

REPORT

OF THE

ATTORNEY GENERAL

TO THE

Governor of Virginia

From June 30, 1926, to July 1, 1927

RICHMOND:
DAVIS BOTTOM, SUPERINTENDENT OF PUBLIC PRINTING
1928

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COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., January 9, 1928.

His Excellency, 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, 1926, to July 1, 1927.

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. *Ballard v. Commonwealth.* Attempt to rape. From circuit court of Albermarle county. Reversed.
2. *Barb v. Commonwealth.* Prohibition. From circuit court of Shenandoah county. Judgment amended and affirmed.
3. *Beavers v. Commonwealth.* Prohibition. From circuit court of Prince William county. Reversed.
4. *Blow v. Commonwealth.* Prohibition. From circuit court of Southampton county. Error confessed.
5. *Brooks v. Commonwealth.* Prohibition. From circuit court of Russell county. Reversed.
6. *Brown v. Commonwealth.* Prohibition. From circuit court of Charles City county. Affirmed.
7. *Caske and Gravatt v. Commonwealth.* Blue sky law. From State Corporation Commission. Reversed.
8. *Chesapeake and Potomac Telephone Co. of Virginia v. Commonwealth.* Telephone rates. From State Corporation Commission. Affirmed.
9. *Collier and Dean v. Commonwealth.* Malicious trespass. From circuit court of Rockingham county. Affirmed as to Collier. Reversed as to Dean.
10. *Collins v. Commonwealth.* Forfeited recognizance. From circuit court of city of Radford. Affirmed.
11. *Colvin v. Commonwealth.* Malicious shooting. From circuit court of Fauquier county. Affirmed.
12. *Commonwealth of Virginia and Giles County v. Pembroke Limestone*

Works. Alleged erroneous assessment. From circuit court of Giles county. Affirmed.

13. *Crook et al. v. Commonwealth*. Sunday law. From circuit court of Norfolk county. Affirmed.

14. *DeBoer v. Commonwealth*. Prohibition. From circuit court of York county. Affirmed.

15. *Funkhouse v. Commonwealth*. Prohibition. From circuit court of Shenandoah county. Judgment amended and affirmed.

16. *Gimmell v. Commonwealth*. Prohibition. From circuit court of Roanoke county. Affirmed.

17. *Grayson v. Commonwealth*. Prohibition. From circuit court of Stafford county. Affirmed.

18. *Harold v. Commonwealth*. Voluntary manslaughter. From circuit court of Warwick county. Reversed.

19. *Industrial Finance Corporation v. Commonwealth*. Charter amendments. From State Corporation Commission. Dismissed.

20. *Jackson v. Commonwealth*. Housebreaking. From circuit court of Louisa county. Dismissed.

21. *Judd v. Commonwealth* (No. 1). Seduction. From circuit court of Rockingham county. Affirmed.

22. *Judd v. Commonwealth* (No. 2). Application for bail. From circuit court of Rockingham county. Writ dismissed.

23. *Keeney v. Commonwealth*. Prohibition. From circuit court of Prince William county. Reversed and remanded.

24. *Knight v. Commonwealth*. Prohibition. From hustings court of city of Petersburg. Error confessed.

25. *Lillard and McAlister v. Commonwealth*. Prohibition. From circuit court of Madison county. Error confessed.

26. *Limbaugh v. Commonwealth*. Seduction. From corporation court of city of Staunton. Reversed.

27. *Manley and Thomas v. Commonwealth*. Trespass. From circuit court of Albemarle county. Error confessed.

28. *Mansfield v. Commonwealth*. Prohibition. From circuit court of Albemarle county. Reversed.

29. *Messer v. Commonwealth* (No. 2). Prohibition. From circuit court of Giles county. Reversed.

30. *Moore v. Moore*. Petition for writ of mandamus. Mandamus awarded.

31. *Morris v. Commonwealth*. Prohibition. From circuit court of Wise county. Affirmed.

32. *Myers v. Commonwealth*. Malicious assault. From hustings court of city of Roanoke. Reversed and remanded.

33. *Owens v. Commonwealth*. Prohibition. From corporation court, part II, of the city of Norfolk. Affirmed.

34. *Page v. Commonwealth*. Embezzlement. From hustings court of city of Richmond. Reversed.

35. *Parsons v. Commonwealth*. Prohibition. From circuit court of Frederick county. Error confessed.

36. *Pembroke Limestone Works v. Commonwealth*. Alleged erroneous assessment. From circuit court of Giles county. Reversed.

37. *Peoples v. Commonwealth*. Murder. From circuit court of Norfolk county. Affirmed.
38. *Piedmont Finance Corporation v. Commonwealth*. Forfeited automobile. From circuit court of Augusta county. Affirmed.
39. *Randall v. Commonwealth*. Prohibition. From circuit court of Prince William county. Error confessed.
40. *Randolph v. Commonwealth*. Assault. From circuit court of Scott county. Reversed.
41. *Rhodes v. Commonwealth*. Embezzlement. From corporation court of city of Bristol. Reversed.
42. *Riner v. Commonwealth*. Prohibition. From circuit court of Scott county. Reversed.
43. *Rosenbaum v. Commonwealth*. Larceny. From circuit court of Washington county. Error confessed.
44. *Rowland v. Commonwealth*. Rape. From corporation court, part II, of city of Norfolk. Affirmed.
45. *Shields v. Commonwealth*. Prohibition. From circuit court of Campbell county. Affirmed.
46. *Shiflett v. Commonwealth*. Prohibition. From circuit court of Madison county. Error confessed.
47. *Smith v. Commonwealth*. Attempt to murder. From circuit court of Nottoway county. Affirmed.
48. *Smith and Miller v. Commonwealth*. Prohibition. From circuit court of Buckingham county. Reversed.
49. *Superior Steel Corporation v. Commonwealth*. Taxation. From State Corporation Commission. Reversed.
50. *Thurpin v. Commonwealth*. Prohibition. From circuit court of Arlington county. Reversed.
51. *Virginia Pilot Association and others v. Commonwealth*. From State Corporation Commission. Affirmed.
52. *Western Gas Construction Co. v. Commonwealth*. Foreign corporation doing business in Virginia without license. From State Corporation Commission. Affirmed.
53. *Wilson v. Commonwealth*. Malicious assault. From circuit court of Lee county. Error confessed.
54. *Wood v. Commonwealth*. Attempt to rape. From circuit court of Albemarle county. Affirmed.
55. *Wood v. Commonwealth*. Assault and battery. From circuit court of Grayson county. Affirmed.
56. *Zimmerman v. Commonwealth*. Prohibition. From circuit court of Bedford county. Affirmed.

(No cases were decided in the Supreme Court of United States during this time.)

CASES PENDING IN THE SUPREME COURT OF APPEALS
OF VIRGINIA

1. *Barbee v. Murphy, etc.* Ouster proceedings. From circuit court of Prince William county.
2. *Brooks v. Town of Potomac.* Constitutionality of statute providing for fees of justices of the peace and mayors. From circuit court of Arlington county.
3. *Commonwealth v. Mayo.* Forfeited automobile. From corporation court of city of Alexandria.
4. *Locke and Lewis v. Commonwealth.* Rape. From hustings court of city of Richmond.
5. *Pflaster v. Commonwealth.* Unlawful wounding. From circuit court of Loudoun county.
6. *Timmons v. Commonwealth.* Prohibition. From circuit court of Henrico county.
7. *Turner v. Commonwealth.* Prosecution under regulation of Crop Pest Commission. From circuit court of Northampton county.

CASES PENDING IN THE SUPREME COURT OF THE
UNITED STATES

1. *Western Gas Construction Company v. Commonwealth.* Appealed from the decision of the Supreme Court of Appeals, sustaining fine imposed by the Corporation Commission on the plaintiff in error, a foreign corporation, for doing business in Virginia without a license.
2. *Miller v. State Entomologist and others.* From the Supreme Court of Appeals of Virginia, upholding the validity of the cedar rust law.

CASES IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE WESTERN DISTRICT OF VIRGINIA

1. *Kelleher v. State Entomologist.* Injunction proceedings involving the validity of the cedar rust law. Injunction denied.

CASES PENDING OR TRIED IN THE CIRCUIT COURT OF THE
CITY OF RICHMOND

1. *Commonwealth v. O. B. Thomas, Treasurer.*
2. *Commonwealth v. G. P. 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. Seaboard Air Line Railroad Co.*
10. *Commonwealth v. Virginia Railway and Power Co.*
11. *Commonwealth v. John T. FitzGerald.*
12. *Commonwealth v. John D. Evans, Sergeant.*
13. *Commonwealth v. E. Thompson, Clerk.*

14. *Commonwealth v. R. C. Glover, Com'r of Revenue.*
15. *Commonwealth v. Jas. T. Trehy, Clerk.*
16. *Commonwealth v. Southeastern Iron Corporation.*
17. *Commonwealth v. Red Star Oil Company.*
18. *Commonwealth v. Taylor Korman Oil Co.*
19. *Commonwealth v. W. B. Fulton.*
20. *Commonwealth v. Julian T. Christian.* Judgment satisfied.
21. *Commonwealth v. Auburn Poultry Farm.* Judgment satisfied.
22. *Commonwealth v. Crescent Gas and Oil Company.* Judgment satisfied.
23. *Commonwealth v. R. Lee Harvey.* Judgment satisfied.
24. *Commonwealth v. H. L. Hudgins, Treasurer.* Dismissed.
25. *Commonwealth v. Longborough Oil Company.* Dismissed.
26. *Commonwealth v. Central Service Corporation.* Dismissed.
27. *Commonwealth v. L. B. Resseguie.* Dismissed.
28. *Commonwealth v. W. R. Sulfridge.* Dismissed.

IN CHANCERY

1. *Commonwealth v. R. 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. B. B. Van de Grifdt & Son.*
7. *Commonwealth Fidelity and Deposit Co. of Maryland v. Commonwealth.*
8. *R. H. Stuart's Ex'ors v. Commissioners of Sinking Fund.*
9. *Minton W. Talbot v. C. Lee Moore, Auditor of Public Accounts.*
10. *W. P. Weaver v. State Live Stock Sanitary Board.*

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OPINIONS

ALEXANDERS ISLAND—A part of Virginia.

RICHMOND, VA., February 21, 1927.

WILLIAM THOMPSON, Esq., *District Manager,*
The Texas Co.,
Norfolk, Va.

DEAR MR. THOMPSON:

Acknowledgment is made of yours of the 17th, in which you ask me to advise whether Alexanders Island, just across the river from Washington, D. C., is in the State of Virginia or is a part of the District of Columbia, for the purpose of the payment of road taxes.

My view is that this land, which, as you say, is no longer an island, is a part of the State of Virginia and that all persons and property thereon are liable to this State for taxes.

I understand that there is a movement on foot to claim it as a part of the District of Columbia, but I do not think this claim can be substantiated.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

ADJUTANT GENERAL GARAGE—On State road without building permit.

RICHMOND, VA., January 13, 1927.

COLONEL WILLARD D. NEWBILL,
Assistant Adjutant General,
Richmond, Virginia.

MY DEAR COLONEL NEWBILL:

Acknowledgment is made of your communication of January 12, 1927, in which you request my opinion on the following statement of facts:

“Major LaPrade has just called up and said he is ready to begin the construction of the garage at 308 south First street, but does not know as to whether it will be necessary to secure a building permit from the city. As the land involved belongs to the State, please secure a ruling at the earliest practicable date from the Attorney General of Virginia. My impression is that Colonel Saunders has already ruled in this matter, however, I cannot find record of same. Major LaPrade is ready to give out proposals for the construction of the garage.”

If the lot is owned by the Commonwealth, it is my opinion that it has the authority to erect thereon a building without getting a permit from the building inspector of the city of Richmond. This position taken by the Commonwealth was sustained by Judge Richardson of the hustings court and by Judge Crump of the law and equity court in a controversy between the city of Richmond and its Military Board, resulting from

the erection of certain buildings on property owned by the penitentiary without complying with the building code of the city of Richmond. Although the case went to the Court of Appeals, this issue was not passed on by that court as the case was decided on another point.

I would suggest that the Military Board erect a building in this quarter which would not in any manner create a fire hazard, but I would also suggest that the board refrain from asking for a permit from the city of Richmond to erect the structure.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

ADJUTANT GENERAL—Authority to issue release of judgment.

RICHMOND, VA., April 15, 1927.

HON. W. W. SALE,
Adjutant General,
Richmond, Va.

MY DEAR GENERAL SALE:

I beg to acknowledge receipt of your letter of recent date, in which you enclosed a letter from Mr. Frank D. Matthews, with reference to an alleged release of judgment by the Adjutant General's office in the year 1913.

You state that when Mr. Matthews left the National Guard he was found short on property and the court gave a judgment against him in the amount of \$200. You further state that you think \$100 of this amount has been paid, and Mr. Matthews claims that an order for the release of the remaining \$100 was issued by your office but no such record can be found. You then desire to be advised whether or not the Adjutant General's office can issue such a release.

In reply, I will state that the Adjutant General has no authority to do this. If a judgment has been recovered against Mr. Matthews for the amount of \$200, it can only be satisfied upon the payment of the whole amount. Unless the property has been recovered and restored to the State, under no circumstances could the judgment be released.

Yours very sincerely,

JOHN R. SAUNDERS,
Attorney General.

Arrest—Authority to pursue.

RICHMOND, VA., February 7, 1927.

HON. R. KENT SPILLER,
Commonwealth's Attorney,
Roanoke, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of February 3, 1927, in which you say:

"The question has arisen here as to the right of a deputy sheriff from Roanoke county pursuing a car transporting liquor from the county into the city and overtaking him within the corporate limits, and using force in making the arrest.

"Although it has before been understood by my office, and the office of the Commonwealth's attorney in the county, that the officers from their jurisdiction could make arrest where pursued from the county into the city, I am unable to find any law authorizing a sheriff of a county to pursue a liquor violator or other offender committing a misdemeanor into the city and there make an arrest. I am very anxious to sustain this proposition, as it becomes necessary to follow automobiles into the city. I would appreciate it if your office can cite me to law authorizing same."

It would seem to me that section 4825 of the Code of 1919 is broad enough to permit an officer to pursue an offender from the county in which the crime was committed into another county or city into which the accused has fled.

Trusting this gives you the desired information, I am

Very truly yours,

JOHN R. SAUNDERS,
Attorney General.

ARCHITECTS—License to practice.

RICHMOND, VA., September 28, 1926.

HON. C. G. MASSIE, *Secretary,*
State Board for the Examination and Certification, of Professional Engineers,
Architects and Land Surveyors,
Lynchburg, Virginia.

MY DEAR MR. MASSIE:

Acknowledgment is made of your letter of September 27th, in which you call attention to the exemptions contained in paragraphs (d) and (g) of section 8, chapter 328 of the Acts of 1920, as amended, relating to professional engineers, architects, land surveyors, etc.

Section 8 of the above act, so far as is applicable provides the following shall be exempt from the provisions of this act. * * *

"(D) Engaging in professional engineering, architecture, or land surveying as an employee under a certified professional engineer, a certified architect, or a certified land surveyor, provided that said practice may not include responsible charge of design or supervision."

"(G) Practice of architecture or professional engineering by an individual, firm, or corporation on property owned or leased by said individual, firm or corporation, unless the same involves the public health or safety."

Paragraph (d) in your letter: I fully concur in the construction reached by you as to this section.

You have asked me to advise you as to my construction of paragraph (g) above quoted:

In my opinion, this paragraph means that if an individual, or a firm, or a corporation owns or leases property, such individual, firm, or corporation may practice architecture, professional engineering, on such owned or leased property under this exemption, unless such practice involves the public health or safety, in which latter event, the exemption would not apply. You will observe that such individual, firm, or corporation must own or lease the property on which the architecture or professional engineering is practiced. This section is not broad enough to permit one of a firm of architects, or professional engineers to practice his profession on property which is owned not by the firm, but by another member of the firm. The property must be owned by the firm in order to entitle him to the exemption.

In my opinion, the property owned by a corporation would not justify the stockholders of such corporation in practicing the professions of architecture and engineering on property owned by the corporation. Other instances suggest themselves, but these are sufficient to illustrate my meaning. Of course, none of these exemptions apply to employees.

You call attention to section 12 of the above mentioned act, as amended, and say:

"A person offering his services as a consulting engineer is required by section 12 to have a certificate or certificates in such branch or branches of professional engineering as he may offer his services."

Section 12 of chapter 328 of the Acts of 1920, as amended, reads as follows:

"After January 1, 1925, the practice of architecture, or professional engineering, or the use by any person of the title of architect, or professional engineer, or land surveyor, or the use of any word, figure or letters, indicating or intended to imply that the person using the same is an architect, or a professional engineer, or a land surveyor, without compliance with the provision of this act, shall be deemed a misdemeanor, and such person shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars for each such offense.

"The term architect, as used in this act, shall be deemed to cover an architect or an architectural engineer. The term professional engineer, as used in this act, shall be deemed to cover a civil engineer, mechanical engineer, electrical engineer, mining engineer, metallurgical engineer, or a chemical engineer. Land surveying as covered by this act, refers only to surveys for the determination of areas or for the establishment or re-establishment of land boundaries and the subdivision of land and such topographic work as may be incident thereto, the making of plats and maps and the preparing of descriptions of the lands and lines so surveyed or investigated."

In my opinion, a consulting engineer is included within the definition of an engineer, as contained in section 12 of the above act, as amended, and therefore, I agree with you that he must have a certificate, or certificates, in which branch, or branches of professional engineering as he may offer his services.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

AGRICULTURAL DEPARTMENT—Inspection of cars.

RICHMOND, VA., November 5, 1926.

G. W. KOINER, ESQ., *Commissioner,*
Department of Agriculture,
Richmond, Virginia.

DEAR SIR:

Acknowledgment is made of your letter of October the 29th in which you state in part:

"Our inspector, Mr. G. B. Parrott, found on the car tracks at Winchester a car containing 250 bags of different grades of timothy shipped by the Albert Dickinson Company, Chicago, Ill., on order, notify the Winchester Seed Company, Winchester, Va. Mr. Parrott approached the agent of the B. and O. Railway Company and requested permission to break the seal on this car and inspect its contents as provided for in section 10, chapter 114, Acts of 1924.

The agent thereupon refused to permit him to enter this car for the purpose indicated.

"I wish your opinion as to whether or not under section 10 of this law our inspector had a right to enter this car for the purpose of inspecting its contents."

Having read the letter addressed to your office by the inspector in which he stated that the draft in this particular case had not been paid at the time he requested permission to enter the car and inspect the contents, I would say that until the draft had been paid, the inspector would not have a right to inspect the contents of the car containing the 250 bags of timothy.

