS—Duty of candidates to file declaration.

RICHMOND, VA., *October 21, 1925.*

COL. JAMES S. BROWNING,  
*Pocahontas, Va.*

MY DEAR COL. BROWNING:

I beg leave to acknowledge receipt of your letter of October 16, in which you say in part:

"I would like to have your ruling on this state of facts: There are three parties running for House of Delegates. No one was nominated, no convention held. I contend that as we are running independent, it is not necessary to file."

I am of the opinion that it is necessary for these candidates to file their declaration of candidacy.

Hon. John Garland Pollard, when Attorney General, gave an opinion, a copy of which I am enclosing, in which he held that where one had been regularly nominated as a candidate in a Democratic primary that it was not necessary for him to file his declaration of candidacy, because it was the duty of the electoral board to take notice of the fact that he had been duly nominated in the primary.

I think this opinion is entirely correct, but how is the electoral board to officially know that a party is a candidate in the general election without filing his declaration of candidacy, unless he has been regularly nominated in a convention or in a primary?

With my kindest regards, I am

Yours sincerely,

JOHN R. SAUNDERS,

*Attorney General.*

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### LICENSE—Issuance to official auctioneer.

RICHMOND, VA., *October 23, 1925.*

HON. CALLOM B. JONES,  
*Assistant United States Attorney,  
Richmond, Va.*

MY DEAR MR. JONES:

Acknowledgment is made of your letter of October 20, 1925, which reads as follows:

"It is the desire of the United States attorney's office of the Eastern District of Virginia to ascertain from you whether or not an official auctioneer would be required to take out a State license in order that he might publicly or privately sell such properties as are to be sold by an order or decree in the United States District Court for the Eastern District of Virginia.

"Among the duties of this official would be the sale and disposition of estates in bankruptcy, as well as such other property as might from time to time be ordered to be sold under proper proceedings had in this court.

"I am of opinion that this official would be an official of the court, and as such would be merely carrying out the direction of the court, and therefore not required to take out either a State or city license.

"As soon as Judge Groner sees fit and proper to appoint such official, the order appointing will define his duties so as to permit him from time to time to sell such property as may be referred to him for the purpose of sale. In whatever capacity he may be called upon to act, it will be as an official of the court, but should he engage as an individual operating for himself in the private or public sale of property, there is no question but that he would be required to take out a State and local license. Of course, you realize the jurisdiction of this official would include all of the counties and cities in the Eastern District of Virginia."

I have carefully noted the contents of this letter, and am of the opinion that the "official auctioneer," with such duties as you define in your letter, would not be required to pay a license tax to the State of Virginia in order to discharge his duties as such.

Of course, should he undertake to sell any property other than that sold by an order or decree of the United States District Court, he would be required to pay a license tax to the State of Virginia, and the locality if one is imposed.

I would further add that I have discussed this with Hon. C. Lee Moore, Auditor of Public Accounts for the State of Virginia, and he concurs in this opinion.

With kindest regards and best wishes, I am

Sincerely yours,

JOHN R. SAUNDERS.

*Attorney General.*

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#### REAL ESTATE—Taxation of.

RICHMOND, VA., October 10, 1925.

MR. EDMUND A. ALLEN,  
*Deputy Grand Master, I. O. O. F.,  
Newington, Va.*

MY DEAR MR. ALLEN:

I am just in receipt of yours of October 9, to which I will reply at once.

In this you desire to be advised whether the property owned by the Independent Order of Odd Fellows, and is used exclusively for lodge purposes, is exempt from taxation under the laws of the State of Virginia.

In reply, I will state that such property is exempt from taxation. If, however, any revenue is derived from the rent or use of the property in any way, then it is taxable.

Trusting I have made myself clear, I am

Yours truly,

JOHN R. SAUNDERS.

*Attorney General.*

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### SUPPLEMENTAL INDENTURE—Tax of recordation.

RICHMOND, VA., *October 30, 1925.*

HON. T. JUSTIN MOORE, *General Counsel,*  
*Virginia Railway and Power Company,*  
*Richmond, Va.*

MY DEAR MR. MOORE:

I am just this moment in receipt of your letter of October 29, relative to the supplemental indenture dated October 26, 1925, between the Spotsylvania Power Company and the Chase National Bank of the city of New York, trustee, which said deed of indenture has been presented to Mr. Geddes, the clerk of the circuit court of the city of Williamsburg, for recordation. In your letter you make the following statement:

"I beg to assure you that it is not intended by the paragraph on next to the last page, reading—

"'But in trust nevertheless for the further and equal pro rata benefit, security and protection of all present and future holders of bonds issued and to be issued under and secured by this supplemental indenture \* \* \*,'  
etc.,

to provide for the issuance of additional bonds without payment of the additional tax provided by law. The original indenture of the Spotsylvania Power Company to the Chase National Bank of New York, trustee, dated October 1, 1925, referred to in the supplemental indenture, provides for the issuance of series A of bonds in the amount of \$3,000,000, and the usual State tax has been duly paid on that amount. As and when additional bonds are issued under said original indenture, the additional tax will be paid as provided by law at the time the necessary supplemental indentures are executed.

"All that is intended by the supplemental indenture dated October 26, 1925, which we are recording in the clerk's office of the circuit court of the city of Williamsburg, which Mr. Geddes brought to your attention, is to add the Williamsburg and other properties therein described as additional security for the payment of the \$3,000,000 of series A bonds as above described, and such additional bonds as may be hereafter issued, as provided for in the original indenture of the Spotsylvania Power Company to the Chase National Bank, dated October 1, 1925.

"I have explained this to Mr. Geddes and am giving him a copy of this letter, with your assurance that no additional tax will need to be paid

for the recordation of the supplemental indenture, dated October 26, 1925."

Inasmuch as the supplemental indenture simply conveys additional property as security for the \$3,000,000 in bonds issued and to be issued under the original indenture dated October 1, 1925, which has been duly recorded and the tax paid thereon, I am of the opinion that there is no State tax to be charged for the recordation of this supplemental indenture as this does not secure any additional bonds.

I have shown your letter to Honorable C. Lee Moore, Auditor of Public Accounts, and he concurs in this opinion.

I am sending a copy of this letter to Mr. Geddes, clerk of the circuit court of the city of Williamsburg.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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#### GAME WARDENS—Fees of

RICHMOND, VA., October 5, 1925.

R. L. WRIGHT, ESQ.,  
*Jordan Mines, Va.*

DEAR SIR:

Acknowledgment is made of your letter of recent date, in which you say in part:

"I am a justice of the peace for this county and as such I have quite a few cases of violation of the game laws, and our game warden, Mr. P. F. Wright, has recently been claiming one-half of the fine, which I claim, and I am upheld by several attorneys that a regular warden that is paid a salary by the State is not entitled to half of the fines. Section 3325 says that a regular warden shall get not to exceed \$75, and section 3343 says that special wardens and other officers shall get one-half of all fines."

In reply, I beg to say that an opinion construing section 3343 of the Code was rendered during the incumbency of my predecessor to the effect that the words "other officers" were broad enough to include regular game wardens, and I have not thought it necessary to reverse this ruling, although if it had been presented to me in the first instance, I might have considered that construction doubtful in view of section 3325.

However, upon considering the various statutes regulating the enforcement of game laws and the obvious purpose to stimulate prosecutions in proper cases, I am sure that the legislature intended that the regular wardens, as well as all other officers, should receive one-half of the fines.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

**BLUE SKY LAW—License from State Corporation Commission.**RICHMOND, VA., *October 10, 1925.*

HON. WM. R. SHANDS,  
*Director Securities Division,  
State Corporation Commission,  
Richmond, Va.*

MY DEAR MR. SHANDS:

I beg leave to acknowledge receipt of your letter which is as follows:

"I shall appreciate your giving me your opinion as to the application of the provisions of sections 3848(27)—3848(46) of the Code of Virginia, known as the Blue Sky Law, to the following case:

"An individual without authority to make any sales of lots in Florida or to make any offers regarding the same, with the approval of the owners of the property in Florida solicits and secures persons to make trips to Florida to see the land in question. These persons, referred to as guests of the owners of the property, are really carried at a cost of approximately one-half what the usual expenses would be, the owners of the property bearing the remaining expense. Supposedly they go under no obligations to purchase any property, although there must of necessity be some moral obligation once the hospitality of the company has been accepted.

"The solicitor or agent, if we may so refer to him, is paid a commission on the sales actually made to the persons he has secured to make the trip. While his activities, therefore, as regard the real estate consist only of placing the prospect in position in another State where other agents of the company may sell real estate to him, this solicitor's compensation is based directly on the sales of real estate made.

"The Commission has on previous occasions considered the offering for sale or selling in Virginia of lots in a subdivision located outside of this State a speculative security coming within the provisions of clause 7 of section 3848 (27) of the act. Section 3848 (28) requires certain information to be filed before speculative securities can be offered or sold in this State, and among the things required is:

"The names, addresses and selling territory in this State of any agents by or through whom any such securities are to be sold, and no such agents shall be employed unless such statement with respect to them, together with satisfactory evidence of their good character, has been filed hereunder, and there shall have been paid to the Commission a registration fee of \$25 for each such agent."

The beginning of the same section, 3848 (28), declares:

"It shall be hereafter unlawful for any promoter to sell or offer for sale (except to banks, bankers, trust companies or dealers in securities) or by means of any advertisement, circulars, or prospectus, or by any other form of public offering to attempt to promote the sale of any speculative securities in this State until the said promoter shall have first applied for and secured from the State Corporation Commission, hereafter called the Commission, a permit to do so."

"The questions presented then are, first, would an individual in Virginia, representing here a Florida owner of real estate in the capacity as above outlined, be required to secure a permit from the Commission to cover his activities in Virginia, and, second, would an individual carrying on the activities as above outlined while working for a Florida concern already permitted to offer and sell Florida real estate in Virginia be re-

quired to secure from the Commission an agent's license as provided by clause 7 of section 3848 (28)."

In response to the two questions contained in the last paragraph of your letter, I am of the opinion that both should be answered in the affirmative. In other words, I think that the parties in question should be required to secure from the State Corporation Commission an agent's license as provided for by clause 7 of section 3848 (28) of the Virginia Code, 1924, and that they should also qualify before and be licensed by the Virginia Real Estate Commission.

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

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**ELECTIONS—Eligibility of voters.**

RICHMOND, VA., *October 27, 1925.*

MR. M. L. BLAYDES,  
*Spotsylvania, Va.*

MY DEAR SIR:

I am just in receipt of your letter of October 26. In this you state that Mr. Joseph Vaughan and his wife moved to Fredericksburg in December, where Mr. Vaughan secured work and rented a house to live in while so engaged, having no intention of making Fredericksburg his permanent home. You further state that he owns a large farm in Spotsylvania county, that he and his wife are registered voters in that county, and have paid their capitation taxes as required by law. You then desire to be advised whether or not these parties have a right to vote in the county.

In reply, I will state that the Court of Appeals decided in the case of *Williams v. Commonwealth*, 116 Va. 272, that the question of residence is one of intention, and that where one had once gained a legal residence in a place it could be lost only by the combination of two acts—first, by removal; and, second, with the intention of changing his legal residence.

If Mr. and Mrs. Vaughan came to Fredericksburg temporarily with no intention of abandoning their legal residence in Spotsylvania county, it, therefore, follows that they are still legal residents of the county and have a perfect right to vote in said county, provided they are registered voters and have paid all capitation taxes.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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**ELECTORAL BOARD—Eligibility of member for another office.**

RICHMOND, VA., *October 20, 1925.*

SENATOR GEORGE B. KEEZELL,  
*Keezeltown, Va.*

MY DEAR SENATOR:

I am just in receipt of your letter of October 15, to which I will reply at once.

In this you desire to be advised whether a member of the electoral board of a county is eligible to be a candidate for an office to be filled by the electors of the county.

You further ask whether the fact that he did not participate in the printing and stamping of the ballots, though still retaining his position as a member of the electoral board, in any way affects his eligibility to be a candidate, and to have his name placed on the official ballot.

In this connection, I beg leave to call your attention to the last paragraph of section 84 of the Virginia Election Laws (which is section 84 of the Code of Virginia), which paragraphs reads 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 a registrar or judge of election."

You will see from the reading of this paragraph that no person who holds any elective office of trust or profit in the State, or in any county, city or town thereof, can be appointed a member of the electoral board.

It would, therefore, seem to follow that the converse of this proposition is true, namely, that a member of the electoral board could not be elected to such office.

It would be entirely improper, in my judgment, for a member of the electoral board, which board appoints judges of election, to be candidate for an office at an election in which he participated in the appointment of the judges holding such election.

Trusting this gives you the desired information, I am

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

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## JUSTICE OF THE PEACE—Jurisdiction of.

RICHMOND, VA., *October 29, 1925.*

MR. E. PEYTON TURNER,  
*Attorney at Law,*  
*Emporia, Va.*

MY DEAR MR. TURNER:

I beg leave to acknowledge receipt of your letter of October 28, in which you ask for my construction of section 6022 of the Code of 1919 with respect to the following.

You state that it is the contention of an attorney in your town that in cases wherein justices of the peace have no final jurisdiction, but simply investigate the case and decide whether or not it is to be sent on to the circuit court, the accused has the right to demand that two justices shall be associated with the justice who issued the warrant and before whom it is returnable.

That portion of section 6022 of the Code of 1919, which is applicable to your question, reads as follows:

"\* \* \* In the trial of all warrants, both civil and criminal, upon application of the defendant, at any time before trial, to the justice of the peace, who issued said warrant and before whom it is returnable, such justice shall associate with himself two other justices of the peace of the county \* \* \*"

The whole matter, in my judgment, hinges upon the question as to what is the trial of the case. While it is true that in prohibition and felony cases the justice has no right to make a final disposition of these cases where there is probable cause of guilt; on the other hand, if there is no evidence to justify his sending the case to the grand jury, the justice has full power and authority to dismiss it. Would not that be a trial of the case?

While I hesitate to disagree with you, I really think that the accused has a perfect right to request the justice who issued the warrant to associate with himself two other justices. I would further add that I have discussed this matter fully with both of my assistants, and in this view we all concur.

With kindest regards and best wishes, I am

Yours very sincerely,

JOHN R. SAUNDERS,  
*Attorney General.*

#### CRIMINAL WARRANT—Dismissal of.

RICHMOND, VA., *October 27, 1925.*

GEORGE E. HEATH, ESQ.,  
*Justice of the Peace,*  
*R. F. D. No. 2,*  
*Ashland, Va.*

MY DEAR MR. HEATH:

Acknowledgment is made of your letter of October 26, 1925, in which you request me to advise you whether you have the right to dismiss a criminal warrant against Mr. E. R. Vaughan, of Doswell, for operating an automobile without lights on the payment of the costs by him, and whether you could give him an official receipt for the costs.

It appears from the facts furnished me that Mr. Vaughan was arrested for operating his automobile without proper lights in violation of section 2142 of the Code of 1919, as amended. It further appears that Mr. Vaughan claims that his lights were in proper order when he started out on his journey, but that one or more of them went out between Richmond and Doswell without his becoming aware of the fact until stopped and arrested by the officer. You state that under these circumstances, you would like to dismiss Mr. Vaughan without imposing a fine, but that the officer insists on the payment of his costs, and, therefore wish to know whether you could dismiss the case on the payment of the costs.

From a technical standpoint, Mr. Vaughan violated section 2142 of the Code of 1919, as amended. The officer, therefore, properly summoned him to court for a violation of this section. The warrant having properly been issued and Mr.

Vaughan having technically violated the law, he should properly pay the costs incident to the same. I, therefore, can see no impropriety in your dismissing the case without the imposition of a fine, but on condition that the costs be paid by Mr. Vaughan.

Yours very truly,

LEON M. BAZILE,  
*Assistant Attorney General.*

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### ELECTION—Eligibility of Voters.

RICHMOND, VA., *October 29, 1925.*

MR. J. FRANK JONES,  
2033 *West Broad street,*  
*Richmond, Va.*

MY DEAR MR. JONES:

Your letter of October 28 just received. In this you state that up to the present time you have spent most of your life in the city of Richmond, Va., but that in the last few months you have moved to Westover Hills, a suburb of Richmond, which is in Chesterfield county and outside of the corporate limits. You further state that all of your business interests are in Richmond, that you pay your capitation taxes in said city, and that it is your desire and purpose to maintain your legal abode in the city and vote.

I am of the opinion, which is based on the decision of the Supreme Court in the case of *Williams v. Commonwealth*, 116 Va. 272, which you refer to in your letter, that you have a right to vote in the city of Richmond. In fact, I do not think there is any doubt about this.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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### CLERKS OF COURTS—Fees.

RICHMOND, VA., *October 24, 1925.*

HON. C. LEE MOORE,  
*Auditor of Public Accounts,*  
*Richmond, Va.*

MY DEAR MR. AUDITOR:

Acknowledgment is made of your communication of recent date with which you submit certain letters from W. L. Prieur, Jr., Esquire, clerk of the Norfolk courts, and ask to be advised as to the proper fees to be charged by the clerks for admitting to record, etc., the instruments executed between the Chesapeake and Potomac Telephone Company and persons over whose land the poles, wires, etc., of such company are erected, by which instrument a right of easement is granted to the telephone company. These instruments are under seal and acknowledged by the grantor. They are, therefore, deeds and have been so held to be such by

you on the advice of this office and counsel for the State Tax Board, as appears from your circular opinion addressed to clerks of courts dated April 5, 1923.

These instruments being deeds, the fees to be charged by the clerks for admitting the same to record are fixed by section 3484 of the Code of Virginia, 1919, as amended by the Acts of 1920, clauses (1) and (5) thereof.

Clause (1) of section 3484 of the Code, as amended, provides as follows:

"Where a writing is admitted to record under chapters one hundred and thirty-two, two hundred and ten and two hundred and eleven of the Code of nineteen hundred and nineteen, for everything relating to it, except the recording in the proper book, to-wit: for receiving proof of acknowledgments, entering orders, endorsing clerk's certificate, and where required, embracing it in list for commissioners of the revenue, fifty cents."

Clause (5) of this section provides as follows:

"In lieu of the said allowance of three cents for every twenty words, the clerk may for recording in the proper book elect to charge the following specific fees, to-wit:

"Where the writing is a deed of trust, mortgage, or is a conveyance of real or personal estate, one dollar.

"For recording a will a specific fee of fifty cents, or in lieu thereof three cents for every twenty words."

You will see from the above that for the actual spreading of the deed on record the clerk is entitled to charge three cents for every twenty words, or in his discretion in lieu thereof one dollar, and that for his service in receiving proof of the acknowledgments to the instrument and endorsing the clerk's certificate compensation to which the clerk is entitled for recording such deeds \$1.50, unless thereon he is entitled to an additional compensation of fifty cents, making a total the clerk elects to take three cents for each twenty words, in which event the charge would be fifty cents for receiving proof of the acknowledgments and endorsing his certificate and three cents for each twenty words contained in the deed.

The State tax upon the recordation of such instruments would be the same as is required for the admission of other deeds to record.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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#### EXAMINER OF RECORDS—Powers and duties.

RICHMOND, VA., October 5, 1925.

JOHN PARSONS, JR., ESQ., *Cashier,*  
*Townsend Banking Company,*  
*Townsend, Va.*

DEAR SIR:

Acknowledgment is made of your letter of September 29, in which you say:

"A number of our customers have been requested by the examiner of records for the district, Mr. Waples, of Onancock, to report to him the

amount of money they owned on February 1 for taxation at 20 cents per hundred dollars. This appears to give them no little concern. I would appreciate it very much if you will give me your opinion of this law; its constitutionality, whether the examiner of records can make demands upon the banks for this information should he desire to do so, and whether a taxpayer must report only his savings deposits, or all money owned by him, regardless of whether he borrowed the money or earned it."

In reply, I beg to say that the powers and duties of examiners of records in this matter are prescribed by section 2255 of the Code of Virginia, which is as follows:

"Interrogatories to be returned by each commissioner of the revenue to the examiner of records. It shall be the duty of each commissioner of the revenue on June first of each year to submit to the examiner of records of his circuit all interrogatories of taxpayers received by him. It shall be the duty of the examiner of records thereupon to examine and review such interrogatories with particular reference to the returns of intangible personal property, money and income, and it shall be the further duty of the examiner of records to call upon every taxpayer who may not have properly returned to the commissioner all of his intangible personal property, money and income, and to require such taxpayer to make return of the same, and for this end the examiner of records may summon before him by registered letter or otherwise the taxpayer or any other person to answer under oath questions touching the ownership and value of all intangible personal property, money and income of all taxpayers."

It will be noted that an examiner of records is authorized to ascertain the amount of money a person has in bank at the time when same should be returned for taxation and may summon and swear the taxpayer or "any other person" to testify regarding money which is the property of any taxpayer. Of course, officers of banks who have information upon such subjects are included in the term "any other person." My attention has not been called to any authority holding such a law to be unconstitutional. Under the terms of the statute, the taxpayer must return all money owned by him, regardless of how he acquired it.