Section 10, chapter 114 of the Acts of 1924 uses the following language:

"The inspector, etc., shall have free access, at all reasonable hours, upon and into any premises or structures to make examination of any agricultural seeds or mixtures of same, whether such seeds or mixtures are upon the premises of the owner or consignee of such seeds or mixtures, or on the premises or in the possession of any warehouse, elevator, railway or steamship company * * *"

Although the above section says that the inspector shall "have free access," I do not think it was the intention of the General Assembly that the inspector should "break the seal on the car and inspect the contents."

Of course the language gives right much discretion to the inspector but he must not in the course of his authority abuse this discretion. He must be reasonable in making this inspection. The language of the above section also says that the inspector shall make his inspection "at all reasonable hours."

Trusting this will give you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

AUTOMOBILES—License tax.

RICHMOND, VA., November 23, 1926.

HON. WILBUR C. HALL,
Attorney at Law,
Leesburg, Virginia.

MY DEAR MR. HALL:

Your letter of November 2, 1926, addressed to Hon. Lester Hooker, has been referred to me for attention. In this letter you ask to be advised whether a taxi driver who holds a "C" certificate, is required to pay a license fee to an incorporated town.

If you will examine section 5 (paragraphs 1 and 2) of chapter 551 of the Acts of 1926, amending the motor vehicle carrier's law, you will see that express provision is made for license taxes by cities or towns in the case of holders of certificates "A" and "D." You will also observe that no prohibition against the imposition of a license tax by a city or town, with reference to holders of other classes of certificates, is contained in this law.

If you will examine section 3072 of the Code, you will see that cities and towns are authorized to impose license taxes for the privilege of doing anything for which a State license tax is required, with certain exceptions.

I also call your attention to section 29, paragraph (e) of chapter 149 of the Acts of 1926.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

AUTOMOBILES—Truckman's tax.

RICHMOND, VA., December 7, 1926.

STRASBURG STEAM FLOURING MILLS,
Strasburg, Virginia.Attention: C. D. Smith, Esq., *Treasurer*

GENTLEMEN:

Acknowledgment is made of your letter of December the 4th in which you say:
in part:

"It has come to our attention that quite a hardship in the way of permits, license, bonds and other expenses, such as gas tax has been placed on two or three of our local truckmen. One of these men called our attention to the fact that his tax would be on January 1, 1927, around \$150.00. These men do general hauling in and around Strasburg but do not have regular work and in our opinion do not come under the head of freight and passenger trucks."

You request an opinion as to whether the above is correct. In answer to your inquiry I would say that the above mentioned truckmen would be required by law to get a certificate E from the commission, for which they would have to pay \$50.00.

Section 5 of chapter 551 of the Acts of 1926 at page 925 provides in part as follows:

"The commission may grant a certificate E for property carrying vehicles to such applicant or applicants holding themselves out for private employment only for the transportation of specific loads or commodities for one person or firm on a single trip, to or from the city, town or location from which said carrier operates to such other cities, towns or locations over any improved public highway of the State, but who will not operate upon a regular schedule, nor solicit nor receive patronage along the route or between the cities, towns or locations served by a class D carrier. Nothing in this section, however, shall prohibit or interfere with class E carriers while engaged in the transportation of farm or dairy products exclusively from the farm or dairy to market or shipping point. *** The holder of certificate E shall pay to the Motor Vehicle Commissioner for the privilege of operating under such certificate fifty dollars for each license year in addition to the State license tax."

It would seem, therefore, that the particular truckmen would come under the provisions of the above mentioned section and would be required by law to get a certificate E and pay \$50.00 to the commission. The exact sum that would have to be paid by these truckmen would depend, in addition to above \$50.00, upon amount of the State license, gas tax and the other incidentals connected with owning a truck. I dare say in the end it would amount to \$150.00.

Trusting this will give you the desired information, I am,

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

AUTOMOBILES—License for transporting neighbors.

RICHMOND, VA., March 16, 1927.

HON. R. B. STEPHENSON,
Commonwealth's Attorney,
Covington, Va.

DR. MR. STEPHENSON:

I have yours of the 4th, in which you say:

"I want to propound the following question to you in regard to the operation of an automobile for hire; a citizen of this county goes to his work some miles

away in his automobile. He has two or three neighbors who also go to work at the same place, or along the same road; the owner of the car hauls his neighbors to and from their work, but does not make any charge for transporting them. These neighbors, however, sometimes give him money for hauling them, and the owner of the car accepts this. Under this state of facts, I would like to know whether this man is required to take out a license for operating an automobile for hire. He is not carrying any large number of passengers, just two or three, and is not trying to evade the law, and it seems to me somewhat doubtful that any license is required. Please advise me as to this matter."

In reply, I beg to say that if a party transporting his neighbors accepts compensation for doing so, even though he may not demand it, he should have a license. I see no exceptions in the law which would cover this case.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

AUTOMOBILES—Speed limit on public roads.

RICHMOND, VA., July 26, 1926.

E. D. SMECKER, ESQ.,
Justice of the Peace,
Crabbottom, Virginia.

DEAR MR. SMECKER:

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

"Will you please give me some information as to the recent act of the General Assembly concerning the automobile traffic law?

"Does the speed limit law apply to all public roads, county and State, and has a justice of the peace the right to arrest and fine any person violating the speed limit law, when done under his observation, and what is the speed limit law on county roads running by schools and through unincorporated towns?"

In reply I beg to say that the speed limits prescribed by chapter 474 of the Acts of 1926 apply to all public roads, county and State. The limit when running on county roads when passing a school during recess or while children are going to or leaving school during its opening and closing hours is fifteen miles an hour.

An unincorporated town would come within the definition of a residence district if seventy-five per centum or more of the frontage on the road for a distance of 300 feet or more is mainly occupied by dwellings or by dwellings and buildings in use for business purposes. There is no provision in the act in regard to unincorporated towns as such.

There is no law which permits an officer making an arrest to try the case. A justice, being a conservator of the peace, may, of course, arrest persons for violations of the law committed in his presence, but, in that event, some other justice should try the case.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

AUTOMOBILES—Operation of truck for transfer.RICHMOND, VA., *August 3, 1926.*

MR. W. B. MASON,
*Care of Shackelford-Warren-Mason, Inc.,
Orange, Virginia.*

MY DEAR MR. MASON:

I am just in receipt of your letter of the 31st, to which I will reply at once. In this you state there is a party in your town who owns a truck and is operating the same for transfer under permit "C." You then desire to be advised whether or not this party is required to take out a chauffeur's license.

I discussed this matter with Mr. Hayes, Motor Vehicle Commissioner, and he says that this party will have to take out a chauffeur's license.

I am frank to admit that section 19½ is somewhat ambiguous; at the same time, that portion of the section which states "that every person who drives a motor vehicle while in use as a public or common carrier of persons or property shall take out a chauffeur's license" would seem to include the case mentioned in your letter.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

AUTOMOBILES—Fees of justice of peace.RICHMOND, VA., *December 30, 1926.*

MR. J. T. HARMAN,
*Justice of the Peace,
Route 1, Box 19,
Christiansburg, Va.*

MY DEAR SIR:

Your letter of December 23rd, addressed to the Motor Vehicle Commissioner, has been referred to this office for attention. In your letter you say in part:

"A month ago a lady came to me with a complaint that a man in a car had driven a car at a high rate of speed down a narrow mountain road and ran into a buggy in which she and a companion were driving and narrowly averted a serious accident. The man, it is stated, did not stop to apologize or even slow up to see if anyone was hurt or not. I found who the party is and issued a warrant charging reckless driving, but have held it up, as I do not know that I can try the case, as I do not get a salary, but fees, and I do not wear a uniform.

"It has never been my plan to arrest on the road, but rather to get the tag number of violators and send the constable of the district for the party on a warrant of arrest or a summons, but the constable does not wear uniform and he gets no salary, but is paid in fees and, of course, if there is not a conviction, he and myself as well have the right to make a claim against the Commonwealth and after same has been sworn to a few times and approved by the judge, etc., one half may be collected. I have never tried to collect a claim of this kind.

"I hope you will tell me just what is the status of a justice in remote districts in which there is no uniformed officers nor any salaried ones, and where there are violations of the automobile laws every day, as I do not wish to overstep the provisions of the law, neither do I wish to ignore wilful violations when the safety of the public requires, as I believe, a strict enforcement of all our laws with regard to automobiles."

I have examined section 2, subsection c, of chapter 149 of the Acts of 1926, with care and it is my opinion that this section does not prohibit a justice of the peace from

receiving fees for the issuance of warrants and the trying of cases connected with the violation of motor vehicle laws.

In my opinion, this section is limited to the arresting officer or officers and has nothing to do with the fees of the justice trying the case or issuing the warrant. I regret to say that the law has provided that the constable must perform his duties in this case without compensation in the form of a fee.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

AUTOMOBILES—License on State reservation.

RICHMOND, VA., *January 13, 1927.*

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

MY DEAR GOVERNOR BYRD:

Acknowledgment is made of your letter of January 10, 1927, with which you send me certain correspondence from Major E. H. Chase, Jr., in charge of the Federal ordnance depot at Pig Point, Virginia.

Major Chase contends that the depot at Pig Point is a Federal reservation acquired for military purposes by the Federal government under authority of article 1, section 8, clause 17 of the Federal Constitution, and that, this being so, the ordnance depot is not a part of the State of Virginia and persons residing thereon are nonresidents of this State. From this premise he argues that automobiles owned by persons residing on the reservation can come into this State without being registered or licensed by the Commonwealth. You have requested my opinion as to this.

The answer to Major Chase's contention is to be found in the proper construction of section 20 of chapter 149 of the Acts of 1926. Subsection (a) thereof provides as follows:

"A nonresident owner, except as otherwise provided in this section, owning any foreign vehicle which has been duly registered for the current calendar year in the State, county or other place of which the owner is a resident and which at all times when operated in this State has displayed upon it the number plate or plates issued for such vehicle in the place of residence of such owner may operate or permit the operation of each vehicle within this State without registering such vehicle or paying any fees to this State."

If the Pig Point depot was in fact acquired by the Federal government under authority of article 1, section 8, clause 17 of the Federal Constitution, it would no longer be a part of the Commonwealth and persons residing thereon would not be residents of this State, but, admitting these as established facts, it would not necessarily follow that persons residing on such reservation would be entitled to bring their automobiles into the Commonwealth of Virginia without first registering and obtaining licenses for such cars. In order for a nonresident to avoid the registering and licensing of his car in this State when brought therein, it is necessary, under the above quoted section of the law, that it shall have been duly registered in the jurisdiction in which he resides and number plates issued for such vehicle in the place of residence of such owner.

I would, therefore, say that, if the Federal government has provided for the registering of automobiles on Federal reservations acquired under authority of article 1, section 8, clause 17 of the Federal Constitution, and has further provided for the issuing of number plates for such machines, they could be operated off of the reservation in the Commonwealth without registering in this State; but I am of the opinion that, if the Federal government has not provided by law for the registering of such automobiles on its military reservations and the issuing of number plates, such cars cannot be operated in this Commonwealth without first registering and paying the necessary license tax required by this State.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

BONDS—State employee.

RICHMOND, VA., February 23, 1927.

HON. E. O. FIPPIN, *Executive Secretary,*
Conservation and Development Commission,
Richmond, Va.

DEAR MR. FIPPIN:

I have gone over again the letter of Honorable M. A. Hutchinson, chief clerk in the office of the Secretary of the Commonwealth, dated December 29, 1926, and also my letter to you of December 30, 1926, in regard to the bond of Alexander Stuart accountant in your department.

These letters were left at my office several days ago by you with the verbal request that I reconsider my opinion that the bond should be made payable to the Commonwealth and accompanied by copy of a resolution of the commission fixing the amount of the bond at \$5,000. I understand that your view is that, since the money collected by Mr. Stuart does not become the property of the Commonwealth, there is no reason for the bond being payable to the Commonwealth.

In this connection, it will be noted that section 1 of chapter 169 (p. 307) of the Acts of 1926 provides that the State Commission on Conservation and Development is created as an agency of the Commonwealth of Virginia. There is no provision in our statutes for an employee of any agency of the Commonwealth giving bond not payable to the Commonwealth. I cannot see that any difficulty could arise from having the bond made so payable, and I suggest that it be redrawn in the manner indicated in my letter of December 30th.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

BANKRUPTCY LAW—Abrogation of State law by Congress.

RICHMOND, VA., January 26, 1927.

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

MY DEAR MR. AUDITOR:

Acknowledgment is made of your letter of recent date, with which you sent me a letter from Honorable E. H. Marshall, treasurer of the city of Danville, in which he

calls attention to the recent amendment to section 64b of the bankruptcy act, in which Congress has attempted to subordinate the lien for State taxes to the claims of laborers, clerks, salesmen, etc.

It is true that the bankruptcy act has been amended as stated by Mr. Marshall. In my opinion, however, the power conferred upon Congress by the Constitution to enact bankruptcy laws throughout the United States is not broad enough to permit Congress to abrogate in favor of citizens of this State statutes of this State which declare that the lien for taxes shall be prior to all other liens. See section 2271 of the Code, as amended.

I would, therefore, suggest that the first time the issue arises a test of the validity of this amendment to the bankruptcy act be made.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

BOARD OF SUPERVISORS—Authority to borrow money.

RICHMOND, VA., June 23, 1927.

MR. C. M. GIBBONS,
1007 Mass. Avenue, N. E.,
Washington, D. C.

MY DEAR SIR:

Acknowledgment is made of your letter of June 23, 1927, in which you refer to chapter 180 of the Acts of 1926, page 322, authorizing the board of supervisors of the county of Greene to borrow money not in excess of \$25,000, and to issue it bonds therefor for the purpose of repairing the present court house, or building a new one for the county and so forth.

I have examined this act and in my opinion the legislature did not exceed the power vested in it by the Constitution in authorizing the board of supervisors of Greene county to issue the bonds mentioned in the act and use the proceeds for the purpose authorized thereby.

I am further of the opinion that bonds issued in accordance with the provisions of this act, and as authorized by the same, would be valid.

Very truly yours,

JOHN R. SAUNDERS,
Attorney General.

BOARD OF SUPERVISORS—Borrowing from district funds to be used for road fund.

RICHMOND, VA., March 1, 1927.

HON. W. L. JOYCE,
Attorney at Law,
Stuart, Va.

DEAR SIR:

Acknowledgment is made of yours of February 26, in which you ask me the following questions:

“First: Can the board of supervisors purchase machinery, equipment and materials for the building and maintenance of roads out of the various district

funds, said machinery, equipment and materials to be used in the district, or districts, from which payment would be made?

"Second: Is it possible for the board of supervisors to purchase machinery and equipment for the building and maintenance of roads in the county out of the county road fund?

"Third: Is it possible for the board of supervisors to borrow from one fund, in case of emergency, for the use of another, and later repay the same from the fund for which it is borrowed?

"Fourth: Can the board of supervisors use the fund levied for general county purposes, if there is a surplus, for the purpose of purchasing road machinery and equipment?"

In reply I beg to say that, after a consultation with the chairman of the State Highway Commission, I am of the opinion that your first and second questions should be answered in the affirmative and the third and fourth in the negative.

I am aware of the fact that in cases of emergency there is sometimes a borrowing of one fund by another and occasionally a diversion of funds levied for one purpose to an entirely different purpose. However, I feel that in such matters it is safest to comply strictly with the law and to apply to road purposes only those funds which have been derived from taxes levied especially for such purposes.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

BOARD OF SUPERVISORS—Additional levy unconstitutional.

HON. W. A. SCARBOROUGH,
*Superintendent of Schools,
Dinwiddie, Virginia.*

RICHMOND, VA., March 28, 1927.

MY DEAR MR. SCARBOROUGH:

I am just in receipt of your letter of March 25th in which you submit the following questions:

"If the revenues for school purposes yielded by the maximum levy permitted under statute are insufficient to maintain and operate the schools on a reasonable basis of efficiency, does it come within the authority of the board of supervisors to make an additional levy in the county funds for the purpose of making an appropriation to the school board?"

I am of the opinion that this cannot be done.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

BOARD OF DENTISTRY—Authority to practice.

DR. JOHN M. HUGHES, *Secretary-Treasurer,
Virginia State Board of Dental Examiners,
Richmond, Virginia.*

RICHMOND, VA., April 13, 1927.

MY DEAR SIR:

On March 17, 1927, I received a letter from you relative to Dr. L. K. Walz, in which you made inquiry as to whether or not he was entitled to practice his profession anywhere in Virginia.

The facts contained in your letter of that date were as follows:

"Dr. Walz took the State examination in 1896 and failed. He then went to Kentucky where he practiced for several years. In 1901 the General Assembly passed a special act in his favor granting him the privilege of practicing in the town of Lexington. After practicing in Lexington for a few years he gave up practice and went into business. When he resumed practice he located in the city of Richmond. Dr. Walz maintains that the present dental law, and certain correspondence which he has had with a former secretary of the board give him the privilege of practicing anywhere in Virginia."

It so happens that Dr. Walz is now in my office and he has shown me the correspondence between him and Dr. John P. Stiff when Dr. Stiff was secretary and treasurer of the State Board of Dental Examiners. He also exhibited registration cards from your board showing that he was duly registered as a dentist many years prior to 1919. Dr. Walz advises me that for the past eight years he has been actively engaged in practicing his profession in the city of Richmond; that he is duly registered with the Virginia State Board of Dental Examiners; that he has paid his registration fee regularly and that he has obtained each year from the commissioner of revenue in this city a license to practice his profession.

Section 1646 of the Code of 1919 provides in part:

"No person, unless previously licensed or registered to practice dentistry in this State shall begin the practice of dentistry, or any branch thereof, without first applying for and obtaining a license for such purpose from the Virginia State Board of Dental Examiners."

Clearly this provision of the law does not apply to Dr. Walz, because he has been previously licensed and registered to practice dentistry in this State. Such being the case, there can be no doubt that Dr. Walz is entitled to continue to practice his profession in this State and to receive his annual registration card.

Trusting this gives you the desired information, I am,

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

BOARD OF VISITORS OF WILLIAM AND MARY—Negotiating loan.

RICHMOND, VA., April 11, 1927.

DR. J. A. C. CHANDLER, *President,*
William and Mary College,
Williamsburg, Virginia.

MY DEAR DR. CHANDLER:

Acknowledgment is made of your letter of April 8, 1927, received this morning in which you say:

"As you recall, the State Board of Education permitted the College of William and Mary to use from the literary fund the sum of \$250,000 with which to construct dormitories. Our board finds that this will construct one building at \$170,000 and will construct the east wing of another building at approximately \$80,000. The second building is in three units, east wing, central portion, and west wing. It will take approximately \$40,000 to construct the central portion and \$80,000 to construct the west wing. We are, therefore, in need of \$120,000. If we cannot go on with this work, when we finally come to the point of constructing the central portion and west wing it will probably entail a cost of \$150,000, because certain materials have already been bought, and it is difficult to get proper credits.

"Now, the board of visitors has passed a resolution authorizing the president and treasurer in the name of the College of William and Mary to borrow the requisite amount and to pledge for the payment of that amount all subscriptions which may be made from private individuals for this building, and, furthermore, to pledge all of the rents after the expense of maintenance has been deducted on the west wing and central portion of the building. In addition to this, the alumni association, incorporated, is willing to assist in the raising of the money and to give us their notes to be endorsed at bank or to be used as collateral as might seem best.

"The object of writing you this letter is to ask you if we have not the legal right to make such a loan. As I interpret the law, we are a corporation, and under the general corporation laws have the right to make such contracts and enter into such negotiations as are permitted under the charter of the ancient college and the laws of the General Assembly. We recognize, of course, that no mortgage can be given on any property here because this is a State institution. We do believe, however, that all moneys given to us and all moneys secured from the use of property not constructed by the General Assembly can be used to pay for buildings, and that we are not prohibited by the appropriation bill from making loans. We are prohibited from exceeding our appropriation and from obligating the State. Of course, you understand that any buildings that we do construct or any property that we purchase on time, after it has been duly paid for, becomes the property of the State. You also are aware of the fact that through donations and other sources that State has already acquired at William and Mary, in addition to its own outlay, property valued at \$750,000."

Section 936 of the Code makes the board of visitors of William and Mary a corporation under the style of "The College of William and Mary in Virginia," and while this section places the real and personal property of the college under the control of its board of visitors it further provides that such property shall "be and become the property of the State of Virginia."

From an examination of the index to the Code and the Constitution of Virginia I find nothing that would prohibit the board from negotiating the loan mentioned in your letter. Certainly the provision in the appropriation bill under the appropriation made to the College of William and Mary, Acts 1926, does not prohibit the loan of the character mentioned in your letter.

It is further my opinion that your board, after having made the loan, would have the authority to repay the same from donations made to the college and moneys secured from the use of dormitories which were not constructed with funds provided by the State in the absence of prohibition by the General Assembly. I do not think, however, that the board of visitors would have the authority to assign any of these rents except subject to revocation by the General Assembly if it thought fit to do so.

Trusting that this gives you the desired information, I am,

Yours very sincerely,

JOHN R. SAUNDERS,
Attorney General.

BOARD OF COUNTY SUPERVISORS—Power of board to establish and maintain public sewers and water mains along streets, public highways, etc.

RICHMOND, VA., July 14, 1926.

HON. W. POTTER STEARNE,
*Commonwealth's Attorney,
Dinwiddie, Virginia.*

DEAR MR. STEARNE:

I have been out of the city almost continuously since receipt of yours of the 8th, which accounts for my delay in replying.

You ask my opinion as to the power of the board of supervisors of Dinwiddie county under section 2757 of the Code, to establish and maintain public sewers and water mains along the streets, alleys and public highways of the unincorporated village of Kenilworth, which you say is located in Dinwiddie county "near the suburbs of the city of Petersburg."

The same question was presented to Dr. Ennion G. Williams by Honorable Charles T. Lassiter, and by Dr. Williams referred to me for an opinion, which was rendered to him on June 22, which was to the effect that, in my judgment, section 2757 did not authorize the construction of water mains and provided only for public sewers in incorporated towns and villages and in the suburbs of cities.

You say that Kenilworth is not incorporated and is not part of the suburbs of Petersburg, but only near the suburbs. I have been unable to escape the conclusion that section 2757 was not broad enough to cover the case you state.

However, my opinion in the matter is merely tentative. If the board of supervisors desire to order the building of sewers and water mains in Kenilworth and nobody makes objection, no doubt the project would go through; but, as there probably would be objection, the objectors could ask for an injunction to restrain the establishment of sewers and water mains and so obtain a judicial decision, or it might be possible for the village to be incorporated and so proceed in the usual manner to provide for these improvements.

Of course, section 2757a of Michie's Code has no application to the present case, since the county of Dinwiddie does not constitute a separate judicial circuit.

I am not aware that any community exactly like Kenilworth has been permitted to have public sewers and water mains under section 2757.

Yours very truly,

JOHN R. SAUNDERS,

Attorney General.

BOARD OF SUPERVISORS—Clerk's compensation.

RICHMOND, VA., July 15, 1926.

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

MY DEAR SIR:

Acknowledgment is made of your letter of recent date in which you state that **two** clerks were employed in the office of the treasurer of your county and the treasurer resigned, leaving their compensation to the amount of \$400.00 unpaid. You also state that these claims have been presented to the board of supervisors, and then say:

"I would like very much for the board to know whether or not such a claim is in any way legal or equitable. In other words, has the county any right legally to pay the expenses of those hired in the treasurer's office, which, unless some special statutory provision is made, would allow the board of supervisors to pay my stenographer's salary and the salaries of those working in the clerk's office."

Since the receipt of your letter, I have given the matter my careful consideration, and, in the absence of some statutory authority authorizing the board to compensate such clerks, I am of the opinion that the county funds could not be used for this purpose.

In this connection I call your attention to the case of *Norfolk v. Pollard*, 94 Va. 279 (1897). In that case the court held that, in the absence of express or implied power,

the collector of the city of Norfolk, who was required by law to annually expose for rent at public auction all the stalls within the marker house, and collect the rent for the same, was without authority to employ an auctioneer at the expense of the city.

Trusting this gives you the desired information, I am,

Very truly yours,

JOHN R. SAUNDERS,
Attorney General.

BOARDS OF SUPERVISORS—Annual budget.

RICHMOND, VA., *November 15, 1926.*

MR. PAUL CLINE,
The Southwest Times,
Pulaski, Virginia.

DEAR MR. CLINE:

I beg leave to acknowledge receipt of your letter of November 12th, in which you desire certain information, and which I am very glad to give you.

Chapter 545 of the Acts of 1926 requires the boards of supervisors of the counties, and councils of other governing bodies of cities and towns, to prepare and publish annual budgets, etc. One paragraph of this law provides that a brief synopsis of the budget shall be published in a newspaper having general circulation in the locality affected, notice to be given of public hearings, etc. It further provides that where there is not a newspaper of general circulation, then the board of supervisors may provide that notice by written or printed handbills, etc.

I would suggest that you get the Acts of Assembly from some attorney's office and read this chapter.

Now as to the publication of the delinquent tax list, if you will read section 2460 of the Code of Virginia, this provides in detail how this should be done. I do not understand from this section of the Code that it is essential that this list shall be published in a newspaper.

Trusting I have given you the desired information, I am,

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

BOARD OF SUPERVISOR—Residence of paupers.

RICHMOND, VA., *December 6, 1926.*

B. RICHARDS GLASCOCK, Esq.,
Commonwealth's Attorney,
Warrenton, Virginia.

DEAR MR. GLASCOCK:

Acknowledgment is made of your letter of December the 3rd in which you request an opinion as to whether the board of supervisors of Fauquier is under any obligation to support Mr. Brooke and family who is unable to maintain himself and family and who moved from Warrenton two years ago and is at present living in Washington, D. C.

You state that the associated charities of Washington, D. C., have made application to the board of supervisors of Fauquier to have Mr. Brooke and family removed from the District of Columbia to Fauquier and have them supported by the board of supervisors of Fauquier county.

In reply I would say that the question, as you know turns upon what is the "legal settlement" of Mr. Brooke and family. You are familiar with section 2800 of the Virginia Code which provides in substance that no person unable to maintain himself and family, etc., shall be entitled to assistance and relief unless he shall reside in the county or town one year. The one year residence spoken of in this section, constituting "legal settlement."

As you know, the intention of the person plays a large part in determining legal residence and that a person may be physically present in one State and yet be domiciled in another, depending upon the intention to remain and presence. In this particular case though, I should say that the words "reside therein one year," mean physical presence. This being true, I would say that Mr. Brooke and family who moved to Washington, D. C., two years ago are not entitled to be supported by the board of supervisors of Fauquier because they have not been physically present in Fauquier one year.

Trusting this will give you the desired information, I am,

Yours very truly,

JOHN R. SAUNDERS,

Attorney General.

BOARD OF SUPERVISORS—Authority to borrow money.

RICHMOND, VA., *December 10, 1926.*

HON. CHAS. H. FUNK,

Marion, Virginia.

MY DEAR MR. FUNK:

Acknowledgment is made of your letter of December 6, 1926, in which you request me to advise you whether the board of supervisors of your county has a right to borrow money necessary to construct 2.6 miles of road in one of the districts of your county upon an agreement with the State Highway Department that if the road is constructed by the board of supervisors that the highway department will take over the road and extend it to the Tazewell line.

You state that the county is without money, and if the road is to be constructed, it is necessary to borrow the money from the local banks.

I have examined the Code with care, and so far as I am able to find, there is nothing in the Code which would authorize the board of supervisors to borrow money for the purpose outlined in your letter, except in the manner authorized by the statute in cases of bond issue elections.

In my opinion, the the absence of express authority, the board would not be authorized to make the proposed loan.

Yours very truly,

JOHN R. SAUNDERS,

Attorney General.

BOARD OF SUPERVISORS—Payment of county school warrant.RICHMOND, VA., *September 23, 1926.*HON. W. W. WEBB, *Treasurer,*
Abingdon, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of September 20, 1926, in which you say:

"The county school board have outstanding warrants for last year amounting in round numbers, \$76,000.00. The board of supervisors laid for the year 1926-27 an indebtedness levy which in no district exceeds \$0.33. This levy will not pay more than ten per cent of the above amount and interest on same. In addition to this they laid the *county and district* levy for the maintenance of the schools this county for year 1926-27, and placed on their minutes a resolution to the effect that the treasurer of this county shall not pay any of the *old* school warrants out of the levy laid for the maintenance of the schools for the year 1926-27.

"Which warrants have preference when we have school funds available, the old or the new?"

After examining sections 2781, 2782 and 2783 of the Code, I am of the opinion that county school warrants, no matter when issued, should be paid by you whenever presented, and that the school board is without authority to direct you to decline to pay any lawfully issued warrant, unless it has some off-set against that warrant or some other valid reason for not paying the same. In my opinion, the fact that the warrant was issued last year is no valid reason why it should not be paid out of the funds in the hands of the treasurer this year.

Yours very truly,

JOHN R. SAUNDERS,
*Attorney General.***BOARD OF SUPERVISORS—Levy of tax for schools.**RICHMOND, VA., *January 27, 1927.*HON. A. WILLIS ROBERTSON,
Commonwealth's Attorney,
Lexington, Virginia.

MY DEAR MAJOR ROBERTSON:

Acknowledgment is made of your letter of January 26, 1927, in which you request my opinion as to whether the board of supervisors of a county is required under the present law to levy a uniform tax in each magisterial district for the current operating expenses of the public schools in the form of a county tax, to be expended by the county school board in any part of the county in which it may desire to spent it, regardless of the source from which it came.

In my opinion the board is not required to levy such a tax.

Section 136 of the Constitution, which governs this matter, provides, so far as is applicable:

"Each county, city, town, if the same be a separate school district, and school district is authorized to raise additional sums by a tax on property, * *."

Section 740-a of the Code of Virginia, 1924, is not in conflict with this section, and in my opinion the Constitution authorizes the board of supervisors to lay both a county

and district tax and vests in the board the sole discretion as to the amount of each levy, so long as the combined levy does not exceed the total amount authorized by law.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

BOARD OF SUPERVISORS—Right to add levy.

RICHMOND, VA., January 29, 1927.

HON. A. H. CRISMOND,
Clerk of Court,
Spotsylvania, Va.

DEAR MR. CRISMOND:

Yours of the 18th would have been answered sooner but for the fact that the court of appeals and the State Board of Education have been demanding my attention. You say:

"A question has arisen before our board of supervisors relative to the preparation of the county budget and I am instructed to write you relative to the same. The question is this:

"The State has relinquished its 25c tax on real estate. Our county and district levies vary in the several districts from \$1.60 to \$2.10, exclusive of the 25c imposed on real estate, and in Courtland district the county and district levies amount to \$1.65 plus 25c State tax making a total of \$1.90. After dropping the 25c State tax the total levy for this district is \$1.65.

"The board wishes to utilize the 25c tax dropped by the State, now what we want to know is would the applying of any part of this 25c levy to any district of the county constitute an increase in the levy if it does not exceed the levy in any of the districts, above what it is at present, including the 25c laid by the State?

"To be more explicit, I will state a case. The present levy in Courtland district, which includes the 25c State tax on real estate, is \$1.90, taking off this 25c will reduce the local levy to \$1.65; now can the board add any part of the 25c relinquished by the State, to the present local levy of \$1.65 without its being an increase of that levy, or would any increase to the local levy of \$1.65 be considered an increase provided the total levy did not exceed the total levy of \$1.90 which includes the 25c relinquished by the State?

"We do not want to go to the expense of advertising a hearing unless it is absolutely necessary and the matter hinges on the question as to whether or not the application of any part of the 25c to our local levy constitutes an increase of the same provided it does not exceed the present levy which includes the said 25c relinquished by the State."

It seems clear to me that the board of supervisors has a right to add to the levy in the manner indicated, but since there is an increase, an advertisement is necessary, as the law requires.

I may add that both the Auditor of Public Accounts and the State Tax Commissioner concur in this opinion.

Very sincerely yours,

JOHN R. SAUNDERS,
Attorney General.

BOARD OF SUPERVISORS—Increase of levy.RICHMOND, VA., *April 4, 1927.*

HON. C. W. CARTER,
Commonwealth's Attorney,
Warrenton, Virginia.

MY DEAR MR. CARTER:

I am in receipt of your letter of April 1st, in which you ask whether or not the board of supervisors of the county has the power to increase the county school levy after their April meeting.

In this connection you call my attention to section 2720 of the Code which provides as follows:

"The board of supervisors of each county shall have the power, and it shall be their duty, at regular meeting in month of January in each year or as soon thereafter as may be practicable, not later than their meeting in April, to fix the amount of the county levies for the current year * * * * *"

It is my judgment that after the board of supervisors has made its levy at the April meeting I do not think the levy could be increased. I presume, however, that your board has not had its April meeting, as this is only the 4th day of the month. Whatever the board purposes doing should be done at this meeting.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

BRIDGE—Authority to construct.RICHMOND, VA., *December 28, 1926.*

HON. ARCHER L. JONES,
Commonwealth's Attorney,
Hopewell, Virginia.

MY DEAR SIR:

Acknowledgment is made of your communication of yesterday, in which you request me to advise you, after examining sections 2016 and 2109 of the Code of 1919, the former as amended, whether the city of Hopewell has the authority to construct a bridge across a navigable stream without obtaining express authority from the General Assembly by a special act for it so to do.

I have examined these sections of the Code and find therefrom that section 2016 as amended, authorizes incorporated towns or cities to, among other things, construct bridges across streams without or within its corporate limits, so as to afford access to its streets from permanent public roads outside of its corporate limits, or so as to connect its streets; "provided that no part of any such bridge outside of such corporate limits shall be more than forty miles therefrom; and, *provided further, that the navigation of such streams shall not be interjered with.*" (Italics supplied.)

It seems to me that this act authorizes cities and towns to construct bridges across streams, including navigable streams, provided that in constructing such bridges the navigation of such streams is not interfered with.

It is my understanding that the Federal government also has certain rights over navigable streams, but I am not in a position to advise you just what these rights are

as I have not the time at my disposal at the present to investigate this latter phase of the matter.

Sincerely yours,

LEON M. BAZILE,
Assistant Attorney General.

BUDGET—Publication of town budget.

RICHMOND, VA., March 3, 1927.

ALBERT C. MULLER, ESQ., *Editor,*
The Clarke Courier,
Berryville, Va.

DEAR SIR:

Acknowledgment is made of yours of February 28, in which you say:

"We would like to have an interpretation of chapter 545 of the Acts of the General Assembly of Virginia, 1926. In the case of an incorporated town not raising its levy, is it necessary that the budget still be published 30 days prior to the laying of the usual levy? Or, in such event, does the law require the town to publish such budget annually anyway, and if so, when should this be done?"

"There are two incorporated towns in Clarke county which would be affected by this chapter, and it is of interest to the people to learn the exact requirements thereunder."

In reply, I beg to call your attention to chapter 545 (p. 902) of the Acts of 1926 and especially to subsection (2½) of section 1. As this is a local matter, I suggest that you consult the Commonwealth's attorney of your county as to whether the other sections of the act will apply, and whether it will be necessary for the budget to be published in accordance with those sections thirty days prior to the time when the annual tax levy is made.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

INDICTMENTS—Costs in felony and misdemeanor cases.

RICHMOND, VA., March 1, 1927.

HON. HUGH A. WHITE,
Attorney at Law,
Lexington, Va.

MY DEAR SIR:

I have read with interest and attention your letter of February 24, in regard to costs in cases in which a person has been indicted for a felony and convicted of a misdemeanor.

I have also examined the case of *Hardy and Curry v. Commonwealth*, 17 Gratt. 592. I observe that Judge Moncure did not think the defendant should pay the costs in such a case; but in the lapse of time since 1867 there have been so many changes in the laws relating to fees, costs, etc., that I doubt whether that opinion would be upheld today.

In fact, in *Canada's Case*, 22 Gratt. 899, 911, Judge Moncure himself held that a person who was indicted for maiming and found guilty of assault and battery could

be fined, imprisoned and required to pay the *costs of the prosecution*. This has been the ruling of the Auditor's office from that day to this and I would not consider it any longer an open question in this State. I can see no other construction of section 4964 of the Code, which has remained unchanged since the Code of '49. The point has not been raised in any case brought to the attention of this office since I have been here.

Yours very sincerely,

JOHN R. SAUNDERS,
Attorney General.

CHESAPEAKE-POTOMAC TELEPHONE COMPANY—Injunction pending appeal.

RICHMOND, VA., July 22, 1926.

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

MY DEAR GOVERNOR:

You will recall that at the conference held in your office last week Mr. John S. Eggleston, counsel for the Chesapeake and Potomac Telephone Company, at which conference Mr. Morrisett and I were present, referred to the case of *Oklahoma Natural Gas Company v. Russell*, 261 U. S. 290 (1923), in which the Supreme Court of the United States, speaking through Mr. Justice Holmes, rather strongly intimated that in a State which prohibited public service corporations from putting into effect rates pending appeal to the courts relief would be afforded the corporation in the Federal courts, if in fact the rate permit by the State rate making body was confiscatory in its effect on the particular corporation.