The Auditor of Public Accounts has furnished me a copy of instructions issued September 3, 1925, to Honorable John S. Waples, to whom you refer, in which he says in part:

"Both you and the commissioner of the revenue are authorized to furnish the banks with the names of taxpayers whom you think have money on deposit, and call upon the banks to furnish the information. You would not be authorized to ask for a list of depositors and amount on deposit, but you must mention the taxpayers about whom you make the inquiry. If necessary, action should be taken under section 2397 of the Code, pages 343, tax laws, 1924, by calling for a grand jury investigation."

also copy of instructions furnished Mr. Waples on October 1, 1925, which are in part as follows:

"Money on deposit at interest and in the checking account are both taxable. Borrowed money on deposit to the credit of the taxpayer is taxable, and he has no right to deduct amount of the obligation evidencing the loan. Money representing the year's profits on deposit or in possession of the taxpayer is taxable as money. All money owned by the taxpayer, who is a resident of this State, in his possession or on deposit with a bank

in this State or out of this State, whether in a savings account or checking account, on the 1st of February, is taxable, and the taxpayer cannot make any deduction from the amount thereof."

I am of the opinion that these instructions of the Auditor of Public Accounts are in conformity with the tax laws of the State of Virginia regarding money on deposit.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

#### LEGAL SERVICES—Payment by Auditor.

RICHMOND, VA., October 2, 1925.

HON. E. LEE TRINKLE,  
*Governor of Virginia,  
Richmond, Va.*

MY DEAR GOVERNOR:

Acknowledgment is made of your letter of October 2, 1925, in which you say:

"I am enclosing to you a bill that has been presented by Cardwell and Cardwell, attorneys, against the Department of Game and Inland Fisheries, and in which bill there are two items, one amounting to \$240 and another amounting to \$180 for legal services rendered.

"Please advise me if it is legal for these sums to be paid out of the funds of the Department of Game and Inland Fisheries in the event that I feel the charges are reasonable and the Commissioner likewise, and if the same are approved by me, does it become the duty of the Auditor to pay the bill?"

I have carefully examined the items in the bill rendered by Messrs. Cardwell and Cardwell. The first item is for services rendered in the recodification of the game laws and the preparation of twenty-four bills for introduction in the General Assembly. For these services there is a charge of \$240. The other item is for the trial of eighteen cases in Henrico county involving violations of the dog license laws, which trials were had before a justice of the peace in said county. This item amounts to \$180, making a total of \$420.

I have examined section 577 of the Code, which provides for the duties of the Legislative Reference Bureau. I find from an examination of this section of the Code that this bureau is required to draft or aid in drafting legislative bills only upon the request of the Governor or a member of the General Assembly.

Although my services were not requested in the matter, I find no authority in law requiring the Attorney General to draft bills for the departments of the State government.

It would, therefore, appear that if the Commissioner approves this item, and you regard the same as being a service for which payment should be made, that it would be legal to pay the same out of the funds of the Department of Game and Inland Fisheries.

The second item involves the employment of counsel for appearances in dog license cases in the justice's court of Henrico county.

The attorney for the Commonwealth is not required to appear in such cases in this court, nor is it a part of the duties of the Attorney General to represent the department in a matter of this kind in a court of a justice of the peace.

It would, therefore, appear that in proper cases the Commissioner would have the authority to employ counsel in order to see that the law is properly enforced, hence it follows that when these accounts have been approved by you, it becomes the duty of the Auditor to pay the same.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

#### GAME AND INLAND FISHERIES—Place of residence of Commissioner.

RICHMOND, VA., *February 10, 1925.*

HON. E. LEE TRINKLE,  
*Governor of Virginia,*  
*Richmond, Va.*

DEAR SIR:

Acknowledgment is made of your letter of January 13, in which you say:

"I would appreciate it if you would advise me as promptly as possible, or not, under the law, Honorable W. McDonald Lee, who is the Commissioner of Fisheries and ex-officio Commissioner of Game and Inland Fisheries of the State of Virginia, is directed to live at any particular place, or whether he has a right to select his own residence. I might refer you to sections 3146, 3150, 3306, 3315 and 3308 of the Code and any other sections you may find relative to the matter.

I would appreciate it if you would advise me as promptly as possible.

"The reason I make this request is that some question has been raised as to whether or not he could claim Irvington as his residence and be allowed to charge his expenses up in the two capacities above mentioned when away from there."

In reply, I beg to say that section 3146 of the Code, providing for the appointment of the Commissioner of Fisheries, says:

"For the purpose of enforcing the laws relating to the fisheries of Tidewater Virginia, the Commission of Fisheries, heretofore created, shall consist as at present of five members appointed by the Governor, at least two of whom shall be from the Tidewater section of the State. One of said Tidewater members shall be designated by the Governor as Commissioner of Fisheries, who shall be ex-officio chairman of the Commission of Fisheries and chief inspector, and one other Tidewater member shall be designated Shellfish Commissioner, and shall be Assistant Commissioner of Fisheries, assistant chief inspector and ex-officio secretary of the Commission. The Commissioner of Fisheries and the Shellfish Commissioner shall be, one from that section of Tidewater which lies east of the Chesapeake bay and the other from that section of Tidewater which lies west of said bay. \* \* \*

In my judgment, this section requires that the Commissioner of Fisheries at the time of his appointment and during his incumbency of office to be and

remain a citizen of the Tidewater section of the State and have his legal residence therein. Since section 3306 of the Code makes the Commissioner of Fisheries ex-officio Commissioner of Game and Inland Fisheries, the place of residence of the Commissioner of Game and Inland Fisheries at the time of his appointment and during his incumbency must also be the Tidewater section of the State.

Section 3162 of the Code defines the term "Tidewater Virginia," as used in section 3146 and other sections following to section 3161, inclusive, as follows:

"Tidewater Virginia, as hereinbefore used, is hereby defined to embrace the following counties and all towns and cities situated in any of said counties: Accomac, Alexandria, Caroline, Charles City, Chesterfield, Elizabeth City, Essex, Fairfax, Gloucester, Hanover, Henrico, Isle of Wight, James City, King George, King and Queen, King William, Lancaster, Mathews, Middlesex, Nansemond, New Kent, Norfolk, Northampton, Northumberland, Princess Anne, Richmond, Stafford, Warwick, Westmoreland, York, Surry, Prince George, Sussex and Southampton."

It will be noted that in addition to the counties enumerated, "all towns and cities situated in any of said counties" are declared to be in Tidewater Virginia also. This section is not strictly accurate, since no cities in Virginia can be said properly to be situated in any county, but each city is a separate jurisdiction from each contiguous county, even though the county may entirely surround the city. The evident intention of this statute is to make such cities as Alexandria, Norfolk, Portsmouth, Newport News, Hampton and Richmond, which are really in the section of the State where the tide ebbs and flows, part of Tidewater Virginia within the meaning of the statutes relating to the Commissioner of Fisheries.

Therefore, I hold that the Commissioner of Fisheries might properly have his residence in any one of the cities situated in the Tidewater section of the State, or in any of the counties enumerated in section 3162. The city of Richmond is included in this enumeration by reason of the fact that it is bounded by Hanover, Henrico and Chesterfield counties, all of which are enumerated in section 3162 and, therefore, it may be said to be situated within some of the counties so enumerated. Of course, a State officer may live wherever the duties of his office require him to be, but his legal residence is not thereby changed.

As to the question to which you allude whether or not the Commissioner of Fisheries may claim one place as his residence and be allowed to charge his expenses up as Commissioner of Fisheries and ex-officio Commissioner of Game and Inland Fisheries when away from his residence, I would call your attention to section 3146, which says in part:

"All members of the commission shall be paid actual expenses incurred in the performance of their duties."

As to what are and what are not proper charges by way of expenses are questions to be determined, in the first instance, by the Commission of Fisheries. Section 3150 of the Code provides:

"\* \* \* All records and accounts in the office or offices of said commission shall be opened at all times to the examination of the Governor and Auditor of Public Accounts or their accredited agents."

When so supervised and audited these accounts become charges upon the State treasury and subject to payment as other expenses of the State government.

The expenses of the Commissioner of Game and Inland Fisheries are regulated by section 3307, which is as follows:

"The Commissioner shall, in addition to his present salary, for discharging the duties imposed upon him by this chapter receive a salary of six hundred dollars per annum, payable monthly, out of the game protection fund, in the same manner as other State officers are paid, and the said Commissioner shall be allowed mileage, at the rate of five cents per mile for all travel in the discharge of his duties, but no other reimbursements shall be allowed him for his expenses in traveling over the State."

and by section 3311, which is as follows:

"At the end of each calendar month said Commissioner shall file with the Governor an itemized statement, under oath, of all sums of money received or expended by him in the discharge of his official duty, including clerical services, salaries and expenses while traveling, as hereinafter provided, postage, stationery and other necessary incidental expenses."

It appears, therefore, that if any expenses are incurred by the Commissioner of Game and Inland Fisheries, it is for him to decide whether they shall be charged against the game protection fund as "necessary incidental expenses."

Section 3312 is as follows:

"Upon the approval of such accounts by the Governor, the Auditor shall draw his warrant for such amount, which shall be paid monthly, out of the game protection fund."

Reading all of these sections together, it appears evident that when expenses of the Commissioner are charged in his itemized statement as "necessary incidental expenses" and the account is approved by the Governor, the Auditor must draw his warrant for such amount, payable out of the game protection fund.

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

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#### MOTOR VEHICLE COMMISSIONER—Authority of.

RICHMOND, VA., August 19, 1925.

HON. JAMES M. HAYES, JR.,  
*Motor Vehicle Commissioner,*  
*Richmond, Va.*

MY DEAR SIR:

Acknowledgment is made of your letter of recent date, in which you say:

"I am enclosing herewith copy of letter written to the Alexandria and Suburban Motor Vehicle Co. by this office.

"It seems that the situation is this: This company was issued certificate 98-A by the State Corporation Commission on January 10, 1924,

authorizing them to operate passenger service between Alexandria, Potomac Yards and Theological Seminary. Since that time this company has been operating over this route.

"On February 6 the Commission issued certificate No. 265-A to R. L. May, of Barcroft, granting him authority to furnish passenger service between Alexandria and the State Line destination Washington, D. C. This certificate gave Mr. May authority to operate over the same route then served by the Alexandria and Suburban Motor Vehicle Co. between Alexandria and Potomac Yards.

"Mr. Rich, general superintendent, advised that application for certificate of authority was made to the Corporation Commission for an extension of their route between Potomac, Rosemont and Washington or the State Line, and this certificate was denied by the Commission. Mr. Rich states that his company feels that this part of the territory was being served by his company before other certificates were issued by the Corporation Commission and under this they feel that they had a prior right on any certificate that should be issued. As you will note in my letter to the above-named company that I have acknowledged receipt of these applications for bus line license with check attached to cover the fee, and I wish you would advise me if this office can issue license tags covering this company's operation in Virginia after certificate has been declined by the Commission. This company states that they are perfectly willing to pay the license tax provided for under the Virginia statutes, but if the State will not accept the money for the reason that certificate was denied, their company intends to operate as an interstate carrier under the recent rulings of the United States Supreme Court. As you know, if this company begins operating as an interstate carrier, this office will be unable to stop their operation and the State will be the loser of the license fee."

Section 6 of the Virginia Motor Vehicle Law provides as follows:

"It shall be the duty of the Secretary of the Commonwealth, upon the presentation of a certificate from the Commission, authorizing the motor vehicle carrier to operate, to furnish the motor vehicle carrier with a distinguishing plate or marker, which, in addition to the other matters otherwise by law provided to be placed thereon. \* \* \*"

I am, therefore, of the opinion that you are without authority to issue license tags to an intrastate motor vehicle carrier after the Corporation Commission has denied to such carrier a certificate to operate.

I, of course, express no opinion with reference to a motor vehicle carrier engaged exclusively in interstate commerce.

You should, therefore, return the certified check for \$951.08 to the Alexandria and Suburban Motor Vehicle Company, Alexandria, Virginia.

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

#### **TAXATION—Merchants' license.**

RICHMOND, VA., September 28, 1925.

MR. W. M. HANCOCK,  
*Appomattox, Va.*

MY DEAR SIR:

I am just in receipt of your letter of September 26. In this you state that you have a small manufacturing ice plant at Appomattox, that you deliver ice to various homes in that town, and that you also send ice to Pamplin and other

near-by towns. You further state that you sell tickets, and that when the ice is delivered by your truck driver the amount of ice taken is punched on the ticket. You then request to be advised whether or not, under these circumstances, you are required to pay a merchant's license tax.

In reply, I will state that you are not. The law expressly exempts you. I would further state that I have talked with Mr. Moore, the Auditor of Public Accounts, this morning and he concurs in this opinion. I am very glad to give you this information.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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### CRIMINAL CASES—Cost of jury.

RICHMOND, VA., September 29, 1925.

MR. E. W. OGLE,  
*Clerk Circuit Court of Carroll County,  
Hillsville, Va.*

MY DEAR MR. OGLE:

Acknowledgment is made of your letter of September 28, 1925, in which you say:

"The question has arisen: Should the cost of the jury be taxed against the defendant in a criminal case wherein the defendant is convicted?"

The cost of the jury should be taxed against the accused in a criminal case as a part of the costs. *Angeles v. Commonwealth*, 10 Grat. 696, 705 (1853).

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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### CLERKS OF COURTS—Fees.

RICHMOND, VA., September 25, 1925.

HON. FLOYD HOLLOWAY,  
*Clerk of Court,  
Yorktown, Va.*

MY DEAR MR. HOLLOWAY:

Your letter in regard to my construction of section 3506 of the Code was received just as I was preparing to go to Staunton to attend a session of the Court of Appeals there. Since my return I have been obliged to go back to Staunton to place my daughter in school and to go out of town for other purposes. The result is that there has been considerable delay, for which I apologize.

It seems that the construction of section 3506 depends upon the meaning of the word "case." If three men are indicted and tried jointly, I consider that one case, for which a fee of \$2.50 can be collected by the clerk. If there is a severance and the three men are tried separately, I consider that they are three cases and the clerk may receive \$2.50 for each felony. As to this fee, it makes no difference whether the person charged with felony is convicted or acquitted.

I think you are right in saying that section 3505 has no bearing upon section 3506.

Please accept my hearty thanks for your congratulations and your valuable services. I assure you that I am exceedingly grateful.

With best wishes, I am

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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#### **AUTOMOBILES—Registration and license of.**

RICHMOND, VA., *September 14, 1925.*

FRANK W. TROTH, ESQ.,  
*Justice of the Peace,*  
*Accotink, Va.*

MY DEAR SIR:

Acknowledgment is made of your letter of September 10, 1925, in which you say:

"Will you please give me your opinion as to whether trucks used on a farm to cross public roads from one field to another, or to haul, say gravel, from one part of the place to another. The only means of getting to the gravel bank is for a distance of 500 yards over a much used public concrete road. I have just had a case before me of a party operating a truck without license. I have ruled that he is liable for a license. The owner claims he does not use this truck off the farm, only for crossing the public road from field to field or hauling gravel, as stated above, and it, therefore comes under the class of farm tractors."

Section 2125 of the Code of Virginia, 1919, as amended, makes it unlawful to operate any automobile or vehicle of any kind the motive power of which is gasoline, or other motive power except animal power "on, along or across any public road, street, alley, highway, avenue or turnpike of any county, city, town or village in this State" unless such machine has been registered and license therefor obtained.

It is, therefore, my opinion that your ruling in the above matter is correct.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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#### **MOTOR VEHICLE CARRIERS—License.**

RICHMOND, VA., *September 14, 1925.*

HON. T. RUSSELL CATHER,  
*Commonwealth's Attorney,*  
*Winchester, Va.*

MY DEAR MR. CATHER:

Acknowledgment is made of your letter of recent date, in which you say in part:

"As Commonwealth's attorney of Frederick county, I have been consulted a number of times by farmers who occasionally will haul a load of produce to market for a neighbor and have recently been consulted by a justice of peace before whom a warrant was pended against a contractor in Winchester. The facts are that this contractor spends practically all of his time on his own contract work and in hauling his own materials. He does, however, on occasions deliver shipments of goods from railroad station in Winchester, and on very rare occasions has gone outside the corporation limits of the city in delivering such goods on the improved public highways of the State. After reading section 3 of chapter 222 of the Acts of 1924, I came to the conclusion that no specific permit was required of a carrier such as I have described above and so advised the justice. I should greatly appreciate your advising whether or not such a person should be required to procure a class C permit."

The Corporation Commission has ruled that persons who haul purely agricultural products are not required to obtain a certificate so to do. With reference, however, to the contractor who delivers goods outside of the city of Winchester, the Corporation Commission thinks that he should obtain a certificate C, in order to make such deliveries for compensation. I am inclined to think that this view is correct.

You will observe that the first sentence of section 3 of chapter 222 of the Acts of 1924 provides:

"No motor vehicle carrier shall hereafter operate for the transportation of persons or property for compensation on any improved public highway without first having obtained from the Commission, under the provisions of this act, a certificate and paid the license fee herein required."

The fourth paragraph of section 3 of chapter 222 of the Acts of 1924 provides as follows:

"The commission shall have power to grant a certificate C to any applicant who does not propose to in any way solicit the transportation of persons over such improved public highways nor to operate upon a regular schedule, but who is privately employed for a specific trip and who will not solicit or receive patronage along the route."

This language, in my opinion, is broad enough to require a class C certificate of the contractor referred to in your letter, although I am frank to say the question is not free from doubt, and I can see wherein there is room for a difference of opinion.

With my best wishes, and assuring you that I appreciate your congratulations and the very splendid assistance which you and my other friends gave me, I am

Very sincerely yours,

JOHN R. SAUNDERS,

*Attorney General.*

**SCHOOLS—Right of school board to admit certain children to school.**

RICHMOND, VA., *September 29, 1925.*

HON. R. B. STEPHENSON,  
*Commonwealth's Attorney,  
Covington, Va.*

MY DEAR MR. STEPHENSON:

Acknowledgment is made of your letter of September 28, 1925, in which you request me to advise you whether the school board of Alleghany county should admit to the public schools certain children who are inmates of the Boys' Home near Covington, Virginia. You say in part:

"This institution is incorporated under the laws of Virginia and has its principal office at Covington, and under church control. It has in its custody and under its control a large number of boys of which it is the guardian and custodian. These boys are committed to the institution from all parts of the State of Virginia and some come from outside of the State. There are not sufficient children to make up a school at this point without including the children in the Boys' Home. The school board desires to know whether it is their duty to operate a school to which the boys in this institution can go."

I received a letter from the clerk of the school board and one from the chairman of the school board with reference to this matter, which I referred to Hon. Harris Hart, Superintendent of Public Instruction, after I had conferred with him about the matter.

It appeared to me from the correspondence received from the clerk of the school board that the superintendent of the home had requested that teachers be furnished for the instruction of the inmates at the home. I do not think that the law requires this. On the other hand, it is my opinion, after carefully reading Code section 719, as amended, and Code section 720, that these children, if legal residents of the county, have a right to attend the public schools thereof.

You will observe that section 719 of the Code, as amended, provides in part:

"The public free schools shall be free to all persons between the ages of seven and twenty years residing within the school district \* \* \*."

Section 720 of the Code provides in part:

"\* \* \* Children living with and entirely supported by residents of said district shall be admitted to the public free schools of said district as if they were children of said residents."

These sections coupled with the compulsory education law in my opinion would entitle the children in this home to attend the public free schools of Alleghany county. For this reason I referred the matter to Mr. Hart after I had conferred with him in the hope that the matter could be satisfactorily adjusted

without the necessity of having to determine the question, although I furnished Mr. Hart with my views about the matter at the time we discussed it.

Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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#### **AUTOMOBILES—Operation of.**

RICHMOND, VA., *September 15, 1925.*

HON. W. P. CRUMPACKER,  
*R. F. D. 1, Roanoke, Va.*

MY DEAR MR. CRUMPACKER:

Some time ago I received a letter from you in which you, as supervisor of Botetourt county, requested me to advise you as to the meaning of the following provision of section 2132 of the Code of Virginia, 1919, as amended:

“No such vehicle shall be operated on such road in which the limit of load per inch in width of tire shall exceed 700 pounds, rubber tires to be measured between the flanges of the rim, and the use on the public roads of any truck or trailer exceeding the weight and capacity hereinbefore prescribed shall be a misdemeanor \* \* \*.”

The Highway Commission has construed this law to mean that the total width of the four wheels is to be multiplied by 700 and the result divided by 4. Thus a vehicle having tires 4 inches in width would equal a total of 16 inches for the four wheels. This multiplied by 700 would equal 11,200. This divided by 4 would result in 2,800, which would be the number of pounds that could be hauled in such vehicle. It is my opinion that this construction placed on this law by the Highway Commission is correct.

I also call your attention to section 4745a of the Virginia Code of 1924 (Acts 1923, page 170), which fixes the maximum load which may be hauled in any kind of a vehicle, regardless of the size of the tires.

I also call your attention to section 10, article 2, of the regulations of the State Highway Commission adopted pursuant to authority conferred on that body by law.

Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

**HOTELS—License.**RICHMOND, VA., *September 17, 1925.*

HON. C. LEE MOORE,  
*Auditor of Public Accounts,*  
*Richmond, Va.*

DEAR SIR:

I have examined with care the orders of the corporation court of the city of Roanoke entered on May 29, 1925, relieving Nan F. Taylor, administratrix for the Hotel Roanoke, and J. A. Newcomb, for the Hotel Ponce de Leon, from a license tax imposed for the privilege of conducting an eating house, which tax the court finds to have been an erroneous assessment. Both taxes having been paid, it is ordered that the same be refunded. It appears from these orders that the taxes ordered to be refunded were assessed for the year 1920.