While I had a general knowledge of the trend of the opinions of that court along this line, I was not in a position to express a definite opinion at the time of our conference. Since that time, I have endeavored to investigate the matter, and I find that the supreme court has, in a more recent case, gone much further than it did in the *Oklahoma Gas Case* cited by Mr. Eggleston. The latter case is *Pacific Telephone & Telegraph Company v. Kuykendall*, 265 U. S. 196 (1924).

In that case the telephone company applied to the public service commission of the State of Washington for an advance in rates. After hearing this, relief was denied. The telephone company then, pending appeal, applied to the Federal courts for an injunction against the department of public works to prevent it from interfering with the maintenance and collection of the increased rates, which the telephone company proposed to put into effect. The bill for injunction alleged that the order of the department of public works, if enforced, would deprive the company of its property without due process of law, in violation of the Fourteenth Amendment. On the theory that the rate making process was not complete until the case had been passed upon by the appellate courts of Washington, the inferior Federal courts denied injunction relief and dismissed the bill of the telephone company on authority of *Prentiss v. Atlantic Coast Line Company*, 211 U. S. 210 (1908).

Speaking through Mr. Chief Justice Taft, the supreme court said (pp. 204-5):

"In the case before us, the company is shown by the averments of its bill to be suffering daily from confiscation under the rates to which it is now limited. It has done all it could to get relief, and cannot get it. The rates here in question were in force for more than a year, the company advanced them, the old rates were reinstated by the department of public works. In such a case, then, there

was no chance for a stay. By section 10,429 (Rem. Comp. Stat. 1922) the pendency of any writ of review does not, of itself, stay or suspend the operation of the order of the commission, but the superior court may suspend the order; but no order suspending an order of the commission relating to rates, etc., can be made unless the court finds that great or irreparable damage would be done to the petitioner, and the section contains the following proviso:

"Provided, however, that when any rate has been in force for any length of time exceeding one year, and such rate is advanced by the public service company, and the order of the commission reinstates such prior rate, in whole or in part, no supersedeas shall be allowed in any case from such order pending the final determination of the cause in the superior court, or, if appealed to the supreme court, by such supreme court."

"Under such circumstances comity yields to constitutional right, and the fact that the procedure on appeal in the legislative fixing of rates has not been concluded will not prevent a Federal court of equity from suspending the daily confiscation, if it finds the case to justify it. *Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290, 293, 67 L. ed. 659, 662, 43 Sup. Ct. Rep. 353. In such a case the Prentis case has no application. *Love v. Aichison, T. & S. F. R. Co.* 107 C. C. A. 403, 185 Fed. 321, 324, 325."

It was further said (p. 205):

"* * * A litigant whose constitutional rights are being invaded, and to whom a statute denies a supersedeas in the State tribunals, may properly base his application for equitable relief on the effect of the statute and the presumption of its validity, and is not required to establish that the State statute is not invalid under the State Constitution. * * *"

that being said with reference to the statute of the State prohibiting the granting of a supersedeas in such a case.

Accordingly, the supreme court held that the district court erred in denying a temporary injunction under section 266 of the Judicial Code on the ground that the suit was premature. This latter case has been approved by the supreme court in *Banton v. Belt Line Rwy. Corporation*, 268 U. S. 413 (1925), in which a similar doctrine was announced.

If I can be of any further assistance to you in the matter, I shall be glad to give you such help as I can.

Sincerely yours,

LEON M. BAZILE,
Assistant Attorney General.

CITY COUNCIL—Ordinance in regard adding machine.

RICHMOND, VA., May 18, 1927.

HON. C. LEE MOORE,
Auditor of Public Accounts,
Richmond, Virginia.

MY DEAR MR. AUDITOR:

Acknowledgment is made of your letter of May 17, 1927, in which you say:

"I enclose a letter received from Mr. F. M. Hoge, treasurer, Staunton city, in which he transmits copy of an ordinance adopted May 10, 1927, by the city council requiring him to purchase an adding machine for the use of his office at a cost of approximately \$490.00, and to include the cost in his expenses of office, and take the same out of commissions, etc., of his office.

"Please examine Code section 2767 as amended by chapter 492, page 844 Acts 1926, and give me your opinion if that section as amended makes it the duty of the council at the expense of the city to furnish the city treasurer with this adding machine, which, as they direct its purchase, their judgment considers necessary for the proper conduct of his office."

The ordinance of the city of Staunton referred to in your letter reads as follows:

"The matter of the purchase of an adding machine for the city treasurer's office was brought to the attention of council, and it was decided to have the city treasurer purchase this machine at a cost of approximately \$490.00 and include same in his office expense for the year, and deduct from his gross commissions as provided by law."

Section 2767 of the Code of 1919, as amended, by the Acts of 1926 reads as follows:

"The board of supervisors shall, at the expense of the county, and the city councils of the cities shall at the expense of the city having a population of not more than one hundred thousand inhabitants, according to the 1920 census, provide suitable books and stationery in addition to supplies furnished by the State for the use of the clerk of their board, the commissioner of the revenue, in counties having one such commissioner, the county treasurer, the county clerk, and the clerk of the circuit court, together with appropriate cases and other furniture, for the safe and convenient keeping of all the books, documents, and papers in the custody of each of said officers, and also official seals for each of said officers, where the same are required by law, and also such other office equipment and appliances, including typewriters and adding machines, as in their judgment may be reasonably necessary for the proper conduct of such officers."

From an examination of this section it is my opinion that the expense of supplying an adding machine for the treasurer's office could not be charged as a deductible expense of his office when he came to settle his accounts with the fee commission on account of excess fees, commission and so forth.

The act is extremely badly worded, and I am not sure that under the wording of this act that the city could be compelled to bear the expense, as would be the case of a county. But, the General Assembly has shown a clear intent that the expense of furnishing supplies, such as adding machines, is to be borne by the locality, if ordered and allowed by it.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

CITY COUNCIL—Contract for removal of garbage, etc.

RICHMOND, VA., *April 4, 1927.*

HON. CHARLES T. MORRIS,
City Attorney,
Hopewell, Virginia.

MY DEAR SIR:

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

"I am writing to get your legal opinion regarding the power of the city whose office expires in June of 1928, to enter into a contract for a period of three years in behalf of the city for the removal of garbage, trash and fecal matter."

The subject of your inquiry is discussed in 28 Cyc., pages 654-55, where it is said:

"The power of a municipal council to bind successors in office by a contract for a term of years has been repeatedly recognized with regard to water and light supply, street car fares, the disposal of sewage and garbage, and the issuance of municipal bonds. But they may not bind either themselves or their successors to forego their legislative functions; nor are such contracts for personal or professional services to the corporation binding on the corporation after the expiration of the official term of the contracting members. And in some States power to bind successors in any municipal contract is conditioned upon the same going into full operation during the official term of the contracting members."

The case cited with reference to contracts for the disposal of sewage and garbage is *McBean v. Fresno*, 112 Cal. 159, 53 A. S. R. 191, 31 L. R. A. 794. The same principles with reference to light and water supply contracts are discussed in *Dillon on Municipal Corporations*, Vol. 3, section 1307, where the rule laid down in the above quoted section from *Cyc.* is approved as representing the weight of authority.

Sincerely yours,

LEON M. BAZILE,
Assistant Attorney General.

COMMONWEALTH ATTORNEY—Fees of.

RICHMOND, VA., July 12, 1926.

HON. F. J. HARRIS,

*Civil and Police Justice and Judge of the Juvenile and Domestic Relations Court,
East Radford, Va.*

DEAR SIR:

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

"Will you please construe the last clause of the amended prohibition act passed by the last legislature, on page 425, in regard to the fees to be taxed up in the costs for the Commonwealth's attorney. When the Commonwealth's attorney presents a case in my court, is he entitled to a fee of \$10.00 or \$25.00? When a party pleads guilty, is the Commonwealth's attorney entitled to more than \$5.00 whether he is present or not at the trial? When a party comes into my court and pleads guilty, is it in my jurisdiction to dispose of his case without calling in the Commonwealth's attorney or not? My court is one of final jurisdiction, is it not? And how is this fee business construed as to my court taking this view of it?"

In reply I beg to say that fees for Commonwealth's attorney in prohibition cases tried in such courts as yours are regulated by section 46 of chapter 231 of the Acts of 1926, pages 424-5. Under this section the Commonwealth's attorney must be notified by the trial officer a reasonable time before such hearings in order that he may attend. It is not incumbent, however, for him to attend when the prosecution is under section 17 or section 18. If he does attend in such cases, he receives no fee in the event of acquittal or of conviction on a plea of guilty. In these cases where there is a trial on a plea of not guilty and a conviction the attorney for the Commonwealth receives \$5.00, to be taxed as part of the costs against the defendant. In the cases arising under sections 17 and 18 the trial justice has jurisdiction to try the case subject to the right of appeal to the circuit court. On a plea of guilty in any misdemeanor case, with the consent of the Commonwealth's attorney, the justice may enter final judgment. In all other cases the trial justice has only the powers of an examining magistrate. In all cases in which pleas of guilty are entered in the trial justice court the attorney for

the Commonwealth receives \$10.00 in case of conviction or where the defendant is held for the action of the grand jury. When a case is heard in the circuit court, either on appeal or on indictment, the attorney for the Commonwealth receives a fee of \$25.00 less what he received in the trial justice court.

Yours very truly,

JOHN R. SAUNDERS,

Attorney General.

COMMONWEALTH ATTORNEYS—Fees in connection with bond issue.

RICHMOND, VA., March 25, 1927.

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

MY DEAR SIR:

I beg leave to acknowledge receipt of your letter of recent date in which you say:

"I will appreciate it if you will let me know at your earliest convenience, whether or not it is the duty of the Commonwealth's attorney of a county to do all of the legal work in connection with a bond issue of a magisterial district, which bond issue is floated pursuant to an election held under general law. The reason I asked is because in the event it is not my duty to represent the district in this matter, I, of course, would be entitled to compensation for my services. It is my opinion that it is not my duty to supervise a district bond issue."

In reply would beg to state that after an examination of the statute which defines the duties of the Commonwealth's attorneys, I am of the opinion that you are entitled to a compensation for your services rendered in connection with this matter.

As to the policy of your making a charge, of course, would be a question for you to determine. I have discussed this matter with several Commonwealth's attorneys and some of them have charged for work of this character, and others say they have done it without any extra compensation.

Yours very truly,

JOHN R. SAUNDERS,

Attorney General.

COMMONWEALTH ATTORNEYS—Fees in misdemeanors before justice of peace.

RICHMOND, VA., March 8, 1927.

CHARLES B. GODWIN, JR., ESQ.,
*Attorney for the Commonwealth,
Suffolk, Va.*

MY DEAR SIR:

I am in receipt of yours of the 28th ultimo, in reference to fees of Commonwealth's attorneys in misdemeanor cases before justices of the peace in which, by consent of the Commonwealth's attorney, the accused entered a plea of guilty, and beg to advise as follows:

The opinion contained in my letter of April 15, 1925, to the Commonwealth's attorney of Greensville county, was based upon a construction of the Layman act of 1924, which was in force as of the date of his inquiry.

Since that opinion was rendered section 46, relating to fees, has been materially changed. It will be seen that, after providing for fees for certain officers for services rendered in connection with violations of the Layman act, an addition to the old laws made in the following language:

“ * * except that in cases where pleas of guilty are entered, in cases of misdemeanor before a justice of the peace, the attorney for the Commonwealth shall receive only \$10.00.”

In my opinion, this provision entitles attorneys for the Commonwealth to fees of \$10.00 for each misdemeanor case in which a plea of guilty is entered before a justice, and that such fees are proper charges against the Commonwealth and should be allowed and paid as is provided by law for the payment of other fees.

All of the fees provided for in this section are charges against the accused and should, if possible, be collected from him. If not collected, then your fee will be paid out of the State treasury when properly certified under section 3504 of the Code.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

COMMONWEALTH ATTORNEYS—Duties when change of venue.

RICHMOND, VA., June 21, 1927.

HON. TAZEWELL BUCHANAN,
Attorney at Law,
317-19 Mutual Building,
Richmond, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of June 20, 1927, in which you say:

“On June the 13th last, in the circuit court of Goochland county, Judge Alexander T. Browning granted the motion of the defense for a change of venue of the case of the *Commonwealth v. George Reavis*. This case will be tried in Orange county sometime during the latter part of July or the first part of August, next.

“I respectfully request that you give me your opinion upon the following question: When the Reavis case comes up for trial in the circuit court of Orange county will the prosecution of the same be in charge of Stuart Robertson, Esq., in his official capacity as Commonwealth's attorney for Orange county, or will I follow the case, so to speak, and serve in the same capacity as I would if the case were being tried in Goochland county?

“In other words, who will officially represent the State of Virginia in the capacity of Commonwealth's attorney in the trial of this case when the same comes up for trial in the circuit court of Orange county? What is my status now in regard to this case?”

In reply thereto, I beg to quote section 4916 of the Code of Virginia, which is as follows:

“The clerk of the court, which orders a change of venue, shall certify copies of the recognizances aforesaid, and of the record of the case, to the clerk of the court to which the case is removed, who shall thereupon issue a venire facias, directed to the officer of such court; and such court shall proceed with the case as if the prosecution had been originally therein; and for that purpose the certified copies aforesaid shall be sufficient.”

You will observe that the last sentence of this section reads as follows:

“* * and such court shall proceed with the case as if the prosecution had been *originally therein*: and for that purpose the certified copies aforesaid shall be sufficient.” (Italics supplied.)

My understanding of this language is that it would be the duty of the Commonwealth's attorney of Orange county, in his official capacity as such, to conduct the prosecution of the case which has been removed from Goochland county to Orange county. I do not understand that it is your duty as Commonwealth's attorney of Goochland county to prosecute this case in your official capacity.

I have known of a number of cases where a change of venue was had, and my observation is that this course has always been pursued. However, I would suggest that you consult Judge Browning and ascertain his views in this connection.

Sincerely yours,

JOHN R. SAUNDERS,
Attorney General.

COMMONWEALTH OF VIRGINIA—Declaratory judgment.

RICHMOND, VA., April 19, 1927.

HON. R. M. LETT,
City Attorney,
Newport News, Virginia.

MY DEAR SIR:

Acknowledgment is made of your request of today that I give you my opinion as to whether the statutes relating to declaratory judgments apply to proceedings in which the State is made a party for determining its right to proceed against the plaintiff by indictment, or other criminal proceeding.

I have examined the statutes relating to declaratory judgments in sections 6140-a-6140-h of the Virginia Code of 1924 and in my opinion these sections do not authorize the maintenance of such a proceeding against the Commonwealth. As you know the law is well settled that no one can sue the State except by her consent and as provided by law.

Cornwall v. Commonwealth, 82 Va. 644;
Commonwealth v. Weller, 82 Va. 721;
Commonwealth v. Booker, 82 Va. 964;
Dunnington v. Ford, 80 Va. 177;
Miller v. State Board of Agriculture, 46 W. Va. 192, 32 Southeastern 1107, 1108—
see especially part of
Public Works v. Cannt, 76 Va. 455, 4 Minor's Institute, Part 1, pp. 493;
Higginbotham v. Commonwealth, 25, Barton 627, 637;
McCandlish v. Commonwealth, 76 Va. 1102, 1105.

From an examination of the declaratory judgments statutes you will see that the Commonwealth is not referred to, and in addition to this, the language of the statutes appears to be directed exclusively to civil controversies between parties.

As you know the Commonwealth of Virginia enforces its criminal laws thru the attorneys for Commonwealth in one hundred counties in the State, and the Commonwealth's attorneys in the numerous cities of the State. It is unreasonable to believe

that the legislature ever intended that a proceeding of this kind could be instituted against the Commonwealth in anyone of these many places and the enforcement of her criminal laws stayed, or interfered with, because of such proceeding. Nevertheless, if the statute were applicable to a proceeding of the kind referred to in your communication this would be its effect, and the whole criminal machinery of the State would be paralyzed while awaiting the outcome of the matter.

As another reason indicating that these statutes were not intended to apply to the Commonwealth, I call your attention to section 6140-e, fixing the venue of such proceedings, and in which Commonwealth would unquestionably have been mentioned if these sections of the Code had been intended to apply to it. Furthermore, section 6140-g of the Code of 1924 authorizes the court to award costs "to any party." This, of course, is clearly contrary to the policy of the State, which has always been to prohibit the assessment of costs against it in any proceeding.

For these reasons I am thoroughly satisfied that sections 6140-a to 6140-h are not applicable to proceedings against the Commonwealth.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

COUNTY SURVEYOR—Holding other office.

RICHMOND, VA., *June 14, 1927.*

MR. S. F. OLD,
London Bridge, Va.

DEAR SIR:

Acknowledgment is made of your letter of June 13th, in which you say:

"Will you give me your opinion on article 7, sections 110 and 113 of the Constitution of Virginia? Does this apply to the surveyor of a county?"

Section 110 of the Constitution provides in part:

"There shall be appointed for each county, in such manner as may be provided by law * * * one county surveyor."

Section 113 of the Constitution provides in part:

"No person shall at the same time hold more than one of the offices mentioned in this article * * *."

The offices mentioned in this article of the Constitution are county treasurer, sheriff, attorney for the Commonwealth, county clerk, commissioners of the revenue, superintendent of the poor, county surveyor, supervisors and district officers. See sections 110, 111 and 112 of the Constitution. It follows from the plain language of the Constitution that a county surveyor cannot at the same time hold any other office mentioned in article 7 of the Constitution.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

CORONER—Fees of.

RICHMOND, VA., July 10, 1926.

DR. BURTON NOWLIN,
Lynchburg, Va.

DEAR SIR:

I have your letter of the 8th, in which you say:

"I will appreciate it very much if you will give me your opinion on the following case. I am coroner for the city of Lynchburg. On June 29th one of the other physicians reported to me that a Mrs. Lois Blanks had died after taking morphine (presumably) and that I had better come over and investigate. As soon as I could get my car I went to the house where the woman was boarding, and found that the woman had taken an overdose of morphine, but after she had apparently stopped breathing she had been resuscitated by artificial respiration.

"On July 1st I sent in my bill as coroner, including this item in it, but the item was not allowed. As I made the visit as coroner, I thought I was entitled to the fee, as the case had been reported to me as it should have been done according to law and as I went there as coroner."

In reply I beg to say that the law of this State relating to the fees of coroners is found in section 4818 of the Code, which is as follows:

"A coroner shall have for viewing a dead body, whether an inquest be had or not, three dollars, except where the coroner is a physician and actually makes an examination of the dead body, in which case his fee shall be five dollars, and in the event that the coroner deems it necessary to make an autopsy and does make such autopsy, then he shall be allowed such additional fee as shall seem reasonable to the circuit court of the county or the corporation court of the city in which such autopsy was held; and a sheriff or constable for summoning a coroner's jury and the witnesses shall receive one and a half dollars."

There does not appear to be any provision for compensating a coroner for viewing a live person. However, it appears unfortunate that you should have been misinformed regarding the death of this party, but apparently this contingency was not taken into consideration when the law makers framed section 4818, which has been in the Code in various forms for a great many years.

Yours very truly,

JOHN R. SAUNDERS,
*Attorney General.***CORONER—Necessity for inquest.**

RICHMOND, VA., May 24, 1927.

HON. E. PEYTON TURNER,
Attorney at Law,
Emporia, Virginia.

MY DEAR MR. TURNER:

I beg leave to acknowledge receipt of your letter of recent date relative to a coroner's inquest.

You state in your letter that it is your contention that in cases of sudden death, unless there is reason to suspect criminal agency, there is no necessity for an inquest.

You then cite a concrete case, namely, that a lineman employed by the Virginia Service Company was electrocuted while working on the line in Emporia. This was caused by his coming in contact with a highly charged wire; that there could be no possible reason to think that his death was caused by criminal means, and you are of the opinion that in a case of that kind it is not necessary to put the county to the expense of having a coroner's inquest.

I have carefully read section 4806 of the Code of Virginia as amended by the Acts of 1926, page 461. This amendment, as you know, dispenses with a coroner's jury. The law, in my judgment, is very clear. It provides as follows:

"* * * the coroner shall view the body and make inquiry into circumstances of the said death, and after an inquiry had, as aforesaid, if facts are revealed sufficient to create in the mind of the said coroner a reasonable belief that the person whose body he shall have been called to view came to his or her death by murder or manslaughter, or by the contrivance, aiding, procuring, or other misconduct of any person or persons, he shall fix a time and place for a hearing to determine when, how, and by what means the said person came to his death."

In my judgment the statute means this—that in every case of sudden, or violent, death it is the duty of the coroner to make an inquiry into the circumstances of said death. But, if he is satisfied that said death was not brought about by any of the means mentioned in the statute I do not think it is his duty to hold an inquest, nor should the State or county be put to the expense of an inquest.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

CONVICTS—Disposal of bodies of deceased.

RICHMOND, VA., April 4, 1927.

MAJOR R. M. YOELL,
Superintendent of the Penitentiary,
Richmond, Virginia.

MY DEAR SIR:

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

"The purpose of this letter is to get your opinion on section 1731 of the Code of 1919, in so far as it applies to the bodies of convicts and men serving jail sentences on the road camps and the State farm for defective misdemeanants located at the State farm. It is perfectly clear to me from this section that the relatives of deceased convicts and jail prisoners are entitled to get the bodies by paying the burial expenses. It is necessary for us to make some disposition of the bodies immediately after death, because they should be embalmed as soon as possible and cannot be kept at the penitentiary farm, or road camps, particularly in hot weather. It is rather hard to get in touch with the relatives in a large number of cases, because prisoners give assumed names, relatives move and various other causes. When the relatives are near the camp or we can find them at once, of course, we will continue to turn the bodies over to them, but, in cases where we cannot communicate with them immediately, I wish to ask if it would not be all right for us to have the bodies sent to Dr. K. F. Bascom, secretary of the Anatomical Board of Virginia, Richmond, Virginia, where they would be properly embalmed and held four days after receipt while we were trying to locate the relatives, with the understanding that the Anatomical Board would do nothing with the bodies, except embalm them, until after the four day period, which I understand is as long as they could hold them, at the end of which period, if the

relatives have not been located or will not claim the bodies, the Anatomical Board will be notified they can have the bodies for the purposes outlined in the law for the advancement of medical science."

I have examined section 1731 of the Code with care, and it is my opinion that the program outlined above by you would fully comply with this section of the Code.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

CRIMINAL LAW—What is robbery.

RICHMOND, VA., April 8, 1927.

HON. DAVE SATTERFIELD,
Commonwealth's Attorney,
City Hall, Richmond, Virginia.

MY DEAR SIR:

You will recall that a few days ago you spoke to me about a robbery case that is pending on the docket of the hustings court. We both agreed that where the larceny consisted of a forcible taking from the person of another that this constituted robbery.

Night before last I looked the matter up in the books that I have at home and found the following statement in Clark & Marshall on the law of crimes, second edition, section 373, pages 551-552 where it is said:

"It is said that, to constitute robbery, the property must be taken from the person of another, and in theory this is true. But it is not to be understood from this that the taking must be from the person in the popular and strict sense. If property is taken in the presence of the owner, it is, in contemplation of law, taken from his person. A man is guilty of robbery, therefore, and not merely of larceny, if he comes into another's presence, and, after putting him in fear, drives away his cattle, or compels him to open his safe and takes money therefrom, or compels him to throw down his purse and picks it up. It is not even necessary that the taking shall be in the immediate presence of the owner. It is enough if the property is so near that it can be said to be in his personal custody and care—as where it is in another room of the house where he is—and if the taking of it is accomplished by violence or by putting him in fear."

In 2 East, P. C. 707 cited in the foot note to this section it is said:

"In robbery, it is sufficient if the property be taken in the presence of the owner. It need not be taken immediately from his person, so that there be violence to his person or putting him in fear. As where one, having first assaulted another, takes away his horse standing by him, or, having put him in fear, drives his cattle out of his pasture in his presence, or takes up his purse, which the other, in his fright, had thrown into a bush, or his hat, which had fallen from his head."

See *Wright's Case*, Style, 156.

In *State v. Kennedy*, 154 Mo. 268, 55 S. W. 293, the court held that it was robbery where train robbers drove an express messenger out of his car blew open the safe and took the money therefrom.

Yours very truly,

LEON M. BAZILE,
Assistant Attorney General.

CRIMINAL LAW—Forgery.RICHMOND, VA., *June 24, 1927.*

JUDGE F. J. HARRIS,
East Radford, Virginia.

DEAR JUDGE:

Acknowledgment is made of your letter of the 22nd, in which you say:

"A party was brought before me on a charge of obtaining money on a check that he had claimed to have gotten from a man in Roanoke, Virginia, for \$15.00. When this check was sent in for collection the bank reported that they had no such name on their books. It was proven that the name signed to this check was fictitious; that there was no such person known by the name that was inscribed on the check in question. Was this not a case of forgery, as well as obtaining money under false pretences? The accused acknowledged when on trial that he had signed this fictitious name himself."

In reply I beg to say that, in my opinion, the party you mention was guilty of forgery. Many cases have held that forgery might be committed by the false making of a written instrument in the name of a fictitious person. Among these cases are the following:

Thompson v. State, 49 Ala. 16, 18;
State v. Wheeler, 25 Pac. 394, 395, 20 Ore. 192;
People v. Warner, 62 N. W. 405, 406, 104 Mich. 337;
People v. Van Alstine, 23 N. W. 594, 595, 57 Mich. 69;
Adkins v. State, 56 S. W. 63, 64, 41 Tex. Cr. R. 577;
Hocker v. State, 30 S. W. 783, 784, 34 Tex. Cr. R. 359;
Randolph v. State, 91 N. W. 356, 357, 65 Neb. 520.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

COMMISSIONER OF REVENUE—Compensation.RICHMOND, VA., *February 2, 1927.*

JOS. H. HOBBS, ESQ.,
Justice of the Peace,
Rose Hill, Virginia.

DEAR SIR:

Acknowledgment is made of your letter of January 30, 1927, in which you say:

"Please inform me as to what compensation the commissioners of the revenue will receive under the Acts of Assembly, 1926, page 642, section 2252."

In reply I would say that section 2349 of the Virginia tax laws, 1926, provides as follows:

"Every commissioner shall be entitled to receive in consideration of his services to be paid out of the treasury, upon the warrant of the Auditor of Public Accounts a commission of five per centum on the amount of taxes lawfully assessed for the current year and for any and all prior years by him on persons, on real and personal property, income and salaries within the preceding twelve months, but when the taxes assessed in any district exceed ten thousand dollars the com-

missions allowed on excess shall be three and one-half per centum up to twenty thousand dollars, and two and one-half per centum upon the amount in excess of twenty thousand dollars and up to thirty thousand dollars, and one and one-half per centum upon the amount in excess of thirty thousand dollars up to sixty thousand dollars, and one and one-fourth per centum up to the amount in excess of sixty thousand dollars up to three hundred thousand dollars, and one per centum upon the amount in excess of three hundred thousand dollars."

I am inclosing herewith a blank which explains how the above compensation is worked out.

Trusting this gives you the desired information, I am,

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

CONCEALED WEAPONS—Carrying thereof.

RICHMOND, VA., *December 14, 1926.*

MR. L. L. NORRIS,

*Director Touring Department, National Automobile Club,
362 Pine Street, San Francisco, California.*

MY DEAR SIR:

Acknowledgment is made of your letter of December 7, 1926.

Section 4534 of the Code of Virginia, 1919, prohibits the carrying of concealed weapons by all persons in this State except certain enumerated officers and persons authorized to carry the same by the courts. There is no prohibition against the carrying of unconcealed weapons except to church, or places of religious worship on Sunday, Code section 5578 and Code section 4795 authorizes the courts to put a person going armed under a recognizance for his good behavior.

The possession of blackjacks, brass or metal knucks, or like weapons for any purpose is prohibited by section 4535 of the Code.

Trusting this gives you the desired information, I am,

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

CONCEALED WEAPONS—Who can carry.

RICHMOND, VA., *May 10, 1927.*

MR. A. W. MATTHEWS,

North Tazewell, Virginia.

MY DEAR SIR:

Your letter of the 6th addressed to Governor Byrd has been referred to me for reply.

You request to be advised if when a notary public is acting as conservator of the peace he is allowed to carry a gun, and if so, is it necessary for him to have a badge to show his authority.

Section 4534 of the Code of Virginia prohibits the carrying of concealed weapons and provides the punishment for so doing, but it further provides that this section shall

not apply to any city officer, town or city sergeant, constable, sheriff, or a notary public acting as a conservator of the peace. Therefore, he is not prohibited by law from carrying a concealed weapon. It is not necessary for him to have a badge in order to do this.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

CONSERVATION AND DEVELOPMENT COMMITTEES—Compensation of.

RICHMOND, VA., October 9, 1926.

MR. E. O. FIPPIN,
*Executive Secretary and Treasurer, State Conservation and Development Commission,
Richmond, Virginia.*

MY DEAR SIR:

In response to your inquiry as to what compensation the members of the State Commission on Conservation and Development are entitled to, I beg leave to submit the following:

A portion of section 1 of chapter 169 of the Acts of 1926, approved March 17, 1926, which created this commission, reads as follows:

“* * * Members of the said commission shall receive no salaries, but shall be paid their necessary traveling and other expenses incurred in attendance upon meetings, or while otherwise engaged in the discharge of their duties, and the sum of ten dollars (\$10.00) a day for each day or portion thereof in which they are engaged in the performance of their duties. * * *”

The language used in this paragraph, in my judgment, is clear and explicit and means just what it says, namely, that the members of the commission shall be paid their necessary traveling and other expenses incurred in attendance upon meetings, or *while otherwise engaged* in the discharge of their duties, the sum of \$10.00 a day for each day or portion thereof.

The language, “or while otherwise engaged in the discharge of their duties,” in my judgment means that, in the event any member of the commission is performing a duty incumbent upon him by virtue of being a member of said commission, he is likewise entitled to this compensation, even though he may not be sitting with the commission as a whole.

Trusting that I have made myself clear in this matter, I am,

Very truly yours,

JOHN R. SAUNDERS,
Attorney General.

ELECTIONS—Eligibility of candidates.

RICHMOND, VA., April 27, 1927.

MR. B. N. KIBLER,
Luray, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of April 25, 1927, received this morning in which you state that you were a registrar in your county, and that this year in April

you sent a transfer of a voter from your precinct to the registrar of another precinct and then resigned.

You request me to advise you whether you are eligible to be a candidate for county treasurer. Section 97 of the Code reads as follows:

"No person who acts as registrar shall be eligible to an office to be filled by election by the people at the election to be held next after he has so acted as registrar."

Under this section Mr. Pollard, a former Attorney General, held that one who as registrar has registered voters since the November general election was not eligible as a candidate at the next primary election.

In my opinion the act of transferring a voter is an official act of the registrar, and in so doing he acts as registrar and, therefore, would be disqualified from being a candidate at the election to be held next after he has so acted as registrar.

Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

ELECTION LAWS—Separate list on registration books.

RICHMOND, VA., July 10, 1926.

THOMAS J. NOTTINGHAM, ESQ.,
General Registrar,
Norfolk, Virginia.

MY DEAR SIR:

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

"When the county registrar turned over to the general registrar at the time of the annexation of a part of Norfolk county by the city of Norfolk the registration books for the 26th and 28th precincts, all the white men were placed in one book and all the white women in another. The books for men include both permanent and temporary rolls.

"Should the general registrar recopy the books for those two precincts and place all on the permanent roll in our book in each precinct, and the men that should be on the temporary roll in a book with the women as all women are on the temporary roll?"

Section 108 of the Code provides that voters on the permanent rolls or books "shall be kept separate from the voters whose names have been or shall be entered on the registration books after the first day of January, nineteen hundred and four."

Therefore, I would suggest that the books referred to be copied and those entitled to be on the permanent roll be placed in one book and the other voters in another book, as the law requires.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

ELECTIONS—Electoral Board—Pay of election officers.RICHMOND, VA., *October 14, 1926.*

MR. A. H. CRISMOND,
Clerk of Circuit Court,
Spotsylvania, Va.

MY DEAR MR. CRISMOND:

Acknowledgment is made of your letter of October 12th, in which you say:

"I am writing you for some information. Acts 1926, chapter 521, page 872, amends sections 89 and 200 of the Code of Virginia relative to pay of election officers.

"Section 89 states that each member of the electoral board shall receive for each day of actual service the sum of \$2 and the same mileage as now paid jurors, etc.

"Section 200, following, states that the 'Pay of judges, clerks, registrars, members of electoral board and commissioners of any election shall receive as compensation for their services the sum of \$5 each for each days service rendered, etc.'

"Please write me what, in your opinion, amount should be paid such members for each days service rendered. It seems to me they would be entitled to \$5 per day under section 200."

In reply, there seems to be a conflict between sections 89 and 200 of chapter 521 of the Acts of 1926, which deals with the pay of members of the electoral board. Section 89 provides that each member of the electoral board shall receive \$2 for each day of actual service. Section 200 provides that each member of the said board shall receive \$5 for each day's service rendered.

It is a rule in a case of this kind that the latter section will prevail over a former section. Therefore, I should say that section 200 will prevail over section 89, and that the members of the electoral board should receive \$5 and not \$2.00.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

ELECTIONS—Can registrars serve as judges or clerks of election.RICHMOND, VA., *November 23, 1926.*

W. L. KERR, ESQ.,
Keeling, Virginia.

DEAR SIR:

Acknowledgment is made of your letter of November the 11th, in which you ask whether local registrars of an election district can serve as judges or clerks of election?

In reply I would say that section 86 of the Virginia Code says in part:

"* * * and such registrar shall not hold any office by election or appointment during his term. * * *"

The above section further says:

"* * * The acceptance of any office, either elective or appointive, by such registrar during his term of office shall ipso facto vacate the office of registrar. * * *"

It is therefore clear from the foregoing section of the Virginia Code that local registrars cannot serve as judges or clerks of election at the same time.

You also ask the following question:

"If, when the registrar delivers the registration books of his election district by section 104 to the judges there being no judges on hand, may he serve as bystander by section 148?"

In reply to this question I will quote in part section 148 of the Virginia Code:

"* * * Should any judge of election fail to attend at any place of voting for one hour after the time prescribed by law for opening the polls at such election it shall be lawful for the judge or judges in attendance to select from among the bystanders one or more persons possessing the qualifications of judges of election who shall act as judge or judges of such election * * *"

I do not think the local registrar can serve as a bystander and then be selected from this position to the office of judge of election because section 82 of the Virginia Code says he cannot hold both places at the same time. This appointment as judge of the election would contravene section 82 of the Virginia Code whether he serve as bystander or not. Section 148 of the Code says that the bystander must possess qualifications of judges of election and certainly the local registrar would not possess such qualification because he is forbidden by section 86 of the Code to hold more than one office.

Trusting this will give you the desired information, I am,

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

ELECTIONS—Pay of registrars.

RICHMOND, VA., *December 9, 1926.*

MR. W. L. KERR,
Keeling, Virginia.

MY DEAR SIR:

Your letter of the 8th received this morning.

Section 98 of the Code provides "that the registrars in cities and towns shall annually, on the third Tuesday in May, at his voting place, proceed to register the names of all qualified voters within his election district not previously registered in the said district." This section further on provides that "thirty days previous to the November election, each registrar in this State (which of course includes registrars in cities, towns, and counties) shall sit one day for the purpose of amending and correcting the lists and for registering voters applying who have not been previously registered."

You will see, therefore, from this that only the registrars in cities and towns are required to sit twice a year, and the registrar in the country once a year, which is thirty days prior to the November election.

Section 200 of the Code of Virginia, which provides for the pay of judges, clerks, registrars, etc., was amended at the last session of the legislature, which is found on page 872 of the Acts of 1926. This section provides that registrars shall be paid \$5.00 for each day's service rendered.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

ELECTIONS—Writs of.RICHMOND, VA., *January 26, 1927.*

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

MY DEAR GOVERNOR:

In response to your request of this morning that I advise you as to the law with reference to the issuance of writs of election by you to fill the vacancies existing in the General Assembly, the matter is governed by sections 81 and 146 of the Code.

Section 81 of the Code provides that when a vacancy occurs during the recess of the General Assembly by the death or resignation of a member thereof "a writ of election to fill such vacancy shall be issued by the Governor." The section then provides:

"Such writ shall be directed to the sheriff of the county or sergeant of the corporation for which the election is to be held, or to the sheriffs and sergeants of the respective counties and cities composing the election district, or districts, for the election of senators or delegates, when the election is for such districts, but whenever any district is changed after the election of a delegate or senator, and the delegate or senator shall die, resign, or be removed from office, the election to fill the vacancy shall be held in the district as constituted when the said delegate or senator was elected."