I have read section 2385 of the Code of 1919, as amended by Acts of 1924, with care. This section provides that one aggrieved by an assessment of taxes on land or other property may within two years, and one aggrieved at an assessment on income or license tax may within one year from the 1st of September, on which such assessment is made, apply to the court for relief, and then provides, so far as is applicable to the question hereunder consideration, as follows:

“\* \* \* except, that where it is shown to the satisfaction of the court that there has been a double assessment of *the same property* in any case, one of which assessments is proper and the other erroneous, and that a proper single tax has been paid thereon, the court may order that the applicant be exonerated from such erroneous assessment, whether the erroneous tax has been paid or not, and even though the application be not made within two years, as hereinbefore required. \* \* \*” (*Italics supplied.*)

An examination of section 2385 of the Code of 1919, as amended, shows that the General Assembly has drawn a distinction between land or other property and license taxes. A license tax is not a property tax, but a privilege tax. You will observe that the above quoted portion of section 2385 of the Code of 1919, as amended, affording relief against double assessments, is limited to double assessments of property and not of privileges.

It is, therefore, my opinion that section 2385 of the Code of 1919, as amended, is not sufficiently broad to authorize the relief granted by the corporation court of the city of Roanoke. I would, therefore, suggest that a rehearing in this matter be asked.

Yours very truly,  
JOHN R. SAUNDERS,  
*Attorney General.*

**INDUSTRIAL COMMISSION—Funds received from tax levied on premiums collected by insurance companies, etc.**RICHMOND, VA., *September 17, 1925.*

HON. BOLLING H. HANDY, *Chairman,*  
*Industrial Commission,*  
*Richmond, Va.*

MY DEAR MAJOR HANDY:

Acknowledgment is made of your letter of recent date, in which you say:

"The Industrial Commission would like to get a ruling from the Attorney General's office in reference to the situation as to the fund received from the tax levied upon the premiums collected by insurance companies writing compensation insurance, and from the self-insurers of the State.

"Perhaps a brief recital of the circumstances leading to the amendments of the Compensation by the last General Assembly would be of some value to you in this connection. The original Compensation Act provided for a tax of 4% to support the work of this Commission (See Acts of Assembly 1918, page 657.) Under this provision a surplus accumulated over and above the expenses of the Commission, which surplus amounted altogether to the sum, in round numbers, of \$121,000.

"As it appeared that the fund was showing a surplus, the legislature of 1920 reduced the tax to 3%. (See Acts 1920, page 263.)

"This same session of the General Assembly (1920) also provided, by the amendment to clause K of section 75 of the Compensation Act (see Acts 1920, page 264) that all moneys over and above the necessary expenses should be paid into the general fund.

"Owing to the depressed industrial conditions prevailing in the latter part of 1920-21, the collections under the tax for the biennium 1922-24 fell about \$7,000 short of meeting the actual amount appropriated by the legislature to meet the expenses of the Industrial Commission.

"Under these conditions it was felt that the last General Assembly must be asked to increase the tax. Strong opposition to this increase was manifested by the insurance carriers and self-insurers of the State. They took the position that it was unconstitutional to have mingled the proceeds of a special tax levied on a particular class, and for one particular purpose, with the general funds of the State and use it for general purposes, and it appeared that there would be a great difficulty in inducing them not to fight the proposed increase. The only condition upon which they finally agreed not to oppose the increase was that the law should also be amended, so as to segregate the fund from the taxes in the treasury.

"It was under these conditions that clause K of section 75 (Acts of 1924, page 488) was amended so as to provide that the moneys paid into the treasury from this tax 'shall be there held and not otherwise appropriated than in this section provided.' The act was approved March 20, 1924.

"The general appropriation bill (Acts 1924, page 159) contains the proviso that on and after March 1, 1924, all moneys from all sources collected for the support of the Industrial Commission 'shall be paid direct and promptly into the general fund of the State Treasury.' This act was approved March 8, 1924.

"We would like to have a ruling as to the effect of these two provisions in the 1924 Acts. We have proceeded on the assumption that the legislature did not, in any way, intend to change the status of this Commission, so far as its finances are concerned, and that we are absolutely governed by the appropriation bill. It has been our view that the legislature, in view of the past history before outlined, merely intended to segregate in the treasury the collections under these taxes, to be appropriated by

it as it should see fit for the support of this Commission. We have never considered, therefore, that there was any conflict between the two acts. We have no right, as we have thought, to spend any money other than that appropriated to us by the General Assembly."

Section K of chapter 318 of the Acts of 1924, amending the Workmen's Compensation Law, provides as follows:

"The Commission shall not be authorized to incur expenses or indebtedness during any period, chargeable against the maintenance fund, in excess of the premiums tax payable to such fund for the same period. If it be ascertained that the tax collected for a given period exceeds the total chargeable against the maintenance fund under the provisions of this act, the Commission may authorize a corresponding credit upon the collections for the succeeding period. After the payment of the expenses for the year nineteen hundred and twenty the Commission shall pay into the State Treasury on or before August first, nineteen hundred and twenty-one, and annually thereafter on or before August first, all moneys collected under this act over and above such sums as may be annually appropriated by law to the State rehabilitation fund, which moneys shall be there held and not otherwise appropriated than in this section provided."

In the general appropriation bill for the years 1924-25 and the years 1925-26 (Acts of 1924, page 159 and 203) it is provided:

"It is hereby provided that on and after March 1, 1924, all receipts from taxes levied and collected under the provisions of the act, which became a law on March 21, 1918 (Acts of Assembly, 1918, chap. 400, pp. 637-659), as amended, on industrial self-insurers, and on the premiums received by industrial insurance carriers, insuring employers in this State against liability for personal injuries to their employees or death caused thereby, together with all other receipts from all sources collected for the support of the Industrial Commission of Virginia, shall be paid direct and promptly into the general fund of the State Treasury."

I have read with care section K, above quoted, and the above-quoted portion of the general appropriation bill and, in my opinion, there is no conflict between the provisions of section K and the general appropriation bill. There is nothing inconsistent between these respective acts, and it is my opinion that the intention of the General Assembly, in requiring all receipts to be paid into the general fund of the State Treasury, was, nevertheless, to have the same held there intact, subject to future appropriation by the General Assembly.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

**COUNTY TREASURERS—Commissions.**RICHMOND, VA., *September 17, 1925.*

HON. C. B. HALL, *Treasurer,*  
*Beaver Dam, Va.*

DEAR MR. HALL:

Acknowledgment is made of your letter of recent date, in which you say in part:

"I write to you as county treasurer of Hanover county in order to ascertain what commissions I am entitled to receive under section 2431 of the Code of Virginia, edition of 1919, as amended to date, in the following case:

"The county school board of Hanover county, as at present constituted and organized, negotiated a loan under the provisions of an act of the General Assembly of Virginia, approved March 16, 1918, entitled 'An act authorizing district or city school boards to borrow money on short-time loans.' See Acts of 1918, chapter 352, page 535."

It appears from the facts furnished me in connection with this matter that the loan made by the school board of Hanover county, referred to in your letter, was made under authority of chapter 352 of the Acts of 1918, entitled "An act authorizing district or city school boards to borrow money on short-time loans."

In the preamble of the act it is recited that some of the school districts of the State find it necessary to make temporary loans, and the act then provides:

"Be it enacted by the General Assembly of Virginia that the several district or city school boards of the State desiring to borrow money, the purpose aforesaid, be, and the same are hereby, authorized to borrow a sum of money which shall not exceed the amount of the district levy for the year in which the loan is negotiated, such loans to be repaid at such time or times within the space of five years, as may seem best to the respective school boards and to bear interest at a rate not exceeding six per centum per annum; provided that a second loan shall not be negotiated until all preceding temporary loans negotiated under this act have been paid."

The obligations issued by the school board of Hanover county were in the form of bonds and so styled.

Section 2431 of the Code of 1919, as amended, in providing for the compensation of the treasurers, reads in part as follows:

"For receiving and disbursing the money derived from the sale of general county or city bonds, or district road, bridge or *school bonds*, the treasurer shall receive as compensation for his service one-fourth of one per centum of the amount of the proceeds of sale of such bonds, and, in addition, the reasonable costs to him of additional surety bond required to be given by him on account of such bond issue."

and

"On all funds other than those specified in the foregoing paragraphs the treasurer shall receive as compensation for his services, in receiving and disbursing such funds, one per centum of the amount of such funds. Such funds shall include the proportion of capitation taxes returned to counties and cities by the State, funds received from sales of county or

district property, donations to county, city or district for any purpose (except amounts received for school libraries), *loans made* by board of supervisors, city councils or *county or district school boards*, and all other funds ordered to be received by the treasurer by the county, city, or school authorities.

"But no treasurer shall receive any commission upon money loaned from the literary fund for school improvement." (*Italics supplied.*)

It would, therefore, appear that, if the transaction above referred to was the issuance of school bonds, your compensation is limited to one-fourth of one per centum of the amount of proceeds of sale, while, if the same is a loan, your compensation would be one per centum of the fund.

Examination of chapter 34 of the Code, beginning with section 765 thereof, shows that provision is made for the issuance of school bonds. The Code having provided for school bond issues, and the General Assembly in chapter 352 of the Acts of 1918 having provided for school loans, it is my opinion that the above-quoted provisions of section 2431 of the Code of 1919, as amended, were used by the General Assembly with this distinction in mind, and, therefore, it is my conclusion that the commission to be paid the treasurer on a loan under chapter 352 of the Acts of 1918, regardless of the form of the obligation issued, is fixed by the miscellaneous items provision of section 2431 of the Code of 1919, as amended, which is above set out.

The fact that the obligations issued by the school board of Hanover county, under authority of chapter 352 of the Acts of 1918, were in the form of bonds does not change the transaction from a loan, as authorized by law, to a bond issue, for which there is no authority in law, under the facts involved in the Hanover case.

I am, therefore, of the opinion that you are entitled to a commission of one per centum on the funds derived from this transaction.

Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,

*Attorney General.*

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## TAXATION—Merchants.

RICHMOND, VA., *September 17, 1925.*

HON. G. W. KOINER,  
*Commissioner of Agriculture,*  
*Richmond, Va.*

MY DEAR MR. KOINER:

Acknowledgment is made of your communication of recent date, in which you refer to certain correspondence between Mrs. W. H. Booth, recorder of the town of Brookneal, and Honorable C. Lee Moore, Auditor, with reference to the right of the town of Brookneal to pass an ordinance imposing a special license tax on dealers in fertilizer.

Section 3072 of the Code of Virginia, 1919, so far as is applicable to the question hereunder consideration, provides:

"In addition to the State tax on any license the council of a city or town may, when anything for which a license is so required is to be done within the city or town, impose a tax for the privilege of doing the same and require a license to be obtained therefor. \* \* \*

By sections 45 and 46 of the Tax Bill of Virginia, the State imposes a license tax on merchants which would, of course, include fertilizer merchants or dealers. But no special State license tax is required of fertilizer dealers in addition to the merchants' license tax nor as a substitute for it. The inspection tax is not a license tax.

In view of the above, I am of the opinion that the town of Brookneal has authority to impose a town license tax on merchants, including fertilizer dealers, but that the town has no authority to impose a special town license tax on fertilizer dealers in addition to the town merchants' license tax or as a substitute for it. See in this connection *Norfolk v. Griffin*, 120 Va. 524.

I have discussed this matter with Honorable C. H. Morrisett, Director of the Legislative Reference Bureau, and he has reached the conclusion stated above.

Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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## JAILS AND PRISONERS—Duration of time.

RICHMOND, VA., *September 18, 1925.*

HON. JOHN W. STEPHENSON, JR.,  
*Commonwealth's Attorney,*  
*Warm Springs, Va.*

MY DEAR MR. STEPHENSON:

Acknowledgment is made of your letters of September 7 and 15, in re the petition filed by *Samuel H. Landes v. Commonwealth* in the circuit court of Bath county.

It appears from this petition that Landes was convicted under the prohibition law and sentenced to imprisonment in jail and the payment of a fine and costs in two certain cases; that an order was entered by the circuit court of Bath county committing him to the State convict road force; that pursuant to this order he was delivered to the convict road force and worked out the fine and costs prior to his discharge. He now prays the court to mark "satisfied" the judgment for the fines and the costs, which he claims to have paid by reason of his work as a member of the State convict road force, pursuant to the provision of section 2095 of the Code of 1919. This section reads as follows:

"Every person held to the labor, under the provisions of this chapter, for the nonpayment of any fine imposed upon him, shall be required to work out the full amount thereof, including the legal costs, at the rate of fifty cents per day for each day so held, Sundays excepted, and shall be entitled to a credit of twenty-five cents each day of his confinement, whether he labors or not. A statement of the amount of the fine, with the costs and the

number of days' labor required to discharge the same, shall be made out under the direction of the officer imposing the fine, and delivered to the person in charge of the chain gang or superintendent of the convict road force at the time he received the delinquent. No person shall be held to labor in any chain gang for the nonpayment of any fine imposed upon him for a longer period than six months."

You will see from this section, as construed in the case of *May v. Dillard*, 134 Va. 707, that prisoners held to labor in the State convict road force for the nonpayment of a fine are required to work out the full amount thereof, including the legal costs, at the rate of fifty cents per day for each day so held, Sundays excepted, and shall be entitled to a credit of twenty-five cents for each day of his confinement, whether he labors or not. No person can be held, however, for a longer period than six months.

In my opinion, one who has paid his fine and costs by working the same out as a member of the convict road force is entitled to have the judgment for such fine and costs released to the same extent as if he had paid the same in money. One who has been discharged, however, at the end of six months and before the fine and costs have been paid in full, while he cannot be again imprisoned for the nonpayment of same, he is, nevertheless, not entitled to have the judgment for the fine and costs marked "satisfied" in full. In my opinion, he would be entitled to have the money earned by him credited on such judgment for fine and costs, but he is certainly not entitled to a release of the entire judgment, unless, in fact, the fine and costs were paid in full, pursuant to the provision of section 2095 of the Code.

In the case referred to in your letter you will see that, under the provision of section 2095 of the Code of 1919, Landes could not have been held long enough to pay the same in full. Therefore, in my opinion, he is merely entitled to a credit on the judgment referred to and not to have the same marked "satisfied" in full.

Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,

*Attorney General.*

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#### **AUTOMOBILES—License tax on busses.**

RICHMOND, VA., *September 25, 1925.*

GENERAL J. P. JERVEY,  
*City Manager,*  
*Portsmouth, Va.*

MY DEAR GENERAL:

Sometime ago we had some correspondence relative to the weight of busses running over the streets of the city of Portsmouth, and the question as to what license tax should be imposed upon these busses. Somehow your letter was overlooked, but the matter was brought to my attention on yesterday afternoon when Mr. R. G. Edgerton, of your city, came to my office and showed me a letter from Mr. W. T. Brown, your secretary, which related to the same matter. I at once

took Mr. Edgerton over to see Mr. Hayes, the Motor Vehicle Commissioner, who wrote a letter to Mr. Edgerton, in which he stated that his department was governed by the weight of the bus as coming from the factory, provided, of course, this weight is accurate, exclusive of water, gasoline, tools and spare tires.

It seems that all of the States which have a motor bus law fix the license tax in this manner. Of course, you are familiar with that section of the bus law which provides that no city or town shall impose a license fee or license tax on any motor vehicle carrier for the use of streets or roads maintained by such city or town greater than the State license tax computed on the mileage basis.

Inasmuch, therefore, as the State of Virginia has fixed a certain license tax on busses operated by the Edgerton-Reo Bus Line, Inc., I am of the opinion that the city of Portsmouth cannot exact a higher tax.

With kindest personal regards of the writer, I am

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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#### **AUTOMOBILES—Operating without authority.**

RICHMOND, VA., *September 19, 1925.*

GEORGE B. WEST, ESQ.,  
*Attorney at Law,*  
*Cumberland, Va.*

DEAR SIR:

Acknowledgment is made of your letter of the 15th, in which you say:

"Please give me your interpretation of the word 'chauffeur' as used in the last paragraph of section 2132 of the Code.

"Would a party be liable for operating a car without license under this section who has no interest in the car? It seems to me that the owner would have to be liable, and the operator would have to be held under section 4480."

In reply, I beg to say that the interpretation of the word "chauffeur" in section 2132 appears to be the same as that of the same word used in section 2129 of the Code, which was construed by Honorable John Garland Pollard when Attorney General in the following language:

"Of course, the question you have asked is one of fact as every person other than the owner who operates a machine for pay must take out a chauffeur's license. I do not think that the fact that the chauffeur who runs an automobile truck is at the same time a laborer, performing any work a merchant may call upon him to do, in any way affects the question. If a part of his duty is to run an automobile truck, I think that it is necessary for him to procure a chauffeur's license."

As to the question of liability, I prefer not to express an opinion until it becomes necessary for me to do so officially. I do not hesitate to say, however,

that it would be safer for all persons to refrain from operating cars without due authority of law.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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### GAME AND INLAND FISHERIES—Dog tax and license.

RICHMOND, VA., *September 17, 1925.*

HON. J. T. FITZPATRICK,  
*Treasurer of Nelson County,*  
*Lovington, Va.*

MY DEAR MR. FITZPATRICK:

Acknowledgment is made of your letter of September 16, 1925, in which you say in part:

"I am writing asking your opinion whether I should issue a dog tag and license to a minor (who is not required to pay a capitation tax) when he lives at home with his parents, neither of whom have paid a capitation tax."

The answer to your question depends upon whether the dog belongs to the child or to the parents. If the dog is the property of the child he would be entitled to a license therefor without filing the certificate as to the payment of the capitation tax, as a minor is not assessable with the same. If on the other hand, the dog belongs to either of the parents the license should not be issued in the name of the child.

Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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### BOARD OF SUPERVISORS—Power of.

RICHMOND, VA., *September 17, 1925.*

MR. H. AMES DRUMMOND,  
*Accomac, Va.*

DEAR MR. DRUMMOND:

Necessary absences from my office since the receipt of your letter of recent date have prevented an earlier reply. You say:

"Will you please advise me whether the board of supervisors for Accomac county have the power to prohibit the killing of squirrel and dove prior to November 15. Said board has given no notice of said prohibition, but prosecutes gunners who gun in conformity with the State law."

In reply, I beg to say that the season for shooting squirrels is regulated by subsection (a) of section 3356 of the Code as amended by chapter 474 of the Acts of 1924, p. 755. The closed season is from January 31 to September 1. Subsection (b) of the same act concludes in these words:

"Provided, further, that the current closed season fixed in section second (subsections 'a' and 'b') may be lengthened only by fixing a date for same to take effect, as otherwise provided, earlier than prescribed in this act."

The seventh subsection of section 3356 (p. 758, Acts 1924) provides that the boards of supervisors may shorten the open season, which is the same thing as lengthening the closed season, on written petition of one hundred licensed resident hunters or landowners of such county, but it can only do so by fixing an earlier date for the closed season to begin than that which the statute provides. In other words, the open season can be shortened only by cutting off the latter part of the open season.

So far as the power of the board of supervisors to prohibit the killing of doves prior to November 15, it appears from subsection (b) of section 3356 that the closed season for mourning doves is between December 15 and September 1.

Under the provision already cited the board can shorten the open season by cutting off a part of its latter end, and it may under authority of subsection seven terminate the current hunting season at any time by giving ten days' notice in a newspaper published in the county or adjoining county or city (if there be none published in the county).

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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### HOSPITALS—Arrest of escaped insane persons.

RICHMOND, VA., September 4, 1925.

DR. G. W. BROWN, *Superintendent,*  
*Eastern State Hospital,*  
*Williamsburg, Virginia.*

MY DEAR DR. BROWN:

Acknowledgment is made of your letter of recent date with which you send me a copy of a letter written to you by the sheriff of Dinwiddie county, with reference to the arrest of insane persons who escaped from your hospital. In this letter, the sheriff says in part:

"I suppose one of your inmates, Herbert H. Doyle, is now back at your hospital. I made a search for him here and in Petersburg, Va., and as you know, he was caught at his old home here. I think I am entitled to some compensation for my services in the search, and I think \$10.00 would be a reasonable fee. You can let me have a check for this, which I would duly appreciate."

You further advise me that there is no provision in your budget for such an expense.

Section 1044 of the Code of 1919 provides as follows:

"If any person confined in any hospital or colony escape therefrom, the superintendent may issue a warrant directed to any officer authorized to make arrests, whose duty it shall be to arrest said escaped person and carry him back to said hospital or colony or to such other place as may be designated by the superintendent of said hospital or colony, there to be delivered to said superintendent or his authorized agent, and the said officer to whom said warrant is directed, may execute the same in any part of the Commonwealth."

While this section makes it the duty of an officer to arrest persons escaping from an insane hospital, it provides no compensation therefor.

Section 1027 of the Code of 1919, as amended, which seems to be the only other statute bearing on this subject, provides in part as follows:

"The cost of conveying persons committed to any hospital or colony, except those committed to the department for the criminal insane, from the railroad station or steamboat landing designated by the superintendent of such hospital or colony shall be paid from the funds appropriated for the support of the said hospital or colony. Unless authorized to do so by the Commissioner of State Hospitals or superintendent of a hospital or colony, no officer shall be allowed anything for carrying an insane, epileptic, feeble-minded or inebriate person to or from any hospital or colony, either for himself or the insane, epileptic, feeble-minded or inebriate person."