Section 146 of the Code provides as follows:

"Whenever a special election is ordered by the Governor, Speaker of the House, or President of the Senate, it shall be his duty to issue a writ of election, designating the office to be filled at such election and the time when such election is to be held, and to transmit the same to the sheriff of the county and the sergeant of the city in which such election is to be held, to be by such sheriff or sergeant published by posting a copy thereof at each voting place in his county or city at least ten days before such election."

I assume, of course, that you have the necessary forms in your office for the required writs.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

ELECTIONS—Refund of salary.RICHMOND, VA., *April 11, 1927.*

HON. JOHN B. BOATWRIGHT,
Commonwealth's Attorney,
Buckingham, Virginia.

MY DEAR MR. BOATWRIGHT:

Acknowledgment is made of your letter in which you request me to advise whether or not a candidate for an office can offer to refund to the treasurer a part of the salary to be received by him as an inducement to the voters to nominate, or elect, him. In my opinion such a promise would not be only illegal, but criminal. See 9 R. C. L. title "Elections;" section 128, pp. 1127-28, where it is said in part:

"It has been held in a number of cases that a promise by a candidate, made to the electors generally, to serve, if elected, for less than the fees or salary prescribed by law, constitutes bribery. When a candidate gives an elector per-

sonally money or property, there is a direct attempt to influence his vote by pecuniary considerations. The expectation is that such vote will be controlled, not by the elector's judgment of the fitness of the candidate for the office, but by the pecuniary benefit he has received. In other words, it is money and not judgment which directs the ballot, and thus the election turns not on considerations of fitness or public good, but of private gain. And that which is wrong when done directly is equally wrong when done indirectly. So it is declared, as salaries are paid by taxation, when a candidate offers to take less than the stated salary he offers to reduce *pro tanto* the amount of taxes which each individual must pay. If the candidate went to each elector and offered to pay one dollar of his taxes, that clearly would be direct bribery; and when he offers to take such a salary as will reduce the tax upon each taxpayer one dollar, he is indirectly making the same offer of pecuniary gain to the voter; so that those cases rest upon the simple proposition that the election of a candidate for office cannot be secured by personal bribery offered directly or indirectly to the voter."

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

ELECTION—Registrar—Eligibility for other office.

RICHMOND, VA., *April 11, 1927.*

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

DEAR MR. CRUSH:

Acknowledgment is made of yours of the 7th, in which you say in part:

"Please settle this point under the election laws for me. Under section 97 of the Code and under the Constitution, it is provided that no registrar shall be eligible to any office filled by election by the people at the election to be held next after he has so acted and registered. There are registrars in this county who desire to become candidates for district offices in the next November election. They have held office since the last election in November, but have not registered any persons during that time and have resigned from that office and they wish to know, under these circumstances, if they cannot be eligible for this office to which they aspire."

In reply I beg to say that, in my opinion, section 97 of the Code of Virginia prohibits a person who has held the office of registrar from being a candidate for any office filled by the people at an election held during or immediately after the time that he occupies that position. Section 97 is as follows:

"No person who acts as a registrar shall be eligible to an office to be filled by election by the people at the election to be held next after he has so acted as registrar."

I agree with you that the law applies whether there is any actual registration or not. I gave a similar opinion to Mr. W. C. Strickland, Fancy Gap, Virginia, which may be found on pages 124-5 of the report of the Attorney General of 1923.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

ELECTIONS—Voting for all candidates.RICHMOND, VA., *April 28, 1927.*MR. R. M. McCLURE,
Gordonsville, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of April 27, 1927, in which you request me to advise you whether a voter is required to vote for all the candidates for town council on the ballot where there are no more candidates than offices to be filled.

In my opinion, after reading section 162 of the Code (Virginia election laws, page 48), a copy of which I am sending herewith, a voter may vote for any one or more of said candidates and scratch the names of those candidates for whom he does not desire to vote. If he does so, he may substitute the names of other persons on the ballot in place of those scratched out.

I do not think the law ever contemplated that a ballot should be cast out simply because the voter had voted for fewer than the total number of candidates for whom he is entitled to vote.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

ELECTION LAWS—Notice of candidacy.RICHMOND, VA., *March 30, 1927.*HON. C. W. WOODSON,
County Clerk Campbell County,
Rustburg, Virginia.

DEAR SIR:

Acknowledgment is made of yours of the 29th in which you say:

"Please turn to page 67, election laws 1924, section 229, and advise me if you construe this as requiring a candidate for a *district* office to file with notice of his candidacy a petition signed by fifty qualified voters. There is a difference of opinion here and some candidates for district offices, such as supervisor, constable and justice of the peace, are circulating petitions, believing that this law relates to district as well as county officers and I would like to have your letter ruling on this point to show to such of them as may consult me."

In reply I beg to say that after reading section 229 of the Code, I am in some doubt as to whether the words "county officers" include district officers in the county. However, I think it was the evident purpose of the law to require all candidates to file petitions, and I think as a matter of precaution candidates for district offices should follow that course.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

ELECTIONS—Notice of candidate.

RICHMOND, VA., May 10, 1927.

HON. R. B. STEPHENSON,
Attorney at Law,
Covington, Virginia.

MY DEAR MR. STEPHENSON:

I am just in receipt of your letter of May the 6th in which you say in part:

"The regular town election for Covington, and I think the other towns in the State as well, will be held on the second Tuesday in June, being June 14th this year. No candidates for town officers have complied with the above section as amended, and no names have been filed with the clerk of the court previous to sixty days before the date of said election. Some names have been filed within the sixty day period.

"The clerk of the court has asked me to get your opinion as to whether he must certify the names filed, within the sixty day period preceeding said election to the secretary of the electoral board. It seems to be apparent that no names can be legally placed upon the ballot by the electoral board. Will you please advise whether the electoral board should print the ballots and hold an election under the facts as stated above. Your prompt opinion in this matter will be appreciated."

As stated by you in another paragraph of your letter the legislature of 1926 amended the law requiring a candidate to give sixty days notice in writing before the date of election, at which such person is candidate. The old law required only thirty days notice.

You state in your letter that the town election will be held in Covington on the 14th of June, which is the second Tuesday in June and the time fixed by statute for holding town elections; that no candidates for any of the offices to be voted for in said election have filed their notice of candidacy sixty days prior to the 14th of June. You then desire to be advised whether or not the clerk of the court must certify the names of those candidates who have filed within sixty days, but not sixty days, prior to said election.

Section 168 of the Code provides:

"The provisions of this chapter shall apply to all elections held in this State except as is otherwise provided; and where the election is held in an incorporated town for town officers it shall be the duty of all persons who intend to be candidates for office in said town to give notice of said candidacy to the county clerk of the county in which said town is, as provided by section one hundred and fifty-four, and said clerk shall notify the electoral board, and the tickets shall be printed and delivered and the election held and conducted in the manner provided by this chapter."

Section 155 provides how and when ballots are printed. Among other things it states:

"These ballots shall be white paper tickets without any distinguishing mark or symbol, shall contain the names of all the candidates complying with the provisions of the law, printed in black ink, immediately below the office for which they have so announced their candidacy, in due and orderly succession, and the names on said ballot shall be in clear print, in the same order and each name in a separate line, and the type used in printing said ballots shall be plain Roman type, not smaller than pica."

A reading of these sections will give you all of the law applicable to the question raised in your letter.

First—That in order for one to become a candidate to be voted for in a town election which is held on the second Tuesday in June he must give at least sixty days notice of his intention of such candidacy to the clerk.

Second—That the clerk shall certify the names of such candidates who have given this notice.

Third—That the electoral board shall have the ballots printed, which ballot shall contain only the names of those candidates who have complied with the law as to the notice of their candidacy.

It, therefore, follows that unless a candidate has complied with these provisions his name cannot be certified by the clerk to the electoral board.

I do not think that the electoral board has the authority to print the ballots and hold an election under the facts stated in your letter.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

ELECTIONS—Women subject to capitation tax.

RICHMOND, VA., May 9, 1927.

MR. S. F. ADAMS,
Wood Bridge, Box 21, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of May 4, 1927, in which you say:

“I having been appointed delinquent capitation tax collector for Prince William county, and as I have been told that a married woman who has nothing but what her husband provides, does not have to pay the tax unless she desires to vote and that there is no way to make the husband pay it unless he so desires.

“I would like to know if I was informed correctly or if there is a way to collect the said capitation tax.”

If you will examine the Acts of 1920, page 588, as amended, by the Acts of 1922, page 462 or the Virginia elections, pages 85-87 you will see that all women in this State, whether married or unmarried, if above the age of twenty-one years are subject to the State capitation tax.

The payment of these taxes cannot be enforced until they are three years past due, but the fact that a woman does not vote and does not want to vote will not relieve her from the liability of the tax.

This tax is assessed personally against the woman, and not against her husband, and you cannot levy upon the husband's goods for the payment of her tax. You will have to levy upon her property in order to collect the tax.

Trusting this gives you the desired information, I am,

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

ELECTIONS—Electoral board—Eligibility of candidate.

RICHMOND, VA., May 7, 1927.

MR. S. G. DOBYNS,
Stuart, Virginia.

MY DEAR SIR:

I am in receipt of your letter of May the 5th.

In this you desire to be advised whether or not a member of the electoral board who acted with the board in the appointing of the judges and clerks of the election is eligible to be a candidate in said election.

Section 84 of the Code provides that no person who holds 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 section that no person holding an office of trust or profit in the county, city, or town, shall be appointed a member of the electoral board.

The converse of the proposition is true, of course, that a member of the electoral board could not be appointed, or elected, to an office of the character mentioned if the member of the electoral board has acted in conjunction with the other members in selecting the judges and clerks of an election and then proposes to become a candidate in said election.

I do not think he is eligible. It would certainly be highly improper and not contemplated by law.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

ELECTIONS—Treasurer to state street address on list.

RICHMOND, VA., May 6, 1927.

HON. RICHMOND T. LACY, JR.,
Assistant City Attorney,
Richmond, Virginia.

MY DEAR MR. LACY:

Acknowledgment is made of your letter of April 28, 1927, in which you call my attention to section 109 of the Code of 1919, as amended by chapter 306 of the Acts of 1926, page 525, and request me to advise you as to the validity of that part of the statute which requires the treasurer of a city in making up his capitation tax list to state the street address where each person on the list was assessed for each year his tax was paid.

Section 109 of the Code, as amended, requires the treasurer of each county and city, at least five months before the second Tuesday in June and each regular election in November, to file with the clerk of the circuit court of his county, or the corporation court of his city, a list of all persons in his county or city, who have paid not later than six months prior to each of said dates, the State poll taxes required by the Constitution of this State during the three years next preceding that in which such election is to be held. It further provides that the list must be arranged alphabetically by magisterial districts or wards, and in 1926 the legislature provided, "in cities shall state the street address where assessed for each year paid."

The validity of this section depends upon the language of section 38 of the Constitution, which prescribed the duties of the treasurers in making and filing the tax lists mentioned in section 109 of the Code, as amended.

Section 38 of the Constitution, so far as is applicable to the question here under consideration, reads as follows:

“* * the treasurer of each county and city shall, at least five months before each regular election, file with the clerk of the circuit court of his county, or of the corporation court of his city, a list of all persons in his county or city, who have paid not later than six months prior to such election, the State poll taxes required by this Constitution during the three years next preceding that in which such election is held; which list shall be arranged alphabetically, by magisterial districts or wards, shall state the white and colored persons separately, and shall be verified by the oath of the treasurer. * * *”

You will observe that the Constitution clearly points out all the duties of the treasurers in connection with the making and filing of their tax lists, and the provision incorporated in section 109 of the Code by the Acts of 1926 is not one of the duties imposed upon them by the Constitution.

In *Richmond v. Lynch*, 106 Va. 324 (1907), the city of Richmond, by an ordinance, attempted to prohibit its officials, employees and members of its municipal boards from serving as judges, registrars or clerks at any election, regular or primary, or as members of any standing committee of any political party. Lynch was a member of the city council, and was prosecuted for a violation of the city ordinance. In holding the ordinance invalid, the Court of Appeals said (pp. 325-6):

“With regard to the case of the defendant in error, Lynch: As a member of the common council he holds an elective office under the Constitution of Virginia (Article VIII, section 121), and that instrument expressly declares what political positions shall be deemed incompatible with such office. (Article II, section 31.) Membership of a standing committee of a political party is not prohibited by the section referred to; and, the Constitution having dealt with the subject, it is not within the competency of the city, by ordinance, to add other inhibitions to those therein enumerated.

“The governing principle in such case is thus stated: ‘When the Constitution defines the qualifications of an office it is not in the power of the legislature to change or superadd to them, unless the power to do so is expressly, or by necessary implication, conferred by the Constitution itself.’ Cooley on Constitutional Limitations, 79. * *”

This decision of the Court of Appeals is directly applicable to the amendment to the section here under consideration, and in my opinion so much of section 109 of the Code, as amended, as attempts to impose upon the treasurers of cities the duty of stating in said list “the street address where assessed for each year paid” is null and void as seeking to change or super-add to the requirements of section 38 of the Constitution, there being nothing in the Constitution which either expressly, or by necessary implication, confers upon the General Assembly the power to change or add to the duties required of the treasurers by that section of the Constitution.

Trusting that this gives you the desired information, I am,

Very truly yours,

LEON M. BAZILE,

Assistant Attorney General.

ELECTIONS—Absent voters law.RICHMOND, VA., *May 6, 1927.*

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

MY DEAR MR. CRUSH:

I am in receipt of your letter of May the 2nd. In this you state that there are about fifteen democratic voters in your county who are invalids and would like to vote but it is impossible to get them to the polls. You then desire to be advised whether or not under the provisions of the absent voters laws parties sick in the hospital or confined to their homes in full possession of all faculties but who, on account of illness or infirmities are unable to go to the polls can vote by mail.

In reply I will state that I believe under the provisions of this act if a party were confined in a hospital outside of the county he would be permitted to vote by mail. Parties who are sick at home, however, cannot vote under the absent voters law. The law should be so amended as to take care of cases of this character.

You will observe the first section in the law reads:

"Any voter who may be absent from the city, if in a city, or from the precinct or county, if in a county, in which he is registered, may vote; provided."

You will see from this provision of the law it only covers voters who are absent from the county, or city.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

ELECTIONS—Capitation tax—Payment of.RICHMOND, VA., *February 8, 1927.*

HON. W. B. KILBOURNE, *Deputy Treasurer,*
Eig Stone Gap, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of February 7, 1927, in which you request me to advise you what was the last day on which the capitation tax could be paid in order to entitle a person to vote in the regular town election to be held on June 14, 1927.

Section 21 of the Constitution requires the capitation tax to have been paid at least six months prior to the election. In my opinion this means that December 14, 1926, was the last day on which the tax referred to could have been paid so as to entitle a person to vote in the municipal election to be held in June, 1927.

Trusting this gives you the desired information, I am,

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

ELECTIONS—Capitation tax—Authority to impose.RICHMOND, VA., *February 1, 1927.*DR. R. M. WILEY,
Salem, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of January 31, 1927, in which you request me to advise you whether the town of Salem has any authority to impose a town capitation tax upon the residents of the town.

Section 173 of the Constitution, in addition to the State capitation tax, authorizes the General Assembly to allow the boards of supervisors of counties, or the council of any city or town, to levy an additional capitation tax not exceeding \$1.00 per annum on residents within the limits of such county, city or town.

Cities and towns have been authorized by the General Assembly, by section 3073 of the Code, to impose a tax on persons. The town capitation tax does not have to be paid as a prerequisite to the right to vote, but the collection of this tax can be enforced before it is three years past due.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

ELECTION LAWS—Capitation tax.RICHMOND, VA., *April 2, 1927.*MR. THOMAS J. NOTTINGHAM,
General Registrar,
Norfolk, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of April 1, 1927, in which you say:

"Is this office right in ruling that a young man becoming of age prior to February 1, 1927, is assessable for 1927 capitation tax?"

"It has been claimed by several that the date has been changed and only those becoming of age prior to January 1, 1927, are assessable for 1927 capitation tax."

Prior to the year 1927 your ruling would have been correct. However, in 1926, the General Assembly by chapter 160 of the Acts of 1926 amended section 1 of the tax bill so as to make the tax year begin on the first day of January of each year, beginning with January 1, 1927. Therefore, a young man becoming of age in 1927, subsequent to January 1, 1927, would be assessable with a capitation tax for the first time in the year 1928.

Trusting this gives you the desired information, I am,

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

ELECTIONS—Payment of capitation tax.RICHMOND, VA., *April 15, 1927.*

MR. A. R. HARWOOD,
Appomattox, Virginia.

MY DEAR SIR:

Your letter of April 14th received.

The last date for the payment of the capitation tax, in order to vote in the general election and the primary this year, is May 7th. Six months prior to the election comes on Sunday, May 8th, hence it is necessary that the tax shall be paid on Saturday, May 7th, in order to comply with the provision of the Constitution.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

ELECTIONS—Capitation tax.RICHMOND, VA., *May 20, 1927.*

MR. H. P. BURNETT,
Independence, Virginia.

DEAR MR. BURNETT:

I am in receipt of your letter of May the 18th in which you desire to be advised whether or not a young man, or woman, coming of age after February 1, 1926, can register any time prior to thirty days before the general election this fall and vote.

A person coming of age after February 1, 1926, of course, is not assessable with capitation taxes for that year, therefore, it will only be necessary for a person who reaches the age of twenty-one after that date to be assessed with the capitation tax for 1927, pay the same, register and vote.

The Constitution, as you will note, provides that the party must pay all capitation taxes assessed or assessable against him during the three years next preceding that in which he offers to vote six months prior to the election. But, the year 1926 could not have been one of these three years, because no such tax was assessable against him for that year—he having come of age after February 1, 1926.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

ELECTIONS—Exemption of tax.RICHMOND, VA., *May 4, 1927.*

HON. THOMAS NEWMAN,
City Treasurer,
Newport News, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of May 3, 1927, in which you say:

“Please advise me if the widows of Confederate veterans can vote without payment of their capitation taxes, in the August primary and November election.”

Widows of Confederates are not exempted from the payment of the capitation tax and therefore must have paid the same within the time prescribed by section 21 of the Constitution as a prerequisite to the right to register and vote.

The exemption contained in section 22 of the Constitution has application only to veterans of the War of secession, and not to their widows or wives. See also chapter 400 of the Acts of 1920 as amended, Virginia election laws page 85.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

ELECTIONS—Payment of taxes.

RICHMOND, VA., *April 28, 1927.*

HON. A. M. KIRK,
Independence, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of April 26, 1927, in which you say:

“Please let me know the last day poll taxes can be paid in May this year so a party will be entitled to vote at the November election, 1927. The election comes on November 8 and May 8 is on Sunday. Please let me know the last legal day that taxes can be paid to entitle a voter to vote in the coming election in November, 1927.”