I have been unable to find any provision in the law which would authorize the payment of the claim presented by the sheriff. In the absence of some specific authority, you would not be justified in paying for such service, although some provision ought to be made for the compensation of the sheriff.

Trusting that this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,

*Attorney General.*

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## JAILS AND PRISONERS—Duration of time.

RICHMOND, VA., *September 4, 1925.*

MAJOR R. M. YOEUELL,

*Superintendent of the Penitentiary,*

*Richmond, Virginia.*

MY DEAR MAJOR YOEUELL:

Acknowledgment is made of your letter of recent date in which you enclose a copy of the order of the circuit court of Surry county sentencing one Joe Goode to the convict road force, and certain correspondence in connection therewith. You then say: "I would like to know whether Joe Goode is to be held twelve months or eighteen months?"

It appears from the order of the circuit court of Surry county entered on November 25, 1924, that Joe Goode was convicted under a felony indictment for

violation of the prohibition law, and his punishment fixed at confinement in jail for six months and a fine of \$150.00. Under authority of section 8 of the Virginia prohibition law, the court sentenced Goode to serve as a member of the convict road force for a period of six months and until his fine and costs were paid, and, in the event the fine and costs were not paid, for an additional term of six months.

First, it appears from this order that Joe Goode must serve as a member of the convict road force a sentence of six months less the time spent in jail and the time to which he is entitled for good behavior; second, that he must serve an additional time, after the expiration of his jail sentence, at the rate of fifty cents per day, as provided by section 2095 of the Code of 1919, until such fine and costs be paid in full. The period for which he is held for the nonpayment of the fine and costs, however, is limited to six months. If, at the expiration of the six months' period, or prior thereto, Joe Goode has paid his fine and costs either by his labor or in money, he is entitled to a discharge, since the additional period of six months for the nonpayment of the fine and costs can be exacted only in those cases in which they have not been paid. *Gilreath v. Commonwealth*, 136 Va. 709 (1923); see the opinion of the Attorney General to you dated June 30, 1925.

Third: If, however, at the end of the second six months' period Joe Goode has not paid his fine and costs in the manner provided by section 2095 of the Code of 1919, or in money, it will be necessary to hold him for an additional six months, or until such time as he does pay the fine and costs in full.

I am returning the papers requested.

Trusting that this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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## JAILS AND PRISONERS—Ordinance relating to good behavior.

RICHMOND, VA., *September 17, 1925.*

HON. R. M. LETT,  
*City Attorney,*  
*Newport News, Va.*

DEAR MR. LETT:

I returned to the office on Saturday from attending the session of the court at Staunton, but was obliged to go to Saluda and later had to return to Staunton to enter my daughter in a school there. You will understand, therefore, my delay in replying to yours of the 5th.

I have carefully considered the sections of the Code to which you refer, and have arrived at the following conclusions:

Section 5017, allowing Penitentiary convicts ten days a month for good behavior, with the consent of the Governor, is administered through the superintendent, who keeps a record of the conduct of each convict. This provision appears to have been made in 1916.

Sections 2859 and 2860 are statutes older than the other two sections amended in 1920 to allow them the same credit for good behavior as had previously been granted to the convicts in the Penitentiary. These jail prisoners while members of the convict road force are under the supervision and control of the Penitentiary, as are the convicts sent to the Penitentiary itself. He keeps the record of their behavior in the same manner as he does the behavior of the Penitentiary convicts, and, I presume, has no more difficulty in one case than in the other in securing the consent of the Governor to the allowance, which, I assume, is given in a general way and not necessarily with reference to each individual case.

Section 2859 and 2860 are statutes older than the other two sections mentioned, having been last amended in 1910. They relate to prisoners over whom the superintendent of the Penitentiary has no supervision or control. In their case the consent of the Governor is not necessary, but the consent of the judge is. Presumably those sections apply only to those prisoners who remain idly in jail, and it is to be presumed that the legislature considered this fact when they gave a larger allowance to prisoners actively engaged in useful labor.

I see no reason why the council of a city which has plenary power to pass ordinances in relation to certain crimes, and provide punishment for violations thereof, may not make an allowance for good behavior to those violators of ordinances who are actively employed in useful labor. It seems to me that such a regulation would be in accord with the policy already adopted by the legislature of the State in relation to those Penitentiary and jail prisoners under the control of the superintendent of the Penitentiary. The underlying reason for such a policy appears to be the offering of an extra inducement to good behavior and a strict observance of rules, which are not so easily enforced in the case of prisoners not locked in cells but working out in the open. Moreover, it is a humane policy in line with modern legislation in regard to the treatment of prisoners, since the object of punishment is not so much as to inflict suffering as to encourage improvement in conduct and character.

Upon a full consideration of the whole subject, although from a strict construction of the statute, the matter is not free from doubt, I believe the doubt should be resolved in favor of what appears to be the wiser policy in dealing with this class of delinquents.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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#### FOREIGN JUDGMENT—Docketing of.

RICHMOND, VA., *August 10, 1925.*

MR. GEORGE S. DOWELL,  
*Attorney at Law,*  
*Austin, Texas.*

DEAR SIR:

Acknowledgment is made of your letter of August 6, 1925, in re: The docketing of a Texas judgment in this State.

The only statutes which we have in this State relating to foreign judgments are section 5819 and 6205 of the Code of Virginia, 1919. The first is the statute of limitations on foreign judgments, and the second reads as follows:

"The records and judicial proceedings of any court of the United States, or of any State, or of any country subject to the jurisdiction of the United States, attested by the clerk thereof, with the seal of the court annexed, if there be a seal, and certified by the judge, chief justice, or presiding magistrate of such court, to be attested in due form, shall have such faith and credit given to them in every court within the State, as they have in the courts of the State, territory, or district when the said records come."

No provision appears to be made for the docketing of a foreign judgment, although under section 6205 you would be entitled to bring a suit on the same, filing a *lis pendens*.

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

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**ELECTIONS—Recount of votes.**

RICHMOND, VA., August 10, 1925.

HON. A. B. SCOTT, JR.,  
*Windsor, Va.*

DEAR SIR:

Acknowledgment is made of your letter, in which you ask me to advise you as one of the commissioners of election for Isle of Wight county what to do where objection is made to the commissioners of election opening the returns and ascertaining therefrom the candidates who received the greatest number of votes in your county.

You also ask whether the judges from the various precincts can correct minor errors in their returns.

Your questions are answered by provisions of sections 239 and 240 of the Code of Virginia, Virginia Election Laws, p. 71, copy of which I herewith enclose. Of course, objection made by a candidate to the commissioners performing any act which is required by law cannot prevent the commissioners of election from performing the duties enjoined on them by law. The duty imposed upon the commissioners of election, however, is not to count the ballots, which duty is imposed on the judges of election, but is limited to the opening of the returns which have been made from the various precincts by the judges and clerks as required by law, and to ascertain from the returns so made the candidates who have received the greatest number of votes in the county or city.

As I understand the law, the ballots can be recounted only when an official recount has been ordered. You will see from section 240 of the Code how irregularities in any election returns may be corrected. Of course, if the judges and clerks are present at the meeting of the board there is no necessity of having them summoned.

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

**INTOXICATING LIQUORS—Fee for Commonwealth's attorney.**RICHMOND, VA., *September 2, 1925.*

HON. V. L. SEXTON,  
*Attorney at Law,*  
*Bluefield, Va.*

MY DEAR MR. SEXTON:

Acknowledgment is made of your letter of August 27, 1925, in which you ask to be advised whether a justice of the peace trying a misdemeanor prohibition case would be authorized to tax a fee for the Commonwealth's attorney in any case where the Commonwealth's attorney did not appear.

You will observe that under the provisions of section 33 of the Layman prohibition law a justice is authorized to try misdemeanor prohibition cases and finally dispose of the same only in the presence of the attorney for the Commonwealth. Of course, this provision does not apply to drunkenness nor preliminary hearings.

It is my opinion that no fee should be taxed for the attorney for the Commonwealth in the justice court in prosecutions for violating the prohibition law where the Commonwealth's attorney does personally appear and conduct the case. (See section 46 of the Layman prohibition law).

Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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**POLICE FORCE—Deputize members of.**RICHMOND, VA., *September 2, 1925.*

HONORABLE LUTHER PANNETT,  
*Sheriff of Frederick County,*  
*Winchester, Va.*

MY DEAR MR. PANNETT:

Acknowledgment is made of your letter of recent date in which you say in part:

"I have been in the habit of taking a couple of the Winchester policemen with me on whiskey raids in the county principally of a night when they were off of duty and for the reason that they were experienced men and not afraid and were the best I could get hold of. The mayor of the city of Winchester has issued an order that he would dismiss any policeman that I would deputize for to assist me. It has always been my understanding that under the law the sheriff had a right to deputize anybody he saw fit, and on their refusal to act that there was a heavy penalty attached to it. I am writing to you for your opinion in this matter whether I am right or whether the mayor is right."

This matter is governed by section 4511 of the Code of Virginia, 1919, which reads as follows:

"If any person, on being required by any sheriff or other officer, refuse or neglect to assist him in the execution of his office in a criminal case, or in the preservation of the peace, or the apprehending or securing of any person for a breach of the peace, or in any case of escape or rescue, he shall be confined in jail not exceeding six months, and be fined not exceeding one hundred dollars."

While this section is extremely broad, I do not think it was intended to authorize the sheriff or other officers to deputize the police force of another locality for the purpose of being used on prohibition raids as outlined in your letter.

Police officers are employed by a municipality for the purpose of maintaining order and protecting the public of that locality. It is easy to see how the sheriff could deprive the municipality of all police protection if it was held that this statute was broad enough to permit him to deputize the police force of the municipality for the purposes stated in your letter.

I think that the General Assembly in enacting section 4511 of the Code never intended any such result as this to follow, and, therefore, it is my opinion that a municipal policeman is not such a person as could be deputized by the sheriff under section 4511 of the Code of Virginia, 1919, for service outside of the municipality.

Trusting this gives you the desired information, I am

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

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#### **SCHOOLS—Teachers eligible to election to General Assembly.**

RICHMOND, VA., *September 4, 1925.*

MR. HENRY A. WISE,  
*Craddockville, Va.*

MY DEAR SIR:

I am just in receipt of your letter of September 3, in which you ask the following questions:

"Is a teacher in the public schools of Virginia eligible to election to the Virginia legislature?"

"Is a member of a non-State college faculty eligible to election to the Virginia legislature from the district or county in which he holds his legal residence, even though the college in which he teaches is not in his home district?"

In reply to your first question, I would state that there is nothing in the law which prohibits a teacher in the public schools from being a candidate for the legislature, provided, of course, the person is otherwise qualified.

In reply to your second question, I would state that the Court of Appeals has decided in the case of *Williams v. Commonwealth*, reported in 116 Va. 372, that the question of residence is a question of intention. It, therefore, follows that one who is away from his legal residence or home and teaching elsewhere

does not lose his residence on account of such occupation. This being the case, the party in question would be eligible for election to the Virginia legislature, provided, of course, he is otherwise qualified.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

## GAME AND INLAND FISHERIES—Domestic animals.

RICHMOND, VA., September 2, 1925.

HON. McDONALD LEE, *Commissioner,*  
*Game and Inland Fisheries,*  
*Richmond, Va.*

DEAR SIR:

Acknowledgment is made of your letter of recent date, in which you say:

"Anent the facetious newspaper discussion about fowls being domestic animals, I desire to call your attention to subsection (4) of chapter 413 of the dog law, to be found at bottom and top of pages 92 and 93 of the enclosed digest of dog laws.

"In the enforcement of this section, kindly give me your opinion as to fowls being domestic animals and if they fall under the category of sheep and other quadrupeds.

"Beg leave to quote the following from 'Corpus Juris,' Volume 3, top page 16:

"'Particular creatures included. The word has been held to include bees, deer, foxes, otter, dogs, horses, domestic fowls generally, doves, chickens, turkeys, ducks, geese, rooks, fish and turtles.'"

In reply, I beg to say that an examination of subsection (4) of chapter 413 of the Acts of 1920 (page 602) shows it the duty of game wardens in regard to a dog "found killing, injuring or chasing sheep, or killing or injuring any domestic animal \* \* \*" and provides that a warden shall kill such a dog on sight.

Subsection (5) of the same chapter provides that compensation may be received by any person, firm or stock company taxed by the State "who shall have any stock or fowl killed or injured by any dog." By omitting the word fowl in subsection (4) and incorporating it in subsection (5), it is evident that the legislature did not intend that fowls should be included among the domestic animals mentioned in subsection (4). The reason for this distinction is evident. To allow a very valuable dog to be killed at sight by a warden for destroying a chicken of insignificant value would be obviously absurd. On the other hand, there can be no objection to persons who lose fowls by the depredation of dogs collecting compensation therefor.

It is quite true that the term "domestic animals" has been held to include nearly every kind of living thing capable of being used for food or sport, according to the intent of various statutes, which should as far as possible govern the construction. In the case under consideration I am satisfied that the legislature did not intend to include fowls under the general classification of "domestic animals" as used in subsection (4) of chapter 413 of the Acts of 1920.

My recent opinion in regard to fowls has been misunderstood by those not familiar with the laws governing the respective duties of the State Veterinarian and of the Dairy and Food Commissioner. The point involved in that case was as to the proper construction of the words "agricultural products."

However, it would be perfectly in accord with the best statutory construction to hold that under one statute the words "domestic animals" should include fowl, and under another statute, having a different purpose, the same words should be held not to include fowls. The intention governing the enactment of a statute and the objects to be accomplished should determine the construction to be placed upon the statute, so that the law may be applied in a common sense manner to attain the objects desired.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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### CHECKS—Certification of.

RICHMOND, VA., *August 31, 1925.*

HON. C. LEE MOORE,  
*Auditor of Public Accounts,*  
*Richmond, Virginia.*

MY DEAR MR. AUDITOR:

Acknowledgment is made of your communication of recent date with which you return the bond which I prepared at your request for Honorable F. W. Huddleson, treasurer of Fairfax county, in re the certified check lost in transit between his office and yours.

Of course, I know nothing about the merits of the controversy that appears to exist between Dr. Huddleson and Mr. Downs of your office as set forth in Dr. Huddleson's letter to him of August 6, 1925. Dr. Huddleson, however, is mistaken in saying that the check was certified for the benefit of the State. The certification of the check was obtained by him for his benefit, and to enable him to comply with section 2165 of the Code of 1919. Under this section, payments can be made into the treasury only by way of certified checks, or certificates of deposit, and a check certified for this purpose is not for the benefit of the State, but for the benefit of the person who is required by law to pay the money into the treasury, and any loss resulting from this certification of the check, before it has been paid into the treasury, must of necessity fall on the person for whose benefit the check was certified. Therefore, it is my opinion that it is up to Dr. Huddleson to furnish the necessary bond to the bank so that a duplicate check may be issued and the fund in question paid into the treasury.

As a practical matter, I do not see how Dr. Huddleson incurs much risk of loss, as a certified check made payable to the Treasurer of Virginia, as required by law, could be collected only on the valid endorsement of the Treasurer of Virginia. Of course, Dr. Huddleson is aware of the fact that the Commonwealth of Virginia would not, after receiving payment of a duplicate check, cash or even attempt to cash his certified check if it subsequently turned up, nor could the

State do this without subjecting itself to liability to Dr. Huddleson. Code section 2578.

Trusting that this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,

*Attorney General.*

## COUNTY ELECTORAL BOARD—Power of.

RICHMOND, VA., August 31, 1925.

HON. VERNON B. TATE,

*Commonwealth's Attorney,*

*Wise, Virginia.*

MY DEAR MR. TATE:

Acknowledgment is made of your letter of recent date, in which you ask the following questions:

"1st: In the appointment of school trustees by the county electoral board in the year of 1922, did the county electoral board have the authority to limit the term of appointment less than three years?"

"2nd: Should a vacancy occur after the first day of September, 1922, has the judge under section 644b any power to appoint for any term longer than the first day of September, 1925, the unexpired term of the vacancy of said member of said school board?"

In response to your first question, I am sending you a copy of an opinion given by me on September 5, 1923, to Hon. William Stanley Burt, Commonwealth's attorney, Claremont, Virginia (Report of the Attorney General, 1922-23, pages 310-11).

In response to your second question, section 644b of the Code of Virginia, 1924, provides that such vacancies "shall be filled for the unexpired term by appointment by the judge of the circuit court." Therefore, appointments made by the judge between September 1, 1922, and September 1, 1925, would expire on September 1, 1925.

I am rather inclined to the opinion that so much of section 632 of the Code as is in conflict with section 644b of the Code of Virginia, 1924, has been repealed by the latter section.

With my best wishes, I am

Sincerely yours,

JOHN R. SAUNDERS,

*Attorney General.*

**INSURANCE OF COUNTY PROPERTY—By mutual insurance companies.**RICHMOND, VA., *August 31, 1925.*

HON. J. J. FRAY,  
*Division Superintendent of Schools,  
Rustburg, Virginia.*

MY DEAR MR. FRAY:

Acknowledgment is made of your letter of recent date, in which you call attention to my opinion given Dr. W. E. Brown, of the Blue Ridge Sanatorium, Charlottesville, Virginia, with reference to his right to insure State property with a mutual insurance company. You ask to be advised whether this opinion would apply to the insurance of county property with a mutual insurance company.

While county property is not, strictly speaking, the property of the State, the county is a political subdivision of the State and, as such, a part thereof. It seems to me that the same reasoning which applies to the prohibition on the part of the State insuring its property with a mutual insurance company, which is based on the theory that the State is not authorized to incur partnership obligations, or obligations in the nature of a partnership liability, would apply to county property.

Sincerely yours,

JOHN R. SAUNDERS,  
*Attorney General.*

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**BOARD OF SUPERVISORS—Authority to call election for road bonds.**RICHMOND, VA., *August 30, 1925.*

J. D. ESTES, JR., ESQ.,  
*Cascade, Virginia.*

MY DEAR MR. ESTES:

Acknowledgment is made of your letter of recent date, in which you request me to advise you whether a district supervisor has the authority to call an election for or against road bonds.

This matter is governed by chapter 89 of the Code, as amended. Section 2110 of the Code, as amended, provides that the circuit court of the county, or the judge thereof in vacation, may, upon the petition of a majority of the board of supervisors of said county, or upon the petition of 150 freeholders of said county, order a special election to be held. In some counties special bond issue laws exist authorizing the board of supervisors to issue bonds without an election. In the absence of a special law, however, proceedings would have to be as provided by chapter 89 of the Code, as amended.

Chapter 34 of the Code authorizes bond issues for the erection of school houses. Such elections are ordered by the judge on resolutions of the school board and the board of supervisors. See Code section 765, *et seq.*

In response to your second question, I call your attention to section 647 of the Code of Virginia, 1924, which reads as follows:

"The county school fund shall be apportioned by the county school board among the several districts of the county, according to its judgment, having due regard to maintaining, as far as practicable, a uniform term throughout all of the districts; provided, that such primary and grammar schools as may be established in any school year shall be maintained at least four months of that school year before any part of the fund assessed and collected may be devoted to the establishment of schools of a higher grade."

Yours very sincerely,

JOHN R. SAUNDERS,  
*Attorney General.*

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### **AUTOMOBILES—Parking in Capitol Square.**

RICHMOND, VA., August 24, 1925.

HON. E. LEE TRINKLE,  
*Governor of Virginia,*  
*Richmond, Va.*

DEAR GOVERNOR:

Acknowledgment is made of your letter of the 17th, in which you say:

"Will you please advise me what authority has the Superintendent of Public Grounds and Buildings, or I, as Governor, over the Capitol Square as to its use by automobilists?"

In reply, I beg to say that, in my judgment, the answer to your question is found in section 410 of the Code relating to the duties of the Superintendent of Grounds and Public Buildings, which is in part as follows:

"He shall have control of the Capitol Square, subject to the orders and approval of the Governor, and the expense of keeping the same in order shall be paid by him out of the fund appropriated for that purpose. \* \* \*"

It is clear to my mind that the control given the Superintendent of Public Grounds and Buildings by this section, always subject to the approval of the Governor, extends to the use of the Capitol Square by automobilists and would justify him in issuing such orders or regulations as would prevent the overcrowding of the square by the parking of automobiles by persons having no connection or business with the offices located in the square.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

**MOTOR VEHICLE CARRIERS—Class “C” Certificate.**RICHMOND, VA., *August 7, 1925.*

HON. JOSEPH A. BILLINGSLEY,  
*Commonwealth's Attorney,*  
*King George C. H., Va.*

MY DEAR MR. BILLINGSLEY:

Acknowledgment is made of your letter of recent date, in which you request my opinion on the following statement of facts:

“The question is whether or not the owner of a truck who does not regularly engage in the business of hauling for compensation can haul an occasional load of produce for his neighbor for compensation without paying the license.

“We have a case here of a man who owns a truck and this summer hauled four loads of wheat to Fredericksburg for his neighbor, receiving pay for same. He is not engaged in the business of hauling, and there is a question as to whether or not he should have first obtained a license as a motor vehicle carrier.

“Does this law apply to regular carriers or to the truck owner who merely hauls a load occasionally?”

Under rule 66 of the regulations issued by the State Corporation Commission, with reference to motor vehicle carriers, it is provided that persons who operate vehicles exclusively in transporting agricultural and horticultural or other farm products from the point of production to the market or shipping point shall not be required to obtain a class “C” certificate. It would, therefore, appear that the man referred to is not required to obtain a certificate.

For your information, I am sending you a copy of the Commission's rules.

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

**ELECTIONS—Capitation requirements—absent voters' law.**RICHMOND, VA., *August 13, 1925.*

J. J. HOLZBACH, ESQ., *Registrar,*  
*332 50th Street,*  
*Newport News, Virginia.*

MY DEAR MR. HOLZBACH:

Acknowledgment is made of your letter of August 9, 1925, in which you request my opinion on the following questions:

“First: Can a man or woman voting on their age pay their taxes and vote in any election, if he or she does not pay their taxes six months prior to the election? My contention is, that all taxes must be paid six months prior to an election. As they knew that they would be of age by the time the election would be held, they could go and be assessed and pay their taxes. Some contend that they can pay their taxes anytime and vote on their age.

"Second: What disposition should be made of absent voters' ballots that arrive too late to be counted in the regular returns? I can find nothing in the Code as to the disposition of these ballots."

Responding to your first question, the only capitation taxes which one is required to pay six months prior to the election in Virginia, as a prerequisite to the right to vote, are those taxes which are assessed or assessable against him during the three years next preceding the year in which he offers to vote. Capitation taxes are assessed as of the first day of February of each year. Therefore, where one came of age after the first day of February, 1924, the first capitation tax with which he was assessed or assessable would be for the year 1925. 1925 not being one of the three years preceding the year 1925, such tax does not have to be paid six months in advance as a prerequisite to the right to register and vote during the year 1925. It may be paid on the day of the primary and, except in cities having a population of 100,000 or more, such person, if otherwise qualified, would be entitled to register and vote on the day of the primary. See section 93 of the Code (Virginia Election Laws, page 20). Of course, in the case of one coming of age, who desires to vote for the first time in the general election, he must pay his capitation tax and register prior to the closing of the registration books for that election.

In response to your second question, it is my opinion, after a careful examination of the absent voters' law, Code sections 202-218, as amended, that an absent voter who mails his ballot so as to arrive too late to be counted as prescribed by that law, loses his vote just as a voter who is not absent but who comes to the polls after the closing hour.

Sincerely yours

JOHN R. SAUNDERS,  
*Attorney General.*

#### **ELECTION—Registration of voters on day of election.**

RICHMOND, VA., *August 8, 1925.*

MR. T. L. OLIVER,  
*Lynch Station, Va.*

MY DEAR SIR:

Acknowledgment is made of your letter of August 5, 1925, in which you request me to advise you whether a person entitled to register and vote can register on the day on which the primary election is held.

The answer to your question is governed by section 98 of the Code of 1919, which provides that in the counties the registration books shall be closed after thirty days previous to the November election until after the general election has been held. At all other times, except the period between the regular day of registration in October and the holding of the November election, the registration books are open.

Section 98 of the Code provides, in part:

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

Therefore, one entitled to register and vote in the November, 1925, election, was entitled to register on the day on which the August, 1925, primary election was held. Section 98a of the Virginia Election Laws, Acts of 1923, page 102, has no application to counties, and, therefore, does not affect this question.

Trusting that this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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**BOARD OF PUBLIC WELFARE—Dependent and neglected children.  
children.**

RICHMOND, VA., August 7, 1925.

DR. J. T. MASTIN, *Commissioner,  
State Board of Public Welfare,  
Richmond, Virginia.*

MY DEAR DR. MASTIN:

Acknowledgment is made of your letter of August 4, 1925, in which you request me to advise you whether your board is compelled to accept dependent and neglected children who are committed to your board, under authority of section 1910 of the Code of 1919, as amended, by the juvenile courts throughout the Commonwealth. You state that your funds are not sufficient to handle the number of dependent and neglected children who are being committed by these courts to your board, and that, in your opinion, these children should be provided for by the localities from which they come.

Sections 1905-1923, inclusive, of the Code of Virginia, 1919, as amended, give to the juvenile and domestic relations courts of the Commonwealth exclusive original jurisdiction of cases of delinquent, dependent or neglected children, with power to make disposition of the same. There is a distinction between delinquent children who, but for the above-cited Code sections, would be treated as criminals, and neglected and dependent children who are merely children having no one capable or willing to take care of them, or who are more or less dependent upon the public for support. The latter class of children in the absence of juvenile and delinquent laws, unlike the delinquent children, could in no sense be regarded as criminals.

Under the provisions of section 1910 of the Code of 1919, as amended, a dependent, delinquent or neglected child may be allowed to remain in its home on probation, may be placed in some other home, or may be committed to the State Board of Public Welfare, but all delinquent children intended to be placed in a State institution must be committed to the State Board of Public Welfare, the statute declaring "it being the purpose of this chapter to make said board the sole agency for the guardianship of *delinquent* children committed to the State." (Italics supplied.)

Section 1912 of the Code of 1919, as amended, authorizes the juvenile courts of the Commonwealth to compel parents, guardians and other persons liable for the support of dependent, delinquent or neglected children, to furnish support for the same.

The clear intent of the law, in my opinion, is that even delinquent children should not be committed to the State Board of Public Welfare except as a last resort. Of course, the General Assembly having failed to make provision for the State Board of Public Welfare to care for the dependent and neglected children of the State, it is my opinion that the language of section 1910 of the Code of 1919, as amended, was intended to authorize the juvenile courts to commit such children, as are properly chargeable to the locality and not to the State, to the State Board of Public Welfare only with the consent of that board.

It is true that this section of the Code is badly worded and not entirely clear in its meaning, but, in my opinion, the General Assembly never intended to require of the State Board of Public Welfare an impossibility, nor could I hold, in the absence of unmistakable legislation on the subject, that the intent of the General Assembly was to transfer the burden of carrying for the poor, if they happen to be juveniles, from the locality to the Commonwealth.

Trusting that this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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#### ARCHITECTURE—License to practice.

RICHMOND, VA., *August 13, 1925.*

MR. W. LEIGH CARNEAL,  
*Va. Rwy. and Power Bldg.,  
Richmond, Virginia.*

MY DEAR MR. CARNEAL:

Acknowledgment is made of your letter of August 10, 1925, in which you ask the following question:

“Can any one in the State of Virginia practice architecture without first procuring a State license from the State Board governing same after January 1, 1925?”

Section 3145-a of the Code of Virginia, 1924, provides for a State Board of Examiners of architects and certain engineers. Section 3145-1 of the same Code provides that, after January 1, 1925, the practice of architecture, or the use by any person of the title of architect, or the use of any word, figure or letters, indicating or intended to imply that the person using the same is an architect, without compliance with the provisions of this act (chapter 125-a of the Code of Virginia, 1924), shall be deemed a misdemeanor and punished by a fine.

This section also declares that the term architect shall be deemed to cover an architect or an architectural engineer.

You will, therefore, see that your question should be answered in the negative.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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#### OFFICERS—Eligibility to appointment of United States Commissioner.

RICHMOND, VA., *August 17, 1925.*

EDWIN F. CLEMENTS, ESQ.,  
*Union Trust Bldg.,  
Petersburg, Va.*

DEAR SIR:

Acknowledgment is made of yours of the 13th, in which you say:

"I am writing to inquire if, in your opinion, I am eligible to appointment as United States commissioner for the city of Petersburg.

"I am at present civil and police justice of Petersburg and the law under which I was elected provided that 'a special justice of the peace shall be elected to be known as the civil and police justice.'"

In reply, I beg to say that, inasmuch as section 291 of the Code of Virginia provides that United States commissioners may act as justices of the peace, and since the position of civil and police justice is included in the general classification known as justices of the peace, I am of the opinion that you are eligible to appointment as United States commissioner for the city of Petersburg.

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

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#### COMMISSION OF FISHERIES—Right to employ counsel.

RICHMOND, VA., *August 19, 1925.*

HON. C. LEE MOORE,  
*Auditor of Public Accounts,  
Richmond, Va.*

DEAR MR. MOORE:

Acknowledgment is made of your recent letter in which you say in part:

"The Commission of Fisheries has drawn upon its appropriation warrant No. 4055 for \$400.00, payable to Cardwell and Cardwell, for balance of fee for legal services in suit of *Steelman, Inspector, et als., v. Field.*

"I wish your opinion on two points:

"1. Was not this a case in which the Attorney General should have represented the Commonwealth because of the importance of the question involved, and not one for employment of special counsel?

"2. Is this warrant for legal services one which is legal and proper to be charged against the appropriation to the Commission of Fisheries,

and one which I am legally authorized to pay out of appropriation to the Commission of Fisheries?"

Replying to your first question, I beg to say that this appears to have been a proper case for the employment of special counsel by the Commission of Fisheries. Section 3154 of the Code relating to the employees of Commission of Fisheries, provides, among other things: "The said commission is also authorized to employ the services of surveyors and attorneys whenever it is deemed advisable."

My construction of this language is that the commission is the judge of the advisability of such employment, which can only be called in question in cases of the manifest abuse of such discretion. I do not consider this such a case. It is not feasible for the Attorney General's office to examine titles to oyster grounds and appear in trial courts to test questions of titles to such grounds.

Replying to your second question, I would say that in my judgment this warrant should be paid out of and charged against the appropriation to the Commission of Fisheries.

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

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#### CLERKS OF COURTS—Fees.

RICHMOND, VA., *August 26, 1925.*

HON. FLOYD HOLLOWAY,  
*Yorktown, Va.*

MY DEAR MR. HOLLOWAY:

I acknowledge receipt of your letter of recent date, in which you ask for construction of section 3506 of the Code of Virginia, which section deals with the fees of the clerks of courts in the trial of felony cases.

In your letter you state that at the June term of the circuit court of York county three men were jointly indicted and tried at the August term 1925. You do not state in your letter whether these parties were jointly tried or not. If they were, then there was only one case. Under construction of section 3506, which provides for each case of felony tried in his court to be charged only once, the clerk is entitled to a fee of \$2.50. The legislature amended section 3505, which pertains to the fees of attorneys for the Commonwealth, and provided there where two or more persons were jointly indicted or jointly tried for a felony, the Commonwealth's attorney should be paid \$10.00 for each person more than one so jointly tried (see Acts of Assembly, 1924, p. 687). But section 3506 which deals with the fees of clerks was not amended.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

**STATE HIGHWAYS—Jurisdiction of localities over.**RICHMOND, VA., *August 28, 1925.*

HON. JEFF F. WALTER,  
*Commonwealth's Attorney,*  
*Accomac, Va.*

MY DEAR MR. WALTER:

Acknowledgment is made of your letter of August 3, 1925, in re: The authority conferred upon the board of supervisors of your county by chapter 426 of the Acts of 1924. This letter should have been acknowledged at an earlier date, but it reached the office at a time when we were engaged in the preparation of the Commonwealth cases pending on the docket of the Court of Appeals at Staunton. Until these briefs were finished it was impossible for us to consider other matters, hence the delay.

It appears from your letter that you wish to be advised as to the following matters:

1. Whether chapter 426 of the Acts of 1924 authorizing the board of supervisors of the various counties to enact special and local legislation "for the protection of the public roads, ways and bridges of the said counties, and for the regulation of traffic thereon" is broad enough to cover portions of the State highway system lying in those counties passing such ordinances.

2. Whether county police have the right to make arrests for violations of the law committed on said State highways.

3. If such officers have the right to make arrests on the said State highways, can the persons arrested be prosecuted under the State law and the rules and regulations passed by the State Highway Commission pursuant to the provisions of chapter 448 of the Acts of 1924?

After carefully examining chapter 426 of the Acts of 1924, section 31 of chapter 316 of the Acts of 1922 providing for the establishment of a State highway system, chapter 448 of the Acts of 1924 amending the act relating to the Highway Commission, and chapter 2144 of the Code of 1919 as amended, I have reached the conclusion that the General Assembly intended to place the roads of the State highway system in a different classification from the other roads of the State, which, while State highways, are designated as county roads.

Section 31 of chapter 316 of the Acts of 1922 provides that the roads of the State highway system shall be established, constructed and maintained exclusively by the State. Chapter 448 of the Acts of 1924 has authorized the State Highway Commission to make rules and regulations not in conflict with the laws of the State for the protection of and covering traffic on, and use of the State highway system, which rules and regulations are declared to have the force and effect of law, and a violation thereof is made a misdemeanor. This act also makes one damaging the roads of the State highway system civilly liable to the Commonwealth for such injury. This act further provides "in order properly to enforce such rules and regulations \* \* \* the commission is given the power to designate and appoint any or all the employees of the commission special policemen with the powers of a sheriff for the purpose aforesaid."

These statutes so unmistakably show an intent on the part of the General Assembly to provide for the protection and use of the roads of the State highway system, or to authorize its State Highway Commission so to do, I could not

hold, in the absence of express statutory authority to the contrary, that the legislature intended at the same time that the several counties of the State should have similar rights with reference to the roads of the State highway system.

While it is true that chapter 426 of the Acts of 1924 does use the expression "roads of the Commonwealth," in my opinion this was intended to mean roads of the Commonwealth other than roads of its State highway system, which had already been amply provided for so far as the matters found in chapter 426 of the Acts of 1924 are concerned.

As I have said, all of the roads in the Commonwealth including the streets of the several municipalities belong not to the locality but to the Commonwealth.

*N. & W. R. Co. v. Supervisors*, 110 Va. 95 (1909).

*Norfolk City v. Chamberlaine*, 24 Gratt. (70 Va.), 534, 538 (1877).

*Yates v. Town of Warrenton*, 84 Va. 337 (1888).

*Fry v. County of Albemarle*, 86 Va. 195 (1890).

In view of the statutes above cited, it is my opinion that chapter 426 of the Acts of 1924, especially when it is read in connection with its title, was intended to apply only to the public roads, ways and bridges of the several counties not embraced in the State highway system.

Answering your second question, I am of the opinion that county police officers are State officers, *Burch v. Hardwicke*, 30 Gratt. 24 (1878), and, therefore, have the right and power to arrest persons violating State laws and the rules and regulations of the State Highway Commission issued pursuant to the power conferred thereon by provisions of chapter 448 of the Acts of 1924. Persons so arrested must be tried, however, for violation of the State law or of the rules and regulations of the State Highway Commission, and the fines paid into the public treasury.

Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,

*Attorney General.*

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**PROHIBITION OFFICER—His duty in re publishing names of persons giving information.**

RICHMOND, VA., August 3, 1925.

MR. JOHN LEAKE,  
*Spencer, Henry County, Va.*

MY DEAR SIR:

Acknowledgment is made of your letter of August 1, 1925, in which you ask whether it is the duty of a prohibition officer to publish the names of persons giving him information as to violations of the prohibition law.

This would depend upon the circumstances. There might be instances in which an officer should disclose the source of his information. As a general rule, however, unless the party making the disclosure is required as a witness in court, there is no necessity for divulging the name, and the Court of Appeals

held in *Webb v. Commonwealth*, 137 Va. 833, that an officer could not be compelled on cross-examination to divulge the source of his information.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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### REALTY—Curtesy of husband.

RICHMOND, VA., August 3, 1925

MRS. L. H. BAXTER,  
*Loomis,*  
*Placer County,*  
*California.*

MY DEAR MADAM:

Acknowledgment is made of your letter of July 27, 1925, in which you ask whether the husband is entitled to curtesy in his wife's real estate.

Under the provisions of section 5139a of the Virginia Code of 1924 the husband is entitled to curtesy in his wife's real estate, it being limited by this section, however, to one-third thereof instead of the whole of her real estate, as at common law. The right of curtesy is, of course, only a life estate, just as it was at common law. (In Virginia, however, today the husband has no right to the possession of his wife's real estate during coverture.) If the wife leaves no children, subject to her creditors' rights, the husband's curtesy under our statute is in the whole of her real estate. Such portion of the estate as does not pass to the husband by curtesy, subject to the rights of creditors, passes to the wife's children at her death if she leaves any. The part passing by way of curtesy to the husband at his death automatically vests in the wife's children. Having only a life estate in the property, the husband's children by another marriage would be entitled to no part of the property which passed to him by right of curtesy only. The statute of limitation in Virginia with reference to this possession of real estate is fifteen years east of the Alleghany mountains and ten years west of the Alleghany mountains.

Trusting this gives you the desired information, I am.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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### ELECTIONS—Eligibility of voters.

RICHMOND, VA., August 5, 1925.

MR. C. G. AVERY, *Treasurer,*  
*Holdcroft, Virginia.*

MY DEAR MR. AVERY:

Acknowledgment is made of your letter of August 4, 1925, in which you say in part:

"While this primary is practically over, for information, I would thank you for your opinion on the following:

"If a person voted in the last general election for all of the Democratic nominees except for the presidential nominee, and did not vote for either presidential nominee, would he be eligible to vote in this primary, provided he was in every other way qualified?"

In my opinion section 228 of the Code, as amended, means that one must not have voted against any of the Democratic nominees in a general election in the sense that he must not have voted for an opponent of any Democratic nominee. I do not think that the statute means that a Democrat is to be deprived from participating in the Democratic primary because, in the preceding general election, he failed to vote for one of the Democratic nominees, provided he did not vote for that nominee's opponent. Therefore, in my opinion, the voter referred to in your letter would be entitled to vote in the primary.

Trusting that this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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#### **ELECTIONS—Eligibility of voters.**

RICHMOND, VA., *August 5, 1925.*

REV. J. C. CARROLL,  
*Farmville, Va.*

DEAR SIR:

Yesterday while my two assistants and I were absent from the city a telegram to which my name was signed was sent to you as follows:

"Colored person as well as white can vote if qualified."

This message was sent by an employee of this office upon information that was thought to be correct. However, it was erroneous and, seeing it today for the first time, I thought it proper to write and correct the error.

The qualifications of voters in the Democratic primary, in addition to those provided by statute, are further set forth in the primary plan of the Democratic party adopted June 11, 1924, as follows:

"All white persons qualified to vote at the election for which the primary is held may vote at the primary; provided, however, that no person shall be permitted to vote unless such person is a member of the Democratic party and at the last preceding general election in which such person participated voted for the nominees of the Democratic party; provided, further, that if he did not vote at such general election, then upon his declaration that he will support at the ensuing election the nominees of the party, he shall be allowed to vote. When challenged, he shall make his declaration on oath."

You will note that under this plan only white persons may vote in the Democratic primary.

I regret that this mistake should have occurred, and will ask you to be kind enough to show this letter to the judges of the election at your precinct.

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

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### BOARD OF HEALTH—Authority to quarantine.

RICHMOND, VA., *August 10, 1925.*

DR. ENNION G. WILLIAMS, *Commissioner,*  
*State Board of Health,*  
*Richmond, Virginia.*

MY DEAR DR. WILLIAMS:

Acknowledgment is made of your request of recent date, in which you call my attention to sections 1554-b—1554-m of the Code of Virginia, 1924, relating to venereal diseases, and request me to advise you as to the authority possessed by health officers to quarantine persons who have, or are reasonably suspected of having, the venereal diseases enumerated in section 1554-f of the Code of Virginia, 1924.

Venereal diseases are defined by section 1554-b of the Code of Virginia, 1924, and physicians and others treating persons infected with such diseases are required to report the same to the State Board of Health. Section 1554-e of the Code of Virginia, 1924, imposes a mandatory duty upon all State and local health officers to use every available means to ascertain the existence of, and to investigate all venereal diseases within their several territorial jurisdictions and to ascertain the sources of such infections. The last sentence of subsection (a) of this section provides:

“\* \* \* All health officers are hereby empowered and directed to make such examinations of persons reasonably suspected of having syphilis, gonorrhea, or chancroid, as may be necessary for the carrying out of this act.”

Subsection (b) of this section provides that certain enumerated persons

“\* \* \* are to be considered and are hereby declared to be reasonably suspected of having syphilis, gonorrhea, or chancroid, and no person convicted of any of said charges shall be released until examined for such venereal diseases by the proper health officer, his deputy or assistants, or agents.”

Section 1554-f of the Code of Virginia, 1924, reads as follows:

“Upon receipt of a report of a case of venereal disease in a person conducting himself or herself in such a manner as to be a menace to the public health, it shall be the duty of the health officer to institute measures for the protection of other persons from infection by such diseased person.

“(a) Local health officers are authorized and directed to quarantine persons who have, or are reasonably suspected of having, syphilis, gonorrhea,

or chancroid whenever, in the opinion of said local health officer, or the State Board of Health, or the State Health Commissioner quarantine is necessary for the protection of the public health.

"In establishing quarantine the health officer shall, anywhere within the State, designate, and define the limits of, the areas in which the person known to have, or reasonably suspected of having, syphilis, gonorrhea, or chancroid, and his immediate attendant, are to be quarantined and no persons, other than the attending physician, shall enter, or remain in, or leave the area of quarantine without the permission or direction of the local health officer.

"No one but the local health officer, or his authorized deputy, shall terminate said quarantine, and this shall not be done until the suspected person has been found not to be infected and the diseased person has become free from the disease, as determined by the local health officer, or his authorized deputy, through clinical examinations and all necessary laboratory tests, or until permission has been given him so to do by the State Board of Health or the State Health Commissioner.

"(b) The local health officer, or his duly authorized agent, may parole persons pending final cure, but he shall inform all persons who are about to be so released from quarantine for venereal disease, in case they are not cured, what further treatment should be taken to complete their cure."