It is my opinion that May 7th is the last day on which capitation taxes can be paid for the purpose of voting in the November election, 1927.

If you will examine section 21 of the Constitution, you will see that it requires the payment of State capitation taxes “at least six months prior to the election.” Therefore, the payment of a capitation tax on May 9th would not be a payment at least six months prior to November 8, 1927.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

ELECTIONS—Payment of taxes.

RICHMOND, VA., *April 28, 1927.*

C. D. WALTON, ESQ., *Deputy Clerk,*
Jonesville, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of April 26, 1927, in which you say:

“Should a party becoming twenty-one years of age after January 1, and before February 1, pay tax for 1927 or for 1928, as a prerequisite to vote in the coming election? Before, persons becoming twenty-one years of age after the first day of February have paid tax for the next year and not for the year in which they become twenty-one years of age.”

Since the amendment of section 1 of the tax bill by the Acts of 1926, capitation taxes are assessable as of the first day of January of each year. The only capitation

taxes required to be paid, as a prerequisite to the right to vote, are State poll taxes assessed or assessable against one "during the three years next preceding that in which he offers to vote" (section 21 of the Constitution).

Therefore, a young man becoming of age after January 1, 1927, would be assessable for the first time in January, 1928, and for this reason would pay, for the purpose of registering and voting in this year, his tax for the year 1928 and not for the year 1927.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

ELECTION LAWS—Registration of voters.

RICHMOND, VA., *August 23, 1926.*

HON. THOS. J. NOTTINGHAM,
*General Registrar,
Norfolk, Va.*

MY DEAR SIR:

Acknowledgment is made of yours of the 14th, in which you say:

"On May 18, 1925, in a letter to Mr. T. Conway Matthews, general registrar, you ruled that a man who became a resident of the State of Virginia prior to February 1 is assessable for capitation tax for that year.

"It has been unofficially called to my attention that blank forms issued to commissioners of revenue of the State carry a clause that exempts a person from taxation who has not resided in the State over six months prior to February 1, the date of assessing.

"Under your ruling of May 18, 1925, I am refusing to register any person who was a resident of the State on or before February 1 and failed to pay the capitation tax for that year, and shall continue to do so unless instructed otherwise."

In reply I beg to say that I have reexamined my letter to Mr. Matthews, to which you refer, which is entirely correct.

However, if a person who was a resident of the State on or before February 1 and failed to pay his capitation tax for that year should desire to be registered, I can see no reason for refusing to register him, provided he has had himself properly assessed with and has paid the capitation tax with which he was assessable and has the other qualifications for registration.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

ELECTION LAWS—Registration of voters.

RICHMOND, VA., *August 23, 1926.*

C. D. WALTON, ESQ.,
*Deputy Clerk, Circuit Court of Lee county,
Jonesville, Va.*

DEAR SIR:

Acknowledgment is made of yours of the 11th, in which you say in part:

"The registration books at Blackwater precinct, Lee county, Virginia, were burned last winter.

"Will it be the duty of the clerk, under section 108 of the Code of Virginia, to make and certify to the registrar for said precinct a record of the registration of all the voters at said precinct, or just certify to the registrar a list of those who registered before 1904?"

In reply I beg to say that, in my judgment, section 108 of the Code applies to all of the voters registered at any precinct, whether on the permanent roll or registered after the first of January, 1904. This is clearly implied by the language "any permanent roll or book of any precinct."

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

ELECTION—Registration of voters.

RICHMOND, VA., November 12, 1926.

H. F. THORNTON, Esq., *Registrar,*
Shelby, Virginia.

DEAR SIR:

Acknowledgment is made of yours of the 8th, in which you say:

"There seems in our district to be some misunderstanding of the law regarding the days for registration of voters. Do the registrars for county precincts, as well as town and cities, on the third Tuesday in May, at their respective voting places, register voters or do they have only one day for registration, that being thirty days before the election in November?"

In reply I beg to say that section 94-a of the Code of 1924 (Acts 1923, page 102) provides that the registration books in cities of more than 100,000 and less than 160,000 inhabitants shall be closed for the purpose of registering voters for the fifteen days next preceding the day of any special or primary election. Section 98 provides that the registrars of the cities and towns shall sit annually on the third Tuesday in May and those in the counties shall sit thirty days previous to the November elections, but any voter may register previous to the regular days of registration. It is clear that each year between the regular days of registration and the general election days in both the cities and counties, with the exception in regard to the cities mentioned above, persons entitled thereto may register at any time prior to the conclusion of the general registration.

Trusting this gives you the desired information, I am,

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

ELECTION LAWS—Change of residence.

RICHMOND, VA., November 19, 1926.

CLAUDE F. BEVERLY, Esq.,
Freeling, Virginia.

DEAR MR. BEVERLY:

Acknowledgment is made of your letter of November the 17th in which you state:

"In November, 1924, I married a Laurel county, Kentucky, lady, then a citizen and voter of that State. We arranged to move to Virginia in the early

spring of that year, but in early February of that year, 1925, she had a severe attack of influenza with complications that kept her confined until in the spring of this year. In April of this year we moved to Virginia where we now reside and where I have always maintained my legal residence. My wife voted in Kentucky in 1924. When we were married November, 1924, it was then her intention to become a resident of Virginia and she never voted in Kentucky after that.

"Will she be entitled to register and vote here the coming year in view of the fact that she married a resident of Virginia more than two years before the election next year and then and there to all intents and purposes was from the date of marriage a resident of Virginia."

In reply I would say that ordinarily it is true that a woman upon marriage immediately acquires the domicile of her husband and that her domicile ordinarily changes with every alteration of his, regardless of the actual locality of her residence after the marriage. A woman merges her legal identity in her husband's and solemnly yields her will to his. Minor on Conflict of Laws, page 94. But the Virginia Code section 82-a provides that for the purpose of registering and voting the residence of a married woman shall not be controlled by the residence or domicile of her husband.

Under the ordinary rule your wife would be entitled to vote if at the time of the marriage you were domiciled in Virginia for as stated above your domicile becomes the wife's domicile at the time of marriage but the Virginia Code has expressly provided that for the purpose of registering and voting the residence of a married woman shall not be controlled by the residence or domicile of her husband. Section 82-a of the Virginia Code provides that every female person who has been a resident of the State two years, of the county, city, or town one year, and of the precinct in which she offers to vote thirty days next preceding the election in which she offers to vote shall be entitled to vote. Other provisions provide that she shall also be registered and shall pay her State poll taxes.

You will see therefore that your wife will not be entitled to vote until she has come within the provisions of section 82-a of the Virginia Code.

Trusting this will give you the desired information, I am,

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

ELECTION—Residence.

RICHMOND, VA., *November 23, 1926.*

DR. J. S. DEJARNETTE,
*Superintendent Western State Hospital,
Staunton, Virginia.*

DEAR DR. DEJARNETTE:

Acknowledgment is made of your letter of November 22nd, in which you say:

"I am writing to ask you to advise me how long a person has to live in Virginia before they establish a residence. The question of residence often comes up in commitment papers here. I thank you for a full definition for residents of the State and how long it takes a person to secure a residence and what has to be done to secure a residence. Also how long it takes a resident of the State to lose his residence in the State of Virginia. For instance, if a person lives out of Virginia for two or three years, would he lose his residence in Virginia?"

It is impossible to lay down any hard and fast rules as to what constitutes residence, but each case as a general rule will depend upon its own particular facts. For

the purpose of registering and voting in this State, a residence of two years in the State, one in the county, city or town, and thirty days in the precinct is required by the Constitution. In *Williams v. Commonwealth*, 116 Va., page 272, the court of appeals held that where one had once acquired a legal residence for the purpose of registering and voting, that that residence could be lost only by the combination of two things; first, a physical removal to some other place; second, the intention of abandoning the residence acquired at the former place and establishing a legal residence at the place to which he had moved. I would say that a person would be a resident of this State for the purpose of being committed to one of the State institutions if he had moved here with the intention of making Virginia his home, although he had not resided here a sufficient length of time to become a voter. As the tax bill expressly requires that all male residents of this State above the age of twenty-one should be assessed with a capitation tax, and chapter 400 of the Acts of 1920 makes a similar provision in the case of females above the age of twenty-one, I should say that the question as to whether they had been assessed with the capitation tax would be a pertinent inquiry, although a failure to be assessed would not necessarily be conclusive. In the case of persons living in Virginia, the test as to whether they are residents of this State or not, would be whether they lived in Virginia for a temporary or a permanent purpose. If they left for a temporary purpose with the intention of returning, I should say that Virginia remained their home. If, however, when they moved the intention was to change the residence from Virginia to the State to which they moved, I should say they were no longer residents of Virginia, but as I have said before, all of these cases would depend as a general rule upon the particular facts in each individual case.

Trusting this will give you the desired information, I am,

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

ELECTION LAWS—Eligibility of voters.

RICHMOND, VA., January 18, 1927.

MR. JOE W. PARSONS,
Galax, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of January 15, 1927, in which you ask the following questions:

“First: Can a voter live in one county and vote in another, where he has property in both counties?”

“Second: Can a voter who does not own any property claim his citizenship in another county where he has previously lived, and in a different county from where he now resides?”

In response to your first question, I would say that the law permits a man to vote where he has his place of legal residence. Legal residence does not necessarily mean the place where one actually lives.

In *Williams v. Commonwealth*, 116 Va. 272 (1914), the court held:

“The meaning of the words ‘resident’ or ‘residence’ is to be determined from the facts and circumstances taken together in each particular case. For the purpose of voting and holding office a man cannot have more than one legal residence. 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."

I would, therefore, say that if a voter gains a legal residence in one county and then moves to another county, with the intention of retaining his legal residence in the first county, it remains there, as legal residence once gained can be lost only by removal accompanied by the intent to change the legal residence.

The same answer would apply to your second question.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

ELECTIONS—Special—Eligibility of voters.

RICHMOND, VA., *February 9, 1927.*

HON. EPPA S. COX,
*Treasurer of Fauquier county,
Warrenton, Va.*

DEAR SIR:

Acknowledgment is made of yours of the 8th, in which you say:

"The Governor has called an election to be held March 8, 1926, to elect a State senator to succeed the late E. B. White, of Loudoun county. Am I, as treasurer, required to make a poll list for this election of persons who have paid their capitation tax prior to December 15, 1926, or can the list of 1925 be used which shows capitations paid prior to May 1, 1926?"

In reply, I beg to say that the list of persons who six months before the second Tuesday in June have paid the capitation taxes assessed or assessable against them for the three years next preceding the present year is the only list required by section 109 of the Code to be filed by the treasurer. This, as you know, must be filed five months before the second Tuesday in June.

Very truly yours,

JOHN R. SAUNDERS,
Attorney General.

ELECTIONS—Special—Eligibility of voters.

RICHMOND, VA., *February 10, 1927.*

HON. H. L. HULCE,
*City Treasurer,
Richmond, Va.*

MY DEAR MR. HULCE:

I beg leave to acknowledge receipt of your letter of February 2nd, in which you state that there will be a special election held on the 8th of March in your city for the purpose of electing member of the State Senate to fill the unexpired term of the late Senator W. W. Workman. You desire to be advised who are the qualified voters in this special election.

In reply would state that section 83 of the election laws specifies who are the qualified electors at a special election. It states as follows:

"The qualifications of voters at any special election shall be such as are herein before 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, and 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."

This, in my judgment, means that all persons who were qualified to vote in the general election held last November, all persons who have since become of age, registered and paid their poll taxes, and all persons who are qualified to vote in the June election of 1927. These three classes constitute the qualified voters who can vote in your special election to be held on March 8, 1927.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

ELECTIONS—Voters—Eligibility of.

HON. CHARLES E. FORD,
Chairman Electoral Board,
Newport News, Virginia.

RICHMOND, VA., *February 24, 1927.*

MY DEAR MR. FORD:

I am just in receipt of your letter of February 23rd, to which I will reply at once.

In this you state the town of Kecoughtan adjoining the city of Newport News was annexed to that city on January 1, 1927. You then desire to be advised whether or not the electors, or voters, residing in the annexed territory are qualified to vote in the city of Newport News in the primary and general election to be held this year. Section 2964 of the Code of 1919 provides as follows:

"Whenever, by extension of its territorial limits as aforesaid, territory is annexed to a city or town, the council thereof shall, by ordinance, organize the same into a new ward or wards, and shall forthwith select the proper number of councilmen from the residents and qualified voters of such new ward or wards, to serve until the next general election, or attach the same to existing ward or wards, under such regulations as are provided by law. This shall be done long enough before the next ensuing general city election to enable electors in such annexed territory to register. All electors residing in such annexed territory shall be entitled to transfers to the proper pollbooks in said city or town without again registering therein. Any person residing in said territory who shall not have registered shall be entitled to register in said city or town if he would have been entitled to register and vote at the next succeeding election in said county or town. But the failure of the council to so district said territory shall not invalidate and election held in said city or town."

You will see from reading this section that the residents in the town of Kecoughtan are entitled to vote in the primary and general election to be held in Newport News this year.

Yours very sincerely,

JOHN R. SAUNDERS,
Attorney General.

ELECTION LAWS—Eligibility of voters.RICHMOND, VA., *March 26, 1927.*

HON. W. W. WEBB, *Treasurer,*
Washington county,
Abingdon, Virginia.

MY DEAR MR. WEBB:

I beg leave to acknowledge receipt of your letter of March 27th, in which you call my attention to the Acts of the Assembly, 1926, page 288, chapter 160, section 1, and desire to be advised whether or not under this section a party who becomes twenty-one years of age during the month of January, 1927, is assessable with capitation tax for the year 1927.

In reply will state that it is my opinion that the party in question must have reached the age of twenty-one years prior to, or on the first day of January, 1927. The tax year begins on the first day of January and, of course, the party is not assessable if he becomes of age subsequently to the running of the statute.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

ELECTION LAWS—Eligibility of voters—Residence.RICHMOND, VA., *March 28, 1927.*

HON. THOS. H. HOWERTON,
Attorney at Law,
Waverly, Virginia.

MY DEAR MR. HOWERTON:

I beg leave to acknowledge receipt of your letter of March 24th, in which you say:

"I am writing you for a ruling as to a voter as follows: During the year 1925 a person left this county and State and went to Florida, moved his family and there lived with his family until the fall of 1926, while in Florida paid poll taxes. I am not sure about voting there. Should such a person now, since returning to Virginia, be allowed to pay poll taxes in this State for the years 1925 and 1926 (1924 taxes were paid by him before he left here) and vote in the August primary, 1927?"

As you know, the Constitution provides that in order for one to vote in Virginia he must have been a resident of the State for two years, or the county or city for one year, and of the precinct at which he offers to vote thirty days.

The party in question you state moved to Florida in 1925 and remained until the fall of 1926, and while in that State he paid his poll taxes there. Such an action on his part was clearly an intention of changing his residence from Virginia to Florida and in my judgment he would not be permitted to vote in Virginia in the August primary, 1927.

In this connection I would call your attention to the case of *Williams v. Commonwealth*, 116 Virginia, where this question is fully discussed by the Supreme Court of Appeals.

I will be very glad if you will write me if you concur in these views.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

ELECTION LAW—Eligibility of voters.RICHMOND, VA., *April 14, 1927.*

HON. J. CALLAWAY BROWN, *Mayor,*
Town of Bedford,
Bedford, Virginia.

MY DEAR SIR:

I am just in receipt of your letter of April 13th in which you state that on April 19th next the town of Bedford will hold a special election for the issuing of bonds to raise money in order to build a high school building, and you desire an opinion as to who is qualified to vote at this special election.

Section 772 of the Code provides that in an election of this character "all registered voters of any such school district who were qualified by law to vote in the last preceding general election (which was, of course, the last November election) shall be qualified to vote in any such special election."

Section 83 of the Code of 1919, so far as is applicable, provides as follows:

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

This, in my judgment, means all persons who were qualified to vote in the general election held last November and all persons who have since become of age, registered, and paid their poll taxes, and all persons who are qualified to vote in the June election of 1927, or if no such election is held, who would be otherwise qualified and who have, at least six months prior to the second Tuesday in June, 1927, paid all State poll taxes assessed or assessable against them during the next three years preceding the second Tuesday in June, 1927.

Of course you understand that any person who has become of age since January 1, 1927, can be assessed with capitation tax, register and vote in said election—the registration to be at any time, including the day of election.

Trusting this gives you the desired information, I am,

Yours very sincerely,

JOHN R. SAUNDERS,
Attorney General.

ELECTIONS—Eligibility of voters—Residence.RICHMOND, VA., *June 27, 1927.*

MR. BENNETT T. TAYLOR,
Prospect, Virginia.

MY DEAR MR. TAYLOR:

Acknowledgment is made of your letter of June 25, 1927, in which you say:

"Will you kindly advise your interpretation of the law in reference to time a voter can be out of voting precinct and still have right to vote in said precinct."

It is impossible for me to give you any definite answer to the question submitted as I do not know the facts and circumstances connected with the particular case to which you refer.

Under the law, when a voter has once acquired a legal residence in one precinct he can lose that legal residence for the purpose of registering and voting only by the combination of two acts; first, he must remove from the precinct, and, second, in doing so he must move with the intention of abandoning his legal residence in the first place and establishing it in some other place. *Williams v. Commonwealth*, 116 Va. 272. Therefore, one who has once gained a legal residence in a particular precinct may move out of that precinct, but nevertheless continue to vote there if when he moved he intended to keep his legal residence in the precinct from which he moved. Each case will depend upon the facts and circumstances connected with the same.

The Constitution, by section 18 thereof, requires for the purpose of registering and voting a legal residence in this State of two years, of the county, city or town one year, and of the precinct in which he offers to vote thirty days next preceding the election in which he offers to vote.

But, even in those cases where a party moves from a precinct with the intention of abandoning his legal residence at the old precinct this section prescribes that "removal from one precinct to another, in the same county, city or town shall not deprive any person of his right to vote in the precinct from which he has moved, until the expiration of thirty days after such removal."

Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

ELECTIONS—Eligibility of voters—Residence.

RICHMOND, VA., April 28, 1927.

MR. S. M. COOKE, *Registrar*,
Yorktown, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of April 27, 1927, in which you say:

"The question has arisen as to the legality of voting in my district. Two parties, a man and his wife, have been living and are yet living on a government reservation. The woman was born and raised in Yorktown, but has been living on this government reservation with her husband (who was born and raised in another State) at least three years. Do they have the right to register and vote?