Sections 1554-b and 1554-e of the Code of Virginia, 1924, contain substantially the same provisions found in sections 4605¼ and 4605¼-j of the Complete Texas Statutes, 1920.

The provisions of section 1554-f of the Code of Virginia, 1924, relating to the quarantine of persons infected with venereal diseases, with certain immaterial changes, are substantially the same as the provisions of section 4605¼-d of the Complete Texas Statutes, 1920, construed by the Supreme Court of Texas in *Ex Parte Emma Hardcastle*, 208 S. W. 531, 2 A. L. R. 1539, 1540, 1541 (1919).

At the outset it may be said that the law is apparently well settled that health authorities are not usually required to give a hearing to any person before they exercise their jurisdiction for the public welfare. Thus it is said in section 13 of the article on health, 12 R. C. L., page 1274:

"Boards of health, and other boards, act summarily, and it has not been usual anywhere to require them to give a hearing to any person before they can exercise their jurisdiction for the public welfare. The public health might suffer or be imperiled if their action could be delayed until a protracted hearing could be brought to a termination. The prevailing view is that health authorities need not give notice of hearing to any person before they can exercise their jurisdiction for the public welfare, unless the statute under which they are authorized to act expressly so requires.

\* \* \*

See also section 29 of the article on health, 12 R. C. L., pages 1289-1290, and the authorities there cited.

In the case of *Ex Parte Emma Hardcastle*, *supra*, which involved the application for a writ of habeas corpus, the petitioner was held under an order of the city health officer of San Antonio, under authority of quarantine regulations established in accordance with chapter 85 of the Acts of the Fourth Called Session of the thirty-fifth legislature, which was the same law as sections 4605¼ and 4605¼-k of the Complete Texas Statutes, 1920, under a statement of the order of arrest that, according to the information of the health officer, the petitioner was affected with a named venereal disease. The sole issue in the case was whether or not

the decision of the health officer was final, or whether the same could inquired into by writ of habeas corpus. In passing on the question, the Texas Court of Criminal Appeals said, 2 A. L. R., pages 1540, 1541:

"The legislature, under the police power, has authority to authorize the establishment of quarantine regulation for the protection of the public against contagion from those persons whose condition is such as to spread disease, and, incident thereto, to authorize the arrest and detention of such persons; and such, we understand, is the purpose of the statute in question. Under its terms, the proper health officer may issue a warrant by virtue of which a lawful arrest may be made without, preliminary thereto, affording the person affected a hearing; but if, after arrest, such person challenges the right of the authorities to continue the detention, the fundamental law accords him the right to have the legality of his detention inquired into by a proper court in a habeas corpus proceeding. The law denies to no one restrained of his liberty without a hearing the right to prove in some tribunal that the facts justifying his restraint do not exist. 6 R. C. L., p. 435, sec. 449. The health authorities causing the arrest of relator derive their power to do so from the alleged existence of the fact that the relator is affected with the disease mentioned, and that her detention is required in the public interest, to prevent contagion. If those facts do not exist, the officer has no jurisdiction to continue the restraint, and the court in the habeas corpus proceeding has authority to inquire whether the facts essential to jurisdiction exist. *Ex parte Degener*, 30 Tex. App. 556, 17 S. W. 1111."

The court in *Ex Parte Emma Hardcastle*, *supra*, referred to the decision of the Supreme Court of Washington in the case of *State ex rel. McBride v. Superior Court*, 174 Pac. 973, in which, under the Constitution of Washington and the statutes of that State, the court reached the decision that the determination of the board of health as to whether or not a person was affected with a venereal disease was conclusive, and further said, 2 A. L. R., p. 1541:

"Our Constitution, unlike that of the State of Washington, contains no special provision on the subject; but the power to establish quarantine, as existent under our Constitution, is an incident of the police power vested in the legislature under the general power to pass laws. Our statute does not declare that the initial order of arrest shall be conclusive; nor does it designate any tribunal to whom one detained under an order of arrest issued by the health officer may appeal for a hearing. The fair and reasonable interpretation of the statute under which relator is held, we think, is that which accords the health officer the power to order the arrest and detention, leaving to the person detained the right to invoke the decision of the established judicial tribunals of the State on questions raised, either of fact or law, involving the validity of the detention.

"We conclude that, under the act of the legislature in question, the relator had the right to a hearing on writ of habeas corpus, and therein to prove the nonexistence of the facts necessary to authorize her continued detention, and thereby obtain release. Facts essential to determine whether she should or should not be held not being available in this court, it is ordered that the writ of habeas corpus prayed for be granted, and that it be referred for hearing to Honorable R. B. Minor, judge of the Fifty-seventh Judicial District of Texas."

In *Ex Parte McGee*, 105 Kan. 574, 185 Pac. 14, 8 A. L. R. 831 (1919), the court had under consideration a case in which two men infected with a venereal disease were quarantined by the health officer in the State quarantine camp for

men at Lansing, which was a branch of the Kansas Penitentiary. Their release was sought by writ of habeas corpus. While it is true that the quarantine was made pursuant to certain rules and regulations of the State Board of Health adopted pursuant to an act of the General Assembly of Kansas, the decision of the court is peculiarly applicable to the question here under consideration, so far as relates to the right to quarantine persons infected, or suspected of being infected with venereal disease, and with reference to the right to examine the same. In the course of its opinion, the court said, 8 A. L. R., page 835:

"The rules of the State Board of Health and the city ordinance are assailed as unreasonable. In this instance, only those provisions of the rules of the State Board of Health and of the city ordinance are involved, which relate to isolation of persons who have been examined and have been found to be diseased. Reasonableness of provisions relating to discovery and to examination of suspects need not be determined. It may be observed, however, that while provisions of the latter class cut deeply into private personal right, the subject is one respecting which a mincing policy is not to be tolerated. It affects the public health so intimately and so insidiously that considerations of delicacy and privacy may not be permitted to thwart measures necessary to avert the public peril. Only those invasions of personal privacy are unlawful which are unreasonable, and unreasonableness is always relative to gravity of the occasion. Opportunity for abuse of power is no greater than in other fields of governmental activity, and misconduct in the execution of official authority is not to be presumed.

"It is urged that the regulations in question are unreasonable, in that they authorize isolation in remote places beyond the limits of the city in which the petitioners reside. The court knows of no law or rule of public policy or private right which requires a person who, for the protection of the public, must be isolated and treated for loathsome communicable disease, to be interned in the locality in which he may reside. It would have been competent for the State Board of Health to designate a single hospital for the detention of all persons in the State found to be so diseased, and it is entirely reasonable for cities having inadequate facilities, or having no facilities of their own, to take advantage of those provided by State authority. In this instance, the city health officer's power to isolate is restrained by ordinance, which requires the city commission to approve detention hospitals other than those provided by the city.

"In the application for the writ, it is stated that the petitioners are not diseased. The question is one of fact, determinable by practically infallible scientific methods. The city health officer was authorized to ascertain the fact. He has certified to the existence of disease, and, in the absence of a charge of bad faith, or conduct equivalent to bad faith, on his part, his finding is conclusive.

"In the application for the writ it is stated that, if the petitioners be diseased, they are able to provide themselves with proper treatment in an isolated place in the city of Topeka. The answer is: The public health authorities are not obliged to take chances."

See also *People Ex Rel. Barmore v. Robertson*, 302 Ill. 422, 134 N. E. 815, 22 A. L. R. 835 (1922), in which the court held that a typhoid carrier could be quarantined so long as he discharged germs of the disease.

The question with reference to the right of health authorities to quarantine persons infected with a venereal disease was considered at some length by the Court of Appeals of California in *Ex Parte Arata*, 198 Pac. 814, 816 (1921). While it is true that the petitioner in that case was discharged on habeas corpus, the opinion of the court is of interest because it defines at some length the rights

of public health officials in handling cases of this character. In the course of its opinion, the court said:

"Where a person so restrained of his or her liberty questions the power of the health authorities to impose such restraint, the burden is immediately upon the latter to justify by showing facts in support of the order. It might be proved, for instance, that the suspected person had been exposed to contagious or infectious influences; that some person had contracted such disease from him or her, as the case might be. Such proof would furnish tangible ground for the belief that the person was afflicted as claimed.  
\* \* \*

After calling attention to the fact that mere suspicion, unsupported by facts giving rise to reasonable or probable cause, would afford no justification for restraining a person by quarantine, the court continuing said:

"Coming then to a case where it is claimed that the person suspected is one whose habits are such as to warrant the belief that they are afflicted with a venereal disease: We may agree that in cases of persons who commit acts of prostitution—that, acts that are commonly understood to fall within the 'commercial vice' definition—such a majority of them may be afflicted with infectious venereal disease as to justify the health department in enforcing the preliminary quarantine measures as here shown against any such; in other words, that, based upon the experience of the health authorities as it is stated to be in the return, it is reasonably probable that a person found to be of the class mentioned is so infected with such disease. The presumption which this statement allows to be made as against the individual in the first instance has its foundation in the fact that women of ill fame, by the very nature of their occupation, indulge in repeated and promiscuous acts of sexual intercourse. \* \* \*

As to the burden of proof in such cases, the court said:

"If the health authorities rely upon the claim that the person quarantined is a prostitute and hence likely to be afflicted with disease, then the burden is on the quarantine officers to establish the proof of the claim that the accused is of the class and character mentioned. If such person has been legally convicted of being of such class and character, the record of conviction may be relied upon to establish the important fact. In the absence of such conviction, the burden will be with the health authorities to establish the fact by sufficient evidence; for it is the existence of that condition in the person suspected that furnishes the ground for the belief, as an inference only, that the disease exists. It will not do to allow the inference of probable cause to be drawn from a mere suspicion."

In the more recent case of *Ex Parte Dayton*, 199 Pac. (Cal.) 548, 549 (1921), the same court had occasion to consider a case in which the petitioner was detained by the chief of police of a city under instructions from the department of health. The petitioner was detained at the city jail, and was enforced by reason of an order of quarantine issued by the health department based upon the alleged ground that the health authorities had reasonable and probable cause to believe that the petitioner was affected with a contagious venereal disease. The holding of the court is thus stated:

"\* \* \* Petitioner alleges further that said health department has de-

manded that petitioner submit herself for examination to determine the presence of such disease, and that she has refused to obey that order. Respondent justified the detention of petitioner upon the ground that she is a lewd and dissolute person, and, in fact, a prostitute.

"In a recent case this court has had occasion to consider a similar situation affecting the right of quarantine officers and has marked out a measure of that right. *In re Arata*, 198 Pac. 814. In that case it was held that the health department was authorized to enforce quarantine measures against persons where there was reasonable ground to believe that such persons were affected with the kind of disease referred to, and it was held that, in the case of a woman of ill fame, that fact in itself afforded sufficient ground for the inference that she might be affected with the disease. Evidence consisting of oral testimony of the witnesses and an affidavit were presented at the hearing, and from that evidence we have reached the conclusion that the house at which the petitioner was residing at the time of her arrest was a house of ill fame, and that she was one of the inmates thereof. All the circumstances shown in the evidence tend to support that conclusion. It is not essential that the particular acts indulged in in such houses be expressly shown. All of the surroundings, as the evidence illustrated them, the actions, conduct, and demeanor of the persons occupying the place, in the aggregate established to our minds quite clearly and beyond a probability merely that the house was a house of ill fame, and that the inmates belonged to the class mentioned.

"Petitioner is remanded to the custody of respondent."

With reference to the right to examine a person detained under quarantine, it may be said that the authorities generally hold that an examination of the person of one accused of crime cannot be made against such person's will for the purpose of furnishing evidence in a criminal prosecution. Thus in a number of cases involving prosecutions for rape, it has been held that the result of the examination of the body of the accused was not admissible in evidence against him on the trial of the criminal case. See the note to *Wragg v. Griffin*, 2 A. L. R. 1332.

The Supreme Court of Iowa in *Wragg v. Griffin*, *supra*, applied this rule to examinations made by health authorities for the purpose of quarantining persons affected with a venereal disease. This case has not been approved by the authorities generally, and is not believed to be the law outside of Iowa. *Rock v. Carney*, 185 N. W. (Mich.) 798, 803, 804 (1921).

The last cited case was an action of tort against a health officer for quarantining the plaintiff and making an examination of her. The court held that the power to quarantine carried with it, as a necessary incident to the exercise of such power, the right to examine one whom the health officer had reasonable grounds to believe was infected with a contagious disease. In the course of its opinion, the court said, page 803:

"The power to quarantine carries with it, in my judgment, as a necessary incident to the exercise of such power, the right to examine one whom the health officer has reasonable grounds to believe is infected with the communicable disease. \* \* \*"

The court referred to all of the cases which had been decided up to that time, involving quarantine and examination of persons infected with a contagious venereal disease, and said that the case of *Wragg v. Griffin*, *supra*, stood alone in supporting the contention that the health officer had no authority to make an

examination of a person for such disease, while "the balance of the cases tend to sustain the contention of defendant's counsel," namely, that the health officer did have the right to examine one whom he had reasonable grounds to believe was infected with such disease.

This right was also recognized by the Supreme Court of Kansas in the case of *Ex Parte McGee*, 105 Kan. 574, 185 Pac. 14, 8 A. L. R. 831, 835 (1919), where the court said in reply to the contention that the petitioners were not diseased:

"\* \* \* The question is one of fact, determinable by practically infallible scientific methods. The city health officer was authorized to ascertain the fact. He has certified to the existence of disease, and, in the absence of a charge of bad faith, or conduct equivalent to bad faith, on his part, his finding is conclusive."

See also *Ex Parte Brown*, 172 N. W. (Neb.) 522 (1919), and *Ex Parte Hardcastle*, *supra*.

It must be recalled that the detention in quarantine of persons infected with contagious diseases has nothing to do with a criminal prosecution, although the right to quarantine such persons is exercised under authority of the police power. The quarantine is for the purpose of the protection of the public health, and the prevention of the spread of disease that is a menace to the public generally. Persons who are quarantined are not quarantined as criminals, but as disease carriers dangerous to the public health. The reason, therefore, which prohibits the examination of a prisoner for the purpose of obtaining evidence to be used against him in a criminal prosecution does not exist in a case where one is quarantined on account of having a contagious disease.

It is also to be observed in *Wragg v. Griffin*, *supra*, the court expressly pointed out that there was no statutory authority in Iowa authorizing such examinations to be made, therefore, leaving open the question as to the effect of statutory authority for the same. As has been pointed out before, section 1554-e of the Code of Virginia, 1924, expressly authorizes such examinations to be made.

It is, therefore, my opinion that, under authority of the Code sections above referred to, the health officers have the authority to quarantine persons who have, or are reasonably suspected of having, the contagious venereal diseases referred to in section 1554-f of the Code of Virginia, 1924, and those persons designated by subsection (b) of section 1554-e as being declared reasonably suspected of having such diseases.

I am further of the opinion that, as a necessary incident to the exercise of the power of quarantine, the health officer has the right to examine one whom he has reasonable grounds to believe is infected with a contagious disease.

Trusting this gives you the desired information, I am

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

**SHERIFFS—Fees of.**

RICHMOND, VA., August 3, 1925.

T. D. BERRY, Esq.,  
*Bedford, Virginia.*

MY DEAR MR. BERRY:

Acknowledgment is made of your letter of July 31, 1925, in which you ask for the law with reference to the fees paid a sheriff or other officer for serving summons in a garnishment.

This matter is governed by section 3487 of the Code of Virginia, 1919, as amended by the Acts of 1922, page 761. The second subsection provides that the sheriff shall be entitled to fifty cents for serving notice on the principal debtor; the third subsection provides a fee of fifty cents for each garnishee summoned; the twenty-second subsection provides a fee of \$1.50 for levying an execution, except in cities of more than twenty-five thousand inhabitants, in which event the fee shall not exceed fifty cents; and the subparagraphs of the twenty-second subsection also provide that where the sheriff receives payment under an execution he shall be entitled to ten per centum on the first one hundred dollars and five per centum on the next four hundred dollars, etc.

Of course, the sheriff is not entitled to a fee for making a levy unless execution was issued and a levy made, nor is he entitled to a commission unless he actually collected the money under an execution.

Sincerely yours,

JOHN R. SAUNDERS,  
*Attorney General.*

**COMMISSION MERCHANTS—Duty to give bond with surety.**

RICHMOND, VA., July 18, 1925.

HON. G. W. KOINER, *Commissioner,*  
*Department of Agriculture and Immigration,*  
*Richmond, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of July 17, 1925, in which you say, in part:

"We have recently had filed with us claims against Belanga & Forbes, Commission Merchants, Norfolk, Virginia, on consignment of farm produce made to them during the latter part of 1923, for which settlement has not been made with the consignors, according to statements they have filed with us.

"The firm of Belanga & Forbes have not been in business since about January 1, 1924, one of the partners having died on December 17, 1923."

You then state that the surety on the bond of the commission merchants referred to has taken the position that the claim has been filed too late, and then say:

"I desire your opinion in this matter as to whether the surety is correct in his conclusions, also whether or not under the statute the claimant

by his negligence in filing his claim has forfeited his rights for protection under the bond, and whether this department should concern itself in the investigation and settlement of claims of this nature."

Section 1259 of the Code requires every commission merchant, before his registered certificate is delivered, to execute and deliver to the Commissioner of Agriculture and Immigration a fidelity bond with satisfactory sureties in the sum of two thousand five hundred dollars, "to secure the accurate and full accounting to the consignor of the moneys received by such commission merchant from the sale of farm produce sold on commission, and the Commissioner of Agriculture and Immigration may bring an action in any court of competent jurisdiction in the county in which is situated the place of business of the holder of such registered certificate against the principal and sureties for the recoveries of any moneys so received and not properly accounted for."

Section 1260 of the Code, as amended, gives to the commissioner power to investigate, upon proper complaint, any transaction involving the failure to make proper and true accounts and settlement at prompt and regular intervals, etc. It is true that this section does provide that the consignor shall make written complaint to the commission merchants, after thirty days, when he fails to receive a satisfactory settlement, and that, if he fails to secure a satisfactory adjustment, he may file within ten days a certified complaint with you, whereupon you shall forthwith secure an explanation or adjustment, and failing this fix the matter for hearing.

A bond is a sealed instrument, the limitation of which is fixed at ten years by section 5810 of the Code of 1919. The bond required by section 1259 of the Code is given to secure accurate and full accounting by commission merchants to the consignors of all moneys received by such commission merchants by the sale of farm produce sold on commission.

In view of the delay of which the claimants have been guilty in this matter, I seriously doubt whether your department could now be required to investigate the matter. However, I think that the claimants should be advised as to the bond and authorized to proceed against the surety in the name of the Commissioner, *ex rel* the claimants, if they be so advised.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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#### STATE VETERINARIAN—Contagious diseases of poultry.

RICHMOND, VA., *August 7, 1925.*

DR. J. G. FERNEYHOUGH,  
*State Veterinarian,*  
*Richmond, Virginia.*

MY DEAR DR. FERNEYHOUGH:

I beg leave to acknowledge receipt of your letter of August 5, in which you desire to be advised whether or not the State Live Stock Sanitary Board and the State Veterinarian are authorized by law to deal with contagious and infectious diseases of poultry.

A portion of section 907 of the Virginia Code of 1924 provides "It shall be the duty of the State Live Stock Sanitary Board to protect the domestic animals of the State from all contagious and infectious diseases," etc.

According to Webster, an animal is "An organized living being endowed with sensation and power of voluntary motion, and also characterized by taking its food into an internal cavity or stomach for digestion; by giving carbonic acid to the air and taking in oxygen in the process of respiration; and by increasing in motive power or active aggressive force with the process to maturity." Also "one of the lower animals; a brute or beast as distinguished from man, as men and animals." Webster classifies poultry as "Domestic fowls, raised for the table, and for their eggs or feathers."

With this definition before me, I cannot bring myself to the conclusion that poultry is an agricultural product, but they are domestic animals, and, therefore, they should be protected by the State Live Stock Sanitary Board in cases of infectious and contagious diseases.

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

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#### JUVENILE AND DOMESTIC RELATIONS COURT—Forfeited recognizance.

RICHMOND, VA., July 31, 1925.

DR. T. S. HENING,  
*Jefferson, Va.*

MY DEAR DR. HENING:

Acknowledgment is made of your letter of July 25, 1925, in which you ask for certain information with reference to the disposition which you may make of the proceeds of forfeited recognizances in a juvenile and domestic relations case pending before you as judge of that court.

Section 1939 of the Virginia Code of 1924, Acts 1922, page 842, authorizes the juvenile and domestic relations court to require recognizances of persons appearing before it in the capacity of defendant in desertion and nonsupport case, and further authorizes the court to place such persons on probation.

Section 1940 of the Virginia Code of 1924 provides with reference to such recognizances as follows:

"If at any time the court may be satisfied by information and due proof that the defendant has violated the terms of such order, it may forthwith proceed with the trial of the defendant under the original charge, or sentence him or her, under the original conviction, or annul suspension of sentence, and enforce such sentence, or in its discretion may extend or renew the term of probation as the case may be. Under due proof that the terms of said order have been violated, the court shall in any event have the power to declare the recognizance forfeited, the sum or sums thereon to be paid, in the discretion of the court, in whole or in part, to the defendant's wife, or to the guardian, curator, custodian or trustee of

the said minor child or children, or to an organization or individual designated by the court to receive the same."

Sincerely yours,

JOHN R. SAUNDERS,  
*Attorney General.*

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## JUSTICES OF THE PEACE—Removal of cases.

RICHMOND, VA., July 29, 1925.

MR. E. E. SKAGGS,  
*Attorney at Law,*  
*Pennington Gap, Va.*

MY DEAR SIR:

Acknowledgment is made of your letter of recent date, in which you say:

"In your opinion, is a case properly removed from a justice of the peace when the accrued costs and writ tax are paid, or should the advance fee be paid to the clerk in addition? The statute only mentions accrued costs and writ tax. What is defendant's remedy when the case will not be put on the docket unless clerk's fees are advanced? Would it be proper for the justice to enter judgment unless all costs were paid necessary to get the case on the docket?"

The answers to your questions are governed by the provisions of sections 6017 and 3495 of the Code of Virginia, 1919. Section 6017, so far as is applicable to the question here under consideration, provides as follows:

"In every case cognizable by a justice where the amount or thing in controversy exceeds the sum or value of fifty dollars, the justice shall, at any time before trial, upon the application of the defendant, and upon the payment by him of the costs accrued and writ tax, remove the case, and all the papers thereof, to the circuit court of the county or to the corporation court of the city wherein the warrant has been brought and transmit to the clerk the writ tax received by him, and the clerk of the said court shall forthwith docket the case."

The case, in my opinion, is properly removed when the proper application is made by the defendant and he has paid to the justice all of the accrued costs and the writ tax. You will observe that this section says that upon the transmission of the papers and the writ tax to the clerk he shall forthwith docket the case. This provision, however, in my opinion, must be read in connection with section 3495 of the Code, which provides, so far as is applicable to the question here under consideration, that no fee officer shall "be compelled to perform any unless his fees, if demanded, be paid or tendered or otherwise satisfactorily secured him except in criminal cases and in the case of persons suing as provided by section thirty-five hundred and seventeen," which latter section relates to persons suing *in forma pauperis*.

From the time the case is removed by the making of the necessary application and the payment of the accrued costs and writ tax, it is my opinion the

justice loses control over the case. On the other hand, it is my opinion that the justice removing the case would have no remedy against the clerk if the clerk refused to put the case on the docket because of the nonpayment of the clerk's fees in advance, as authorized by section 3495 of the Code of 1919.

Of course, you will realize that the subject of your inquiry is not one which falls primarily under the jurisdiction of the Attorney General, and what I have written you is written merely as a matter of courtesy and not for the purpose of being used in any litigation which may be pending in court.

With my best wishes, I am

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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**PROHIBITION LAW—Penalty imposed by justice of peace—authority to  
hibition law.**

RICHMOND, VA., July 29, 1925.

HON. S. L. WALTON,  
*Commonwealth's Attorney,  
Luray, Virginia.*

MY DEAR MR. WALTON:

Acknowledgment is made of your letter of July 20, 1925, in which you call my attention to sections 6 and 33 of the Layman prohibition law and then say:

"There is a case pending here now in which a man was arrested for transporting and having unlawfully in his possession a small quantity of liquor, and he was also driving a motorcycle while under the influence of liquor, all one transaction. The penalty under the first two charges would be one to six months in jail and a fine of \$50.00 to \$500.00, while the penalty for driving a car under the influence of liquor is one to twelve months in jail and a fine of \$100.00 to \$1,000.00. Now, if the accused were brought before a magistrate charged with these several offenses in the same warrant, or in different warrants, and would enter a plea of guilty to the offense, carrying the maximum punishment, does section 33 mean that the magistrate would have to impose the maximum punishment, or does it mean, by using the words 'shall have jurisdiction to enter a judgment of guilty and to fix the punishment,' that the magistrate cannot give him less than the minimum punishment under the charge carrying the maximum punishment, and, in his discretion, any intermediate punishment or the maximum punishment?"

"In other words, is it in the magistrate's discretion what sentence he shall give the accused, on a plea of guilty in his court, the other requisites being present in the case before him?"

The second paragraph of section 33 of the Layman prohibition law provides as follows:

"Provided that whenever the charge against any person is a misdemeanor, the accused may, in the presence of the attorney for the Commonwealth, and with his consent, endorsed on the warrant of arrest, enter a plea of guilty to that offense charged in said warrant carrying the maximum punishment for any offense charged therein, the plea of guilty specifying the

offense to which the accused pleads, in which event the justice, judge or other officer having criminal jurisdiction before whom the accused is brought shall have jurisdiction to enter a judgment of guilty and to fix the punishment, but no judge, justice or other officer shall suspend sentence in any case heard under the provisions of this section. In entering such judgments the trial justice shall tax in the cost against the defendant the same fees and awards in favor of those charged with the enforcement of this act as is elsewhere herein provided for prosecutions in courts of record."

It is my opinion that this provision means that, while the accused must plead guilty to the offense charged in the warrant which carries the maximum punishment, the justice in trying the case may fix the punishment at anything from the minimum to the maximum punishment for the offense to which the plea is entered. In other words, in the case mentioned in your letter the defendant would be required to plead guilty to the charge of driving his car under the influence of intoxicating liquor, but the justice would have the discretion of fixing his punishment at not less than one nor more than twelve months in jail and a fine of not less than \$100.00 nor more than \$1,000.00.

Responding to your second question, although the language of section 6 is not free from doubt, I do not think that a justice of the peace has the authority to suspend a sentence under the prohibition law.

Sincerely yours,

JOHN R. SAUNDERS,  
*Attorney General.*

## CIRCUS PERFORMANCE—Licenses.

RICHMOND, VA., July 25, 1925.

HON. C. LEE MOORE,  
*Auditor Public Accounts,*  
*Richmond, Virginia.*

MY DEAR MR. AUDITOR:

Acknowledgment is made of your request for my construction of section 109½ of the Virginia Tax Bill relating to licenses for traveling circus performances, carnivals, etc., given during, preceding or succeeding, the holding of agricultural fairs in the city or county in which the circus is to give its performances. Your question has specific reference to the advertising that may be published or posted by such traveling circus.

This section provides as follows:

*"Every traveling circus, carnival or show giving performances in the open air or tents in any county or city in this State, wherein there is held an agricultural fair, for one week previous to, or during the week of, or one week after the time of holding such regular or annual fair, shall pay a State license tax of one thousand (\$1,000) dollars for each performance in addition to the license tax now required by law of a circus, carnival or like show, the State license tax provided for in this section and the State license tax now required by law, to be assessed by the commissioner of the revenue, and these license taxes to be paid to the county or city treasurer before any performance is permitted to be held.*

"It shall be unlawful *for any such circus*, carnival or show to publish or post in any way in such county or city at any time within thirty days prior to the holding of such regular annual fair, advertising of the exhibition of any such circus, carnival or show. Any person, firm, company, or corporation violating any provision of this section shall be fined two thousand (\$2,000) dollars for each offense by the justice of the peace or court trying the case. The provisions of this section shall not apply to circuses, carnivals or shows inside the grounds of any agricultural fair held in any county or city." (Italics supplied.)

You will see from an examination of section 109½ of the tax bill above quoted that every traveling circus giving its performances in the open air or tents in any county or city, wherein there is held an agricultural fair, shall pay an additional tax, if such performances are given during one week previous to, during the week of, or one week after the time of the holding of such agricultural fair.

The second paragraph of section 109½ of the tax bill, which relates to the advertising, provides, as you will observe, that "it shall be unlawful *for any such circus*, \* \* \* to publish or post in any way in such county or city at any time within thirty days prior to the holding of such regular annual fair, advertising of the exhibition of any such circus, \* \* \*." It is my opinion that the language of this paragraph, "any such circus," has reference to the traveling circus referred to in the first paragraph of section 109½ of the tax bill, namely, a circus which gives performances in the open air or tents in a county or city one week previous to, during the week of, or one week after the time of the holding of the regular or annual agricultural fair in such county or city.

I am further of the opinion that the second paragraph of section 109½ of the tax bill has no application to a circus whose performances are given at other times than those specified in the first paragraph of section 109½ of the tax bill.

Trusting that this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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## PUBLIC ROADS—What can be operated on them.

RICHMOND, VA., July 24, 1925.

MR. GEORGE W. PRATT,  
Route No. 3, Box 38,  
Troutville, Virginia.

MY DEAR SIR:

In response to your letter of recent date, with reference to the right of a farmer to use a tractor on the public roads of this State, I am enclosing herewith a copy of chapter 60 of the Acts of 1919, which is in almost the same terms as section 4091 of the Code of 1919, and being later in enactment necessarily prevails over section 4091, so far as there may be conflicts between this act and that Code section. I also enclose herewith copy of the rules and regulations of the State Highway Commission relating to traction engines, etc., beginning with article II on page 8 of the enclosed pamphlet.

I also call your attention to the following sentence of section 5 of chapter 403 of the Acts of 1922, as amended by the Acts of 1924, which section confers general powers and duties on the State Highway Commission:

"\* \* \* The provisions of this section shall not apply to traction engines and tractors, weighing less than five tons, when drawing threshing machines, haybalers or other farm machinery for local farm use."

This appears to be all of the law on the subject.

Trusting that this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,

*Attorney General.*

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### SUNDAY LAWS—Legality of sale of gasoline.

RICHMOND, VA., July 23, 1925.

MR. E. R. LOGWOOD,  
*Big Island, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of July 20, 1925, in which you say, in part:

"On the national highway, which runs through the village here, has been opened up several filling stations. These are handling gas, oil, cream, coca-cola, cigarettes, candy, fruits, cigars, tobacco, and such other merchandise as they see fit to put in, also ham sandwiches. These stands are being operated by the day and night, and great throngs patronize them on Sundays."

The law prohibiting work on Sunday is found in section 4570 of the Code of 1919, which, so far as is applicable to the subject of your inquiry, provides as follows:

"If a person on a Sunday be found laboring at any trade or calling, or employ his apprentices or servants in labor or other business, except in household or other work of necessity or charity, he shall be deemed guilty of a misdemeanor \* \* \*."

In *Ellis v. Covington*, 122 Va. 821, under a town ordinance similar to the above statute, the Court of Appeals held that it was illegal to sell soft drinks on Sunday. However, I call your attention to *Lakeside Inn Corporation v. Commonwealth*, 134 Va. 696, and *Pirkey Brothers v. Commonwealth*, 134 Va. 713. I do not believe that the law would prohibit the sale of sandwiches or other food on Sunday, as people have to eat on Sunday as well as other days, and this, it seems to me, would be a work of necessity.

Gasoline and oil appear to be sold all over the State, I suppose, under the theory that that is a work of necessity. Some years ago, I understand that the operator of a gas filling station was prosecuted in the police court of the city of Richmond and the court decided that his was a work of necessity. At any

rate, no further prosecutions appear to have been instituted, so far as I am advised, and certainly no such case has reached the Court of Appeals.

I would suggest that you take this matter up with the Commonwealth's attorney of your county, who is in a position to advise you as to whether or not prosecutions should be instituted.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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### DAM—Erection of.

RICHMOND, VA., July 24, 1925.

MR. R. B. GLENN,  
*Myrtle, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of July 20, 1925, in re the erection of a mill dam across a stream, the effect of which would be to flood your land.

This matter is governed by chapter 140 of the Code of Virginia, 1919, beginning with section 3582 and extending through section 3592 thereof. These sections are too long for me to have them copied into this letter, but you will find a copy of the Code in the clerk's office of your county, and probably in your town, where you will have an opportunity to examine the same.

You will see that permission has to be obtained from the court to erect a dam, certain notice has to be given, commissioners appointed, etc.

Section 3591 of the Code is probably applicable to your case. This section reads as follows:

"If the applicant shall not begin his work within one year, and so far finish it within three years after such leave, as then to have his mill, manufactory, machine, or engine, in good condition for use; or if such mill, manufactory, machine, or engine, be at any time destroyed or rendered unfit for use, and the rebuilding or repair thereof shall not within two years from the time of such destruction or unfitness, be commenced, and within five years from that time be so far finished as then to be in good condition for use, the title to the land so circumscribed shall revert to the former owner, his heirs, or assigns, and the leave so granted shall then be in force no longer, except as follows:"

Trusting that this gives you the desired information, I am,

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

**TAXES—Recordation of deed of trust.**

RICHMOND, VA., July 24, 1925.

HON. C. LEE MOORE,  
*Auditor Public Accounts,  
Richmond, Virginia.*

MY DEAR MR. AUDITOR:

I have examined the original deed of trust from the Coama Steamship Corporation to the Seaboard National Bank of Norfolk, trustee, to secure to the United States of America, represented by the United States Shipping Board, certain sums of money loaned on a certain vessel being constructed by the plant of the Newport News Shipbuilding and Dry Dock Company, designated as Hull No. 280, named or to be named the Coamo.

It is my opinion that this deed of trust secures money advanced by and payable to the Federal government, and for this reason that the recordation of the same is not subject to tax.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

**BOND—Depository bond.**

RICHMOND, VA., July 23, 1925.

HON. GLENN EDWARDS,  
*Commonwealth's Attorney,  
Hillsville, Virginia.*

MY DEAR MR. EDWARDS:

Acknowledgment is made of your letter of July 15, 1925, in which you say:

"We have a check on the State Highway Commission for \$129,000, payable to the board of supervisors of this county. It is a repayment of money which was loaned the State under the Robertson Act. We have an order asking the State Highway Commission reuse this money on the system in this county. They are not ready at this time to take over this amount and start work, and will not be possibly before the first of the year. Now we want to know if the board of supervisors can deposit this money in a bank here and get interest on it without going through the hands of the treasurer. We want also to know if the money can be deposited by the board without the bank giving bond for it. You can readily see if the money has to go through the hands of the treasurer he will have to increase his bond and then the bank would have to give bond, and all this would amount to as much as the interest. So please let me know if this money can be deposited direct in the name of the board without bond."

I assume that the money advanced under the Robertson Act, and which is being returned to the board of supervisors of your county by the Highway Commission, was advanced by the county of Carroll. If this be true, under the provisions of section 2774 of the Code of 1919, which provides, in part, that the county treasurer shall "receive all moneys payable into the treasury of said county, and disburse the same on warrants drawn by the board of supervisors for the county," it is my opinion that the money referred to will have to be paid to the treasurer if the warrant referred to is collected.

With reference to the depository bond, I refer you to the cases of *Mecklenburg v. Beales*, 111 Va. 691, 696, 698, 69 S. E. 1032, 36 L. R. A. (N. S.) 285, and *Camp, et al. v. Birchett*, 126 S. E. 665, the latter case being decided in February, 1925, by the Special Court of Appeals. It appears from these decisions that the county treasurer is an insurer of the public funds coming into his hands, and, while the county treasurer should be required to give a bond sufficiently large to cover any loss resulting from the handling of this fund, I do not believe that the board of supervisors has any authority to require the depository in which the treasurer deposits this fund to give to it, the board of supervisors, an additional bond. The treasurer, however, would be fully warranted in requiring the depository to furnish him with a sufficient depository bond.

Trusting that this gives you the desired information, I am wishes,

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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#### PROHIBITION—Indictment under omnibus form.

RICHMOND, VA., July 23, 1925.

HON. R. E. L. WATKINS,  
*Commonwealth's Attorney,*  
*Franklin, Virginia.*

MY DEAR MR. WATKINS:

Acknowledgment is made of your letter of July 21, 1925, with which you enclose a statement of facts in the case of *Commonwealth v. Moses Blow*, who was indicted under the omnibus form of indictment and later convicted in your court under this indictment and a bill of particulars charging "that the defendant did keep ardent spirits unlawfully."

I note you say that you are convinced that error has been committed in this case, unless the verdict can be sustained under section 22 of the Layman prohibition law, which provides:

"The keeping, storing, or giving away of ardent spirits, or any shift, or any device whatever, to evade the provisions of this act, shall be deemed unlawful within the provisions of this act, and shall be punished as unlawful selling is punished."

You will observe that the indictment in this case was the omnibus form of indictment provided for by section 42 of the Layman prohibition law. This form of indictment is limited to offenses created by sections 3, 3a, 4 and 5 of that act.

In *Hitt v. Commonwealth*, 131 Va. 752, the Court of Appeals held that a person charged under the omnibus form of indictment could not be convicted of an offense created by sections 39 and 40 of the Mapp prohibition law. See especially the opinion of the court on pages 756 and 757. This being true, it is my opinion that one indicted under the omnibus form of indictment cannot be convicted of an offense created by section 22 of that act, for the reason that it is

not an offense under "sections 3, 3a, 4 and 5 of this act." For this reason, I do not believe that the conviction could be sustained.

Sincerely yours,

JOHN R. SAUNDERS,  
*Attorney General.*

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**MOTOR VEHICLES—License tax paid by second-hand dealer.**

RICHMOND, VA., July 17, 1925.

HON. A. WILLIS ROBERTSON,  
*Commonwealth's Attorney,*  
*Lexington, Virginia.*

MY DEAR SENATOR:

Acknowledgment is made of your letter of July 16, 1925, with reference to the proper construction of section 2154 (14) of the Code of Virginia, 1924, with reference to the necessary license tax to be paid by a dealer in second-hand motor vehicles. The Motor Vehicle Commissioner, as you say, has construed this section in connection with section 2128 of the Code of 1919, as amended, as a result of which he holds that every second-hand dealer must obtain both the dealer's license provided for by section 2128 of the Code of 1919, as amended, and the license provided for by section 2154 (14) of the Code of Virginia, 1924, as a prerequisite to his right to operate machines to be sold by him.

After a careful consideration of these two sections of the Code, I have reached the conclusion that every dealer in machines, whether they be new or second-hand, is required, as a prerequisite to his right to operate the same, to secure the dealer's license provided for by section 2128 of the Code, as amended. If such dealer be a manufacturer or importer, or the selling agent of such manufacturer or importer, may, under authority of this license, buy or take in trade and sell used vehicles without obtaining the license provided for by section 2154 (14) of the Code of Virginia, 1924. However, if the dealer in question is not a manufacturer or importer, or the selling agent of such manufacturer or importer, he is then required, in addition to the license prescribed by section 2128 of the Code of 1919, as amended, to obtain a second-hand dealer's license as required by section 2154 (14) of the Code of Virginia, 1924. This conclusion is strengthened by the language of the last-mentioned section, which provides, in part, that when one applies for a second-hand dealer's license he "shall pay \* \* \* a fee of fifty dollars (\$50.00) *in addition to any other fees now required by law.*" (Italics supplied.)

It seems to me that section 2154, subsection 14, of the Code of 1924, must be read in connection with section 2128 of the Code of 1919, as amended, and that, when read in connection therewith, the license tax required by that section provides for the other fees required by law, in addition to the license fee prescribed by section 2154 (14) of the Code of 1924.

Coming to the second question embraced in your inquiry, namely, that the license tax required of a second-hand dealer must be pro-rated after the first of July and should be \$25.00 and not \$50.00, I am of the opinion that you are correct in this position. While it is true that section 2154 (14) of the Code of 1924

provided that this tax should be pro-rated during the year 1924, it did not stop with this but provided, in addition thereto:

“\* \* \* The Secretary of the Commonwealth” (Motor Vehicle Commissioner) “shall have the power to make suitable rules and regulations for the issuance of such licenses to expire upon the first day of January of the succeeding year, when the application therefor shall be made during the current year, and upon payment of a license fee of twenty-five dollars (\$25.00), provided application is made on or after July first of any year.  
\* \* \*”

It is my opinion that this provision of section 2154 (14) of the Code of 1924 means that the license tax to be paid by a second-hand dealer, making application on or after July 1, is to be \$25.00, the license to expire on the 1st day of January of the succeeding year.

For your information, I am forwarding a copy of this opinion to the Motor Vehicle Commissioner.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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#### **GAME AND FISH—Clams—License tax.**

RICHMOND, VA., July 18, 1925.

MR. B. B. FITCHETT,  
*Franktown, Virginia.*

MY DEAR MR. FITCHETT:

Acknowledgment is made of your letter of July 16, 1925, in which you call attention to section 3294 of the Code of 1919, and request me to advise you whether the license tax imposed by this section “includes all persons who buy clams to sell again, whether by shipping or otherwise.”

Section 3294 of the Code, so far as is applicable to the question here under consideration, reads as follows:

“Every person engaged in the business of buying, marketing and shipping scallops or clams shall for such privilege, on or before October first of each year, pay to the inspector of the district in which such person does business, a license tax per year as follows,” etc.

In my opinion this means that persons who buy clams to sell again to market or to ship are required to pay the tax. In other words, the law, in my opinion, applies to all persons who buy clams for commercial purposes.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

**ELECTIONS—Limitation of expenses of candidate for House of Representatives in Richmond.**

RICHMOND, VA., July 20, 1925.

HON. S. S. P. PATTESON,  
*Attorney at Law,*  
*Mutual Building,*  
*Richmond, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your request that I advise you as to the limitation of expenditures which can be made by a candidate for the House of Representatives in the city of Richmond.

I have examined with care sections 234 and 251 of the Code. Section 251 thereof limits the objects for which campaign expenditures may be incurred, while section 234 places a limit on the amount which may be expended by a candidate for office at any primary. This latter section reads as follows:

"No candidate for any office at any primary shall spend for any purpose whatever, a larger sum than an amount equal to fifteen cents for every vote cast for the candidate of his party receiving the largest vote at the last preceding gubernatorial election, within the territory, the qualified voters of which have the right to vote for the office for whose nomination such person is a candidate at such primary; except that in legislative districts where more than six candidates are to be nominated for the General Assembly, a candidate for the General Assembly may spend no more than forty per centum of the salary to be paid him if elected. Any person violating the provisions of this section shall be guilty of a misdemeanor."

I am advised by you that in the August, 1925, election only six candidates for the General Assembly are to be nominated in the city of Richmond, although in other years when Senators are to be nominated more than six candidates would be nominated in the primary to be held in the city of Richmond. In this particular election, however, only six are to be nominated.

It will be seen from an examination of section 234 of the Code that a candidate for office at any primary is permitted by the general terms of the statute to spend a sum equal to fifteen cents for every vote cast for the candidate of his party receiving the largest vote at the last preceding gubernatorial election, within the territory, the qualified voters of which have the right to vote for the office for whose nomination such person is a candidate at such primary. The exception to the general provision of the statute is badly worded, but in my opinion its language is limited to a legislative district in which more than six candidates are to be nominated for the General Assembly, and that it applies to such districts only when more than six candidates are to be nominated. I do not think that the exception contained in the statute would apply to the city of Richmond in a primary held at such time when not more than six candidates are to be nominated for the General Assembly.

It, therefore, follows that it is my opinion that the general limitation of the Statute and not the special exception applies to candidates for the General Assembly in the city of Richmond in the August, 1925, primary, for the reason that

in that primary not more than six candidates are to be nominated for the General Assembly.

Trusting that this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

---

### **MOTOR VEHICLES—Regulation of by Board of Supervisors.**

RICHMOND, VA., *July 14, 1925.*

HON. JEFF F. WALTER,

*Commonwealth's Attorney,*

*Accomac, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of July 6, 1925, in which you say, in part:

"Referring to chapter 426, page 651, of the Acts of Assembly, 1924, relating to the power of boards of supervisors of the counties of the State to enact special and local legislation for the protection of the public roads of the said counties, and for the regulation of traffic thereon, I desire to be advised as to whether or not this same act is comprehensive enough to authorize the boards to regulate lights on automobiles and cutouts. Are we limited under this act to the speed of motor vehicles?"

The first section of chapter 426 of the Acts of 1924, which governs the subject of your inquiry, reads as follows:

"Be it enacted by the General Assembly of Virginia, that the board of supervisors of the several counties are authorized and empowered to enact such special and local legislation in their respective counties not in conflict with general law regulating the speed of automobiles or other motor vehicles over the roads of the Commonwealth or with regulations promulgated pursuant to law, as they may deem expedient to protect the public roads, ways and bridges of the said counties from encroachment or obstruction, or from any improper, unusual or injurious use."

It appears to me from a reading of this section that the board of supervisors of the several counties are given authority by this act only to regulate the speed of motor vehicles to an extent not in conflict with the general law as to the speed of such vehicles, and, further, that they may pass such ordinances as are deemed expedient for the purpose of protecting the public roads, ways and bridges of said counties from encroachment or obstruction or from any improper, unusual or injurious use. This is broad enough, in my opinion, to authorize a regulation of lights. In my opinion, however, the authority conferred by this section is not broad enough to apply to cutouts. I also seriously doubt whether the authority conferred on the several board of supervisors is broad enough to authorize the

adoption of an ordinance with reference to lights which conflicts with the State law on the subject.

Trusting that this gives you the desired information, I am, with my best wishes,

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

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### TAXATION—Quit-claim deeds.

RICHMOND, VA., July 13, 1925.

HON. C. LEE MOORE,  
*Auditor Public Accounts,*  
*Richmond, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your communication of recent date, with which you enclose the correspondence between you and Honorable Thomas R. Keith in re the recordation of a certain quit-claim deed.

It appears from the facts in this letter that, on March 2, 1925, there was a trustee's sale and a deed was executed by the trustee to the purchaser in which the grantors in the deed of trust united. It appears that the trustee's deed, in which the grantors and the trustee united, conveyed every interest that the trustee or said grantors had in said land. This deed was duly recorded and the tax paid. However, it appears that there was no plat of this land, and, for the purpose of recording a plat of survey subsequently made, the purchaser procured the afore-said grantors to unite in a quit-claim deed to him, the sole object of this quit-claim deed being to get the plat on record.

As I have advised you previously where a quit-claim deed conveys any title to the grantee therein, it is my opinion that such deed is taxable as a deed of conveyance. However, as in this case, the quit-claim deed conveys absolutely nothing, it is my opinion that it is not subject to the tax required by section 13 of the tax bill as amended. Under the facts in this case, the quit-claim deed conveys absolutely no title to the grantee, as whatever title the grantors therein may have had was conveyed by the first deed executed by the trustee and the grantors in the quit-claim deed jointly.

Yours very truly,

LEON M. BAZILE,  
*Assistant Attorney General.*

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### INTOXICATING LIQUORS—Fees of officers.

RICHMOND, VA., July 11, 1925.

J. J. SANGSTER, ESQ.,  
*Justice of the Peace,*  
*Burke, Fairfax County, Va.*

MY DEAR MR. SANGSTER:

Acknowledgment is made of your letter of July 9, 1925, in which you refer

to section 46 of the Layman prohibition law, and ask me to advise you whether the fee for making an arrest in the case of drunkenness is \$5.00 or \$10.00.

I am not surprised if you have had trouble in the interpretation of this section. It is about as complicated as it could be made and in some parts is unintelligible. However, I am of the opinion and have so decided that the fee for making an arrest for intoxication is \$5.00, and that where more than one officer assists in making the arrest only one fee of \$5.00 can be taxed in the costs, which is to be divided between the officers making the arrest.

Trusting this gives you the desired information, I am, with my best wishes,

Yours very truly,

JOHN R. SAUNDERS,

*Attorney General.*

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### INTOXICATING LIQUORS—Fees of officers.

RICHMOND, VA., July 11, 1925.

MR. L. H. BRUCE,

*Justice of the Peace.*

*Elkton, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of July 9, 1925, in which you ask me to advise you as to the fee to be paid a sheriff or constable for an arrest in prohibition cases.

This matter is governed by section 46 of the Layman prohibition law, a copy of which I assume you have. The last paragraph of that section allows an officer for making an arrest for violation of any of the provisions of this or any other prohibition laws of the State, if the defendant is convicted, a fee of \$10.00 to be taxed as a part of the costs, except where an arrest is made for intoxication in which event a fee of \$5.00 only is allowed, which fee must be divided between the officers making the arrest if more than one officer participates.

You will see from section 20 of the Layman prohibition law that where a still is seized and the party owning or operating the still is arrested the officer shall be allowed a fee of \$50.00 to be paid by the defendant.

Trusting that this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,

*Attorney General.*

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### INTOXICATING LIQUORS—Druggists, licenses of.

RICHMOND, VA., July 9, 1925.

HON. ROBERT D. YANCEY,

*Commonwealth's Attorney,*

*Lynchburg, Virginia.*

MY DEAR MR. YANCEY:

Acknowledgment is made of your letter of July 1, 1925, in which you ask for my opinion on the following question:

"Has the judge of the corporation court arbitrary authority in the matter, or must he grant a license to an applicant who proves himself worthy of same? To put the question differently, can the judge simply make up his mind that a certain number of licenses, a dozen, we will say, is sufficient for the city, and then when he has granted a dozen licenses, can he refuse to grant another license to a proper person, regardless of how worthy of a license the person may be?"

This matter appears to be governed by section 72 of the Layman prohibition law. You will see from an examination of that statute that the applicant is required to satisfy the judge as to a number of matters, and to present satisfactory proof "that there is a necessity existing for the granting of such license, and that the sale of ardent spirits at that place and by the applicant will not be contrary to sound public policy or injurious to the moral or material interests of the community."

In my opinion, this statute gives the judge to whom the application is made a very wide discretion, and, while I think that this discretion would be reviewable by the appellate court, I am, nevertheless, of the opinion that it would be a rare case, indeed, in which the discretion exercised by the trial judge would be disturbed by the appellate court. In the absence of a clear abuse of that discretion, I do not believe that the appellate court would disturb it.

Trusting that this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

---

### JUVENILE JUDGE—Holding another office.

RICHMOND, VA., July 11, 1925.

J. H. LONG, ESQ.,  
*Clintwood, Va.*

MY DEAR MR. LONG:

Acknowledgment is made of your letter of July 8, 1925, in which, as a member of the trustee electoral board, you ask me to advise you whether one holding the office of a juvenile judge can hold the office of school trustee at the same time.

In response thereto, I call your attention to section 12 of chapter 423 of the Acts of 1922, which reads as follows:

"No Federal, State or county officer, or any deputy of such officer and no supervisor shall be chosen or allowed to act as member of the county school board, provided that the provisions herein obtained, shall not apply to fourth-class postmasters, county superintendents of the poor, commissioners in chancery, commissioners of accounts, registrars of vital statistics and notaries public. Each members of the board at the time of his election shall be a bona-fide resident of the magisterial district from which he is elected, and if he shall cease to be a resident of said district, his position on the county board shall be deemed vacant."

The juvenile judge of a county is a justice of the peace (chapter 483, Acts 1922), and, as such, is a constitutional officer (section 108 of the Constitution of Virginia).

In my opinion, a justice of the peace is a State officer. While his jurisdiction is limited, he is a constitutional officer, and the functions which he performs affect the people as a whole. It, therefore, follows, in my opinion, that the juvenile and domestic relations judge of a county is not eligible for appointment as a member of the county school board.

Trusting this gives you the desired information, I am, with my best wishes,  
Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

---

**BANK NOTICES—Publication in newspapers.**

RICHMOND, VA., July 9, 1925.

MARVIN J. ANDERSON, ESQ.,  
*Salem, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of July 7, 1925, in which you say, in part:

"The writer owns and publishes a weekly paper here in Salem, and also owns and publishes a weekly paper in Christiansburg for Montgomery county, which is printed in his Salem office. We have a business office in Christiansburg with a lady in charge, full time, who receives \$100.00 per month and who is responsible for gathering local news, both of the town and county. We have a total circulation of 600 copies, U. S. post-office count and publish a newspaper full of local and county news, nonpolitical."

You then ask me to advise you whether bank notices required by law could be legally printed in your paper.

This matter appears to be governed by section 4120 of the Code of 1919, as amended by the Acts of 1920, which requires the various State banks to make certain reports or statements to the Corporation Commission, and then provides:

"\* \* \* and also within fifteen days after such call publish such statements in condensed form in some newspaper printed in the county, city or town where such banking business is carried on or where the principal office of such bank is located; and if there is no such paper published in the county, city or town then such statements shall be published in a newspaper published in the county, city or town nearest thereto. \* \* \*"

While it is true the above act does use the word "printed" in one place, it is immediately qualified by the word "published," which shows that the intention of the legislature was that the word "printed," as used therein, should be synonymous with the word "published." Your paper, although printed outside of Montgomery county, is published in that county, and, therefore, a publication of the bank notices required by section 4120 of the Code of 1919, as amended, in your paper would comply with the provisions of that law.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

**SUNDAY LAW—Violation of.**

RICHMOND, VA., July 8, 1925.

MR. J. L. WHITLOCK,  
*Wolfstown, Va.*

MY DEAR SIR:

Acknowledgment is made of your letter of July 7, 1925, in which you ask for a condensed statement as to the law relating to the sale of gasoline, soft drinks and food on Sunday.

Section 4570 of the Code prohibits any person, on Sunday, from laboring at any trade or calling, or employing his apprentices or servants in labor or other business, except in household or other work of necessity or charity, and declares any violation of this provision to be a misdemeanor.

The Supreme Court of Appeals held, in *Ellis v. Covington*, 122 Va. 821, under a town ordinance almost in the same words as our statute, that it was an offense to sell soft drinks on Sunday. Gasoline appears to be sold in most places in Virginia on the theory that it is a necessity, I suppose. So far as I have been able to find, no test of the matter has been made in court. Food, which is served prepared to eat, may also be sold on Sunday as a necessity. I do not think, however, that a merchant would be justified in selling unprepared foods on Sunday on the theory that they were a necessity.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

**GAME AND FISH—Regulation as to size of mesh.**

RICHMOND, VA., July 8, 1925.

HON. WILLIAM L. DAVIDSON,  
*Commonwealth's Attorney,*  
*Jonesville, Va.*

MY DEAR SIR:

Acknowledgment is made of your letter of July 6, 1925, in which you say, in part:

"I am being called upon repeatedly these days to give an opinion on the fish laws in regard to the size of mesh for seines for use in the waters of Powell river and its tributaries in Lee county, and from reading the fish laws of the State and the one local statute, which is section 3201 for Lee county, which provides that seines may be used in Lee county except from the first day of March and the fifteenth day of June in any year, but there is nothing said in regard to what size mesh such seines shall be. The game wardens of this section are contending that such seines shall be two-inch mesh stretched measure, and all seines which have been used in these waters heretofore have been one inch mesh. I think the game wardens take the general statute, section 3171, for their authority as to the size of the mesh to be used in seines."

You then say that what you particularly wish to know is whether the size of the mesh that may be used in Lee county is two inches stretched measure or less, and, if less, what size.

I have examined section 3171 of the Code. You will see that this section is placed in the chapter with reference to commercial fisheries, and, in my opinion, is limited in its application to commercial fisheries, and has no application to the waters of Lee county. That being the case, it is my opinion that no regulation has been made as to the size of the mesh which may be used in seining for fish in the waters of Lee county.

For your information, I enclose copy of a letter written by me on June 27, 1925, to Dr. J. M. Prichard, Olinger, Virginia, with reference to the catching of black bass with a seine. Of course, this is prohibited by section 3195 of the Code.

With my best wishes, I am

Very truly yours,

JOHN R. SAUNDERS,  
*Attorney General.*

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### JUDGMENTS—Right to re-open.

RICHMOND, VA., July 7, 1925.

HON. THOMAS B. ROBERTSON,  
*Hopewell, Va.*

MY DEAR JUDGE ROBERTSON:

Acknowledgment is made of your letter of July 6, 1925, in which you say:

"There is a question in a case here as to the finality of a judgment. It is similar to the *Jordan Case*, 135 Va., except that an appeal has been properly noted.

"The defendant is asking to reopen the case. Judgment in May last and execution stayed to allow appeal to Supreme Court.

"If I can reopen the case they want to do so and not prosecute the appeal as the defendant who forfeited his bail has been captured and is now in the Penitentiary. I would be willing to let them off on payment of all cost to the Commonwealth."

I have examined the case of *Jordan v. Commonwealth*, 135 Va. 560 (1923), with care and am generally familiar with the question involved, as we had the same question involved in *Harley v. Commonwealth*, 131 Va. 664 (1921), and *Thaniel v. Commonwealth*, 132 Va. 795 (1922). The law seems to be settled beyond all question in this State that, where final judgment has been entered by the trial court and the term has adjourned, the trial court has no power to set aside the judgment and grant a new trial. The above-cited cases, including *Jordan v. Commonwealth*, *supra*, fully establish this.

I do not think that the fact that exception was taken to the ruling of the trial court, and the necessary steps taken to present the case to the appellate court, alters this rule. When the final judgment has been entered and the term adjourned, the trial court has no further jurisdiction. The case referred to appears to be a hard case, and I regret that the trial court is without power in the matter.

With my best wishes, I am

Sincerely yours,

JOHN R. SAUNDERS,  
*Attorney General.*

**OSTEOPATHS—Licensing of.**

RICHMOND, VA., July 7, 1925.

DR. A. R. GRAY,  
*Bentonville, Va.*

MY DEAR DR. GRAY:

Section 1618 of the Code of Virginia, 1919, contains the only provision that I have been able to find in our law with reference to the examination and licensing of osteopaths, chiropractors, etc. This section, so far as is applicable, provides, in part:

"\* \* \* It is further provided that graduates of any sectarian school of medicine who profess to practice medicine, according to the tenets of said schools, shall fulfill all the conditions of the board and of the State Board of Education, save that they may be exempted from taking the examination of the regulars on practice of medicine, materia medica and therapeutics. A license to practice such sectarian school of medicine shall not permit the holder thereof to administer drugs or practice surgery unless he has qualified himself so to do by examination before the board, nor shall it permit members of such sectarian schools now practicing in this State to perform surgery with the use of instruments unless they satisfy the board that they have had adequate clinical facilities at their respective colleges of graduation, or by hospital work, to enable them to perform such operations."

This section also exempts from examination any person who commenced the practice of osteopathy in this State prior to January 1, 1903, and persons who commenced the practice of chiropractic in this State prior to January 1, 1913.

For your further information, I am referring your letter to Dr. J. W. Preston, secretary of the Board of Medical Examiners, Roanoke, Virginia.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

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**SUPERSEDEAS—Effect of.**

RICHMOND, VA., July 1, 1925.

HON. R. B. STEPHENSON,  
*Commonwealth's Attorney,*  
*Covington, Va.*

MY DEAR MR. STEPHENSON:

On May 6, 1925, I wrote you in response to your letter of May 4 that I thought that Sam Palmer should remain in the Penitentiary, where he had been sent until his case had been disposed of by the Court of Appeals. Since writing that letter, I find that in the case of Wood and Hatfield referred to therein the right of the superintendent of the Penitentiary to hold these men was not seriously disputed, and that their detention in the Penitentiary appears to have been acquiesced in. Therefore, this case could hardly be regarded as a precedent.

Mr. O. B. Harvey, counsel for Sam Palmer, contends that the effect of the supersedeas granted by the Court of Appeals is to prevent the execution of the

sentence imposed on Palmer, which I understand was confinement in the Penitentiary, and takes the position that Palmer should be returned to the local jail pending the disposition of his case by the Court of Appeals. I have, therefore, investigated the question more fully than I did at the time I wrote you on the 6th of May, and have now reached the conclusion that Mr. Harvey is correct in the position taken by him.

The effect of a supersedeas is to supersede the enforcement of the judgment of the lower court. 3 Bouvier's Law Dictionary (Rawle's 3rd Revision), page 3136. In *State v. Laffin*, 40 Neb. 441, it is said that a supersedeas is a remedy "by which the enforcement of a decree of a court is superseded or delayed during appeal." The authorities generally so hold. 8 Words and Phrases, p. 6795, *et seq.*

I have read section 4944 of the Code of 1919 with care, and, while the meaning thereof is a little hard to determine, I am inclined to the belief that the last sentence has reference to a case where a supersedeas is not awarded. I am, therefore, instructing the superintendent of the Penitentiary to return this man to your jail pending the disposition of his case before the Court of Appeals.

Yours very truly,

JOHN R. SAUNDERS,  
*Attorney General.*

**Statement**

*Showing the Current Expense of the Office of the Attorney General from  
June 30, 1925, to July 1, 1926*

Telegrams .....	\$ 54 78
Telephone service and tolls.....	277 24
Subscriptions to and purchase of law books.....	223 50
Postage .....	165 00
Towels, drinking water, furniture, office supplies, repairs.....	1,093 52
Additional stenographic service.....	105 00
Insurance premiums.....	10 00
	<hr/>
	\$ 1,929 04

**Statement**

*Showing Amounts Expended from the Appropriation for Traveling Expenses  
from June 30, 1925, to July 1, 1926*

1925	
July 30. Leon M. Bazile, expenses to Norfolk, <i>Sunrise Development Corporation v. Virginia Military Board</i> .....	\$ 14 36
Sept. 15. Jno. R. Saunders, expenses to Staunton, Supreme Court....	23 92
Sept. 25. Lewis H. Machen, expenses attending hearing of certain motions in case of <i>Burr v. Va. Ry. &amp; Power Co.</i> at Petersburg on September 12, 1925.....	1 60
Oct. 1. Leon M. Bazile, expenses to Staunton, Supreme Court.....	25 92
Oct. 14. Jno. R. Saunders, expenses to Washington, hearing before I. C. C., leasing Virginian by N. & W.....	19 95
Dec. 3. Jno. R. Saunders, expenses attending hearing in Washington, lease of Virginian by N. & W.....	28 40
Dec. 7. Leon M. Bazile, expenses, attending hearing in Washington, lease of Virginian Railway by N. & W.....	50 82
Dec. 9. Jno. R. Saunders, expenses to Washington, lease of Virginian Railway by N. & W. Railway.....	18 75
Dec. 29. Leon M. Bazile, expenses to Washington, in re hearing lease of Virginian Railway by N. & W. Railway.....	29 25
1926	
Jan. 14. Jno. R. Saunders, expenses to Washington, lease of Virginian Railway by N. & W. Railway.....	24 10
Feb. 15. Jno. R. Saunders, expenses to Washington, <i>Carter Glass v. State Live Stock Sanitary Board</i> .....	19 40
Feb. 25. Leon M. Bazile, expenses to Washington, <i>Carter Glass v. State Live Stock Sanitary Board</i> .....	23 46
Feb. 26. Leon M. Bazile, expenses to Washington, lease of Virginian Railway by N. & W. Railway.....	93 70
Mar. 3. Jno. R. Saunders, expenses to Washington, New River Development Co. ....	13 40

## STATEMENT TRAVELING EXPENSES—CONTINUED

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Apr. 10.	Jno. R. Saunders, expenses to Washington, <i>Carter Glass v. State Live Stock Sanitary Board</i> .....	\$	16 35
June 15.	Lewis Machen, expenses Wytheville, attending Court of Appeals .....		37 60
June 21.	Leon M. Bazile, expenses Wytheville, attending Court of Appeals .....		38 65
	Total .....	\$	479 63

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