The question of this woman's right to vote depends entirely upon whether, when she moved on the government reservation, she intended to abandon her legal residence previously acquired in York county and establish a new legal residence on the government reservation.

It is my opinion that, under the common law, a married woman could not have a legal residence other than that of her husband. In 1922, however, the General Assembly (Acts of 1922, page 462) provided:

"* * For the purpose of registering and voting, the residence of a married woman shall not be controlled by the residence or domicile of her husband." (Virginia election laws, page 85.)

If you will examine the case of *Williams v. Commonwealth*, 116 Va. 272, you will see that the court of appeals has there stated that, for the purpose of registering and voting, a voter who has once gained a legal residence in one place can lose that residence only by the combination of two acts, namely: removal, plus the intent to abandon the old legal residence and acquire a new legal residence.

In this case I would, therefore, say that the right of the woman in question would depend very largely upon her intent as evidenced by her acts and declarations. If she has regularly been assessed with capitation taxes in York county, has paid the same and has claimed her legal residence in that county, I would say that she is a legal resident of that county for the purpose of registering and voting. On the other hand, if she has failed to pay her capitation taxes, has claimed the reservation as her legal residence, etc., that would show an intent on her part to abandon the old legal residence.

With these rules before you, you will have to determine whether or not she is a legal resident of York county.

Very truly yours,

JOHN R. SAUNDERS,
Attorney General.

ELECTIONS—Eligibility of voters—Residence.

RICHMOND, VA., May 19, 1927.

HON. THOMAS NEWMAN, *Treasurer,*
Newport News, Virginia.

MY DEAR SIR:

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

“Can a person moving from Warwick county to the city of Newport News, Virginia, register and vote when he has been here only six months, or does the law require him to be here twelve months before he can register and vote?”

In reply I would call your attention to section 18 of the Virginia Constitution, which provides as follows:

“Every males citizen of the United States twenty-one years of age who has been a resident of the State two years, of the county, city or town one year, and of the precinct in which he offers to vote, thirty days next preceding the election in which he offers to vote, has been registered and has paid his State poll taxes, as hereinafter required, shall be entitled to vote for members of the Generall Assembly and all officers elective by the people; but removal from one precinct to another in the same county, city or town shall not deprive any person of his right to vote in the precinct from which he has moved, until the expiration of thirty days after such removal.”

You will, therefore, see from the above section that a person moving from Warwick county to Newport News, Virginia, has to be in Newport News twelve months before he can vote. I might say in this connection that the city is not considered a part of the county; it is like moving from one county to another county.

Trusting this gives you the desired information, I am

Very truly yours,

JOHN R. SAUNDERS,
Attorney General.

ELECTIONS—Eligibility of voters—Residence.

RICHMOND, VA., May 2, 1927.

HON. O. B. WATSON,
Treasurer of Orange County,
Orange, Virginia.

MY DEAR MR. WATSON:

I am just in receipt of your letter of April 30th in which you submit the following question for an opinion:

"John Doe was born in the town of Orange, Virginia, and went to Washington, D. C., and worked for some time, his mother still living in the town of Orange, and he naturally called Orange his home. He then gets married and lives in New Jersey for a period of time, long enough for to become a resident of that State, then some eight or ten years ago he moves back into D. C. with his mother yet living in the town of Orange, where he comes to visit her say every two or three weeks, but his wife stays with him in the D. C. Would this party have the right to come to Virginia to vote, or rather could he work and stay in D. C. and register and vote at Orange, Virginia?"

The court of appeals has decided in the case of *Williams v. Commonwealth*, 116 Va. 272 as follows:

"For the purpose of voting and holding office a man cannot have more than one legal residence. A legal residence once acquired by birth or habitancy is not lost by temporary absence for pleasure, health or business, or while attending to the 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."

In the case which you submit you state that the party was born in Orange, Virginia—went to Washington and worked for some time, his mother, however, still remaining in the town of Orange and he still called that place his home. Later on he married and went to New Jersey for a long period of time, long enough to become a resident of that State and after about eight years came back to Washington where he is now living, but still pays visits to his mother in said town.

In this particular case, unquestionably the party abandoned Orange as his residence and acquired a new residence in the State of New Jersey. After leaving New Jersey and returning to Washington, where he still lives, I do not think he could be considered a resident of Orange unless he had continued to pay his capitation taxes in Orange, thereby expressing an intention of retaining his legal residence there.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

ELECTIONS—City voting for county offices.

RICHMOND, VA., May 21, 1927.

MR. J. T. MILLS,
129 Wine street,
Hampton, Virginia.

MY DEAR MR. MILLS:

In response to your inquiry of recent date as to whether or not persons residing in the city of Hampton can vote for the commissioner of revenue for the county.

I beg leave to call your attention to section 22, chapter 230 of the Acts of the General Assembly of 1920, which provides for a charter for the town of Hampton, and which said section reads as follows:

"All county, district court officers, and all notaries public of Elizabeth City county, of which the city is a part, whether heretofore or hereafter elected or appointed, shall except as otherwise herein provided, continue to exercise and have the same rights and privileges, and perform the same duties, and have the same jurisdiction, and receive the same fees in the city as they would receive were the city a magisterial district only of said county; and the qualified voters residing within the city of Hampton shall be entitled to vote for county and district officers at the general election for county officers of the county of Elizabeth City as if such city were not a city of the second class.

"The electoral board for the said city of Hampton shall be appointed by the circuit court of the county of Elizabeth City, or the judge thereof, in vacation, in conformity with the provisions of section thirty-one of the Constitution of Virginia.

"The poor of said city shall continue to be supported and maintained in the same way, and in the same manner, and with the same class of funds, as before the town of Hampton became a city."

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

ELECTIONS—Registrar—Who not eligible.

RICHMOND, VA., May 23, 1927.

HON. J. E. OLD, *Treasurer,*
R. F. D. No. 1, Box 114,
Lynnhaven, Virginia.

MY DEAR MR. OLD:

Acknowledgment is made of your letter of May 21, 1927, in which you say:

"Will you kindly advise me if a post office clerk in classified civil service can legally hold the position as registrar for a voting precinct in the State of Virginia?"

The answer to your question appears to be governed by sections 289-291 of the Code of 1919, the latter as amended.

Section 290 of the Code declares that no person shall be capable of holding any office of honor, profit, or trust, under the Constitution of Virginia, who holds any office or post of profit, trust, or emolument, 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 whatever.

Section 291 of the Code, as amended, which contains certain exceptions to the sweeping provisions of section 290 of the Code, does not contain an exception which would apply to the office of registrar.

It is, therefore, my opinion that a clerk in a United States post office is not eligible to hold the office of registrar.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

ELECTIONS—When assessable with capitation tax.

RICHMOND, VA., May 24, 1927.

HON. O. B. WATSON,
Treasurer of Orange County,
Orange, Virginia.

MY DEAR MR. WATSON:

Necessarily I have had to be out of the office right much recently, and I have so much to do that my reply to your letter of May 12th has been delayed.

As you know, section 21 of the Constitution, among other things, provides that all persons, unless exempted by section twenty-two of the Constitution, shall, as a prerequisite to the right to vote after the first day of January, nineteen hundred and four, personally pay, at least six months prior to the election, all State poll taxes assessed or assessable against them, under this Constitution, during the three years next preceding that in which they offer to vote.

In answer to your question specifically, a young man who became twenty-one years old in August, 1926, of course, was not assessable with the capitation tax for the year 1926. He is assessable with the capitation tax for the year 1927, but he is not required to pay this tax six months prior to the election, because it is not one of the three years next preceding the year in which he offers to vote—hence, it will only be necessary for the young man in question to have himself assessed, pay his capitation tax to the treasurer, register and vote in both the August primary and in the general election this fall.

You understand, of course, that the registration books are closed thirty days prior to the general election held in the fall.

This answer also applies to your second question regarding the young man who became twenty-one years old in January, 1927.

As to the young man who will be twenty-one in July, he can pay his capitation tax and register any time prior to thirty days before the general election in November, 1927.

Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

ELECTION—Entrance fees for candidates.

RICHMOND, VA., May 25, 1927.

HON. CHARLES J. DUKE, *Treasurer,*
Portsmouth, Va.

MY DEAR MR. DUKE:

Acknowledgment is made of your letter of May 23, 1927, in which you call attention to sections 249, 125 and 2894 of the Code with reference to elections. You state that some question has arisen as to whom and as to how much, respectively, is to be paid as entrance fees in the forthcoming primary to be held on August 2, 1927, for the county offices in your county of sheriff, clerk and Commonwealth's attorney. You then say:

"The city of South Norfolk is a city of the second class, as will be seen by reference to Acts of 1924, page 545. It has its own electoral board, its own Democratic executive committee, and the latter have decided for a primary as had also a Democratic executive committee for the county of Norfolk. You will note that section 2894 above recited says 'That the wards of the city shall be treated for such election purposes as precincts of the county.'

"These sections seem to be in conflict with each other and the question has arisen (so far as I am personally concerned) as to whether I shall collect the whole fee from these officers, or whether the treasurer of South Norfolk is to collect one-half, and the treasurer of the county one-half by analogy to the division in section 2894 for district officers as provided in subsection A of that section.

"Norfolk county has twenty-one precincts and the city of South Norfolk has three wards with a precinct in each ward. It is presumed that the electoral board of South Norfolk appoints its judges and clerks to conduct the primary, as the city of South Norfolk is entitled to vote in the primary.

"The candidates desire to do what is right and proper in the premises and we would like to have an official opinion on this apparent conflict of these laws. As the time for filing declaration of candidacy on or before June 3rd is drawing near, kindly let me have a prompt response, so that I may know how to proceed."

Section 2894 of the Code provides:

"The Commonwealth's attorney, the clerk of the circuit court and the sheriff of the county, of which the city is a part, whether heretofore or hereafter elected or appointed, shall continue to exercise and have the same rights and privileges, and perform the same duties, and have the same jurisdiction, and receive the same fees therefor in such city as they did in such town before such municipality became a city; and the qualified voters residing in such city shall be entitled to vote for said officers at the general election for county officers and the wards of the city shall be treated, for such election purpose as precincts of the county, as if such city had not been declared to be a city of second class."

Section 125 of the Code reads as follows:

"Nothing contained in the two preceding sections shall be construed to authorize the voters of any city, living within the corporate limits thereof, to vote at any election held for treasurer, Commonwealth's attorney, sheriff, clerk, or any commissioner of the revenue for the county in which then said city is located in whole or in part."

You are right in stating that there is a conflict between these sections. Section 2894 of the Code, which relates to cities of the second class, however, was passed in 1916 (Acts 1916, p. 314) while in section 125 of the Code was taken from the Code of 1887, and its last amendment appears to have been at the session of 1922-3-4, pages 504, 742. These statutes being in conflict, under the well established rule of statutory construction, the last act, viz: section 2894 of the Code, would prevail.

It follows from this that the qualified voters residing in the city of South Norfolk are entitled to vote for the Commonwealth's attorney, the clerk of the circuit court and the sheriff of Norfolk county at the general election for county officers, as provided by section 2894 of the Code.

Under the provisions of section 35 of the Constitution, the voters of the city of South Norfolk qualified to vote in the general election to be held this fall are entitled to vote in the primary to be held for the purpose of nominating candidates to be voted for at the general election.

Fees of candidates and the officer to whom they are to be paid are fixed by section 249 of the Code, as amended. Subsection b of that section provides in part:

"* * * All other candidates shall pay said fee to the treasurer of the city or county in which they reside. * * *"

This section is applicable to the offices of Commonwealth's attorney, sheriff and clerk, and, in my opinion, the whole fee must be paid by such candidates to the treasurer of the county or city in which they reside. I do not think that the subsequent provision of subsection b of section 249 of the Code, with reference to district officers, has any application to a case where county officers are voted for, under section 2849 of the Code, by the qualified voters of a city of the second class located in said county.

Yours very sincerely,

JOHN R. SAUNDERS,
Attorney General.

ELECTIONS—Declaration of candidacy.

RICHMOND, VA., May 27, 1927.

MR. A. D. CRUTCHFIELD,
Richmond, Virginia.

MY DEAR MR. CRUTCHFIELD:

With reference to my conversation with you over the telephone this morning from Mr. Beverly's office, I call your attention to section 29 of the Code. I have examined this section of the Code with care, and, in my opinion, it does not require district officers, such as justices of the peace and constables, to file, with their declaration of candidacy, petitions signed by fifty voters as is required in the case of county officers.

Very truly yours,

LEON M. BAZILE,
*Assistant Attorney General.***ELECTIONS—Eligibility of voters—Residence.**

RICHMOND, VA., May 31, 1927.

MR. G. W. GILLIAM,
Prospect, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of May 30, 1927, in which you ask the following questions: Can a young man, who has never registered but whose home is in district A, and who works in district B, register and vote in district A? Can a young man, who lives in city L, and who owns his home there, come back to his old home in a different part of the State and vote, although he is employed by the State?

In reply I will say that these questions involve a discussion of the words "domicile" and "residence." To constitute a new domicile two things must concur: first, residence in the new locality, and, second, the intention to remain there. As it is sometimes expressed, the *factum* (presence) and the *animus* (intention) must unite. Where a man has two places of residence, the right to vote or hold office is determined largely by the intention of the party. *Williams v. Commonwealth*, 116 Va. 272. Where there are no open declarations as to one's domicile, the following circumstances have been considered by the courts in determining this question: exercise of voting, paying taxes, owning one's home, etc.

I might say, before entering these two questions specifically, that a person's eligibility to vote is determined by his domicile and not by his residence. In the light of the above discussion it is my opinion that, if the young man in question one owns his home in district A, pays his taxes and lives there, even though he works in district B, his domicile is in district A and there he must vote.

The same principles of law enter into the consideration of question two. If the man in question two pays his taxes in the old locality, and it is intention to retain that place as his domicile, even though he is physically present in city L, he must return and vote in the old locality.

Trusting this will give you the desired information, I am

Very truly yours,

JOHN R. SAUNDERS,
Attorney General.

ELECTIONS—Eligibility of voters—Residence.

MR. W. H. GLENN,
Prospect, Virginia.

RICHMOND, VA., June 1 1927.

MY DEAR SIR:

Acknowledgment is made of your letter of May the 30th in which you ask the following questions:

"1. There is a young lady here who registered at Prospect and voted four years ago and has never voted any place else, her parents live here, and she has always held this as her home, although she has worked a part of the time at Pamplin in Appomattox county, and is now working in Farmville the county seat of Prince Edward county, but comes home to her parents every Saturday night and goes back to Farmville Sunday night. Has she a right to vote at Prospect?

"2. There are four young men whose homes are here, that is their parents live here, and these young men work and board in Farmville, but held Prospect, where their parents reside as their home, come backward and forward two or three times a month, usually Saturday night and Sunday, and held Prospect as their voting place, have never voted any place else. Haven't all of these young men a right to vote here at the coming election if properly registered, and their poll taxes are paid?"

In reply I will say that these questions involve a discussion of the words "domicile" and "residence." To constitute a new domicile two things must concur: first, residence in the new locality, and, second, the intention to remain there. As it is sometimes expressed, the *jactum* (presence) and the *animus* (intention) must unite. Where a man has two places of residence, the right to vote or hold office is determined largely by the intention of the party. *Williams v. Commonwealth*, 116 Va. 272. Where there are no open declarations as to one's domicile, the following circumstances have been considered by the courts in determining this question: exercise of voting, paying taxes, owning one's home, etc.

I might say, before entering these two questions specifically, that a person's eligibility to vote is determined by his domicile and not by his residence. In the light of the above discussion it is my opinion that if the young lady in question one intended to keep Prospect as her *bona fide* domicile, pay her taxes there, she has a right to vote there.

The same principle of the law enters into the consideration of question two. If the young men in question intended to keep Prospect as their *bona fide* domicile, pay their taxes there, even though they may be physically present in another place it is my opinion that they can vote at Prospect if properly registered and their capitation taxes are paid.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

ELECTION—Eligibility—Residence.

RICHMOND, VA., June 2, 1927.

HON. JAMES S. BARRON,
Attorney at Law,
Norfolk, Virginia.

MY DEAR SENATOR BARRON:

Acknowledgment is made of your letter of June 1, 1927, in which you say:

"I am writing this to ask your opinion as Attorney General of the State.

"I came to the city of Norfolk in 1904, and have practiced law here continually since. During this period, I have been a member of the city council for

a number of years, was police justice for several years, and elected a member of the senate here in 1923, which position I now hold.

"I registered here soon after coming, paid my poll taxes here ever since, always voted here, paid my law licenses and income taxes here, was married here, my children were born and educated here, my son finishing his course at the high school here this year. My wife has always voted here; we made it our actual and legal residence and never intended nor intend to change it.

"In the summer of 1925 I took my family to a cottage, owned by my wife, at Virginia Beach, a seaside resort near here. Our intention was to live there temporarily, during the pleasant months, and return to Norfolk each fall. I was unable to rent the beach cottage after the regular season, and for the sake of economy and the pleasure and health of my family, we did not leave there until December, 1926. We then moved to the Southland hotel, in the city of Norfolk, where we remained until March and returned to the beach for the season. I am permanently registered at the Southland hotel and intend to return there with my family this fall. On the registration books of the city I have been transferred from Madison ward, 14th voting precinct, to Jefferson ward, 9th precinct, in which latter ward and precinct is the Southland hotel.

"Upon the above statement of facts, will you please advise me if my legal residence is in the city of Norfolk or at Virginia Beach. Some question has been raised as to my legal right as a candidate for reelection to the State senate from the city of Norfolk in the August primary and election in November of this year."

From the statement of facts contained in your letter unquestionably you are a resident of the city of Norfolk and not a resident of Virginia Beach. I base this opinion upon the case of *Williams v. Commonwealth*, which was decided by the court of appeals and reported in 116 Va. at page 272, etc. The court there, in discussing residence and the right of a party to vote, gave expression to the following opinion:

"* * For the purpose of voting and holding office a man cannot have more than one legal residence. 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."

An examination of the reports of this office, covering a number of years, will show that this has been the opinion uniformly held by me and my predecessors in cases of a similar character.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

ELECTION—Eligibility of voters.

HON. F. W. SMITH,
Attorney at Law,
Grundy, Virginia.

RICHMOND, VA., June 6, 1927.

MY DEAR SIR:

In reply to your letter of June the 2nd it is my opinion that all persons who desire to vote in the town election to be held on the second Tuesday in June (which is the time prescribed by law for holding regular elections in towns) must have paid all capitation taxes assessed or assessable against them at least six months prior to said election.

This has been the consistent ruling of this office for many years.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

ELECTIONS—Time of filing notice of candidacy.RICHMOND, VA., *June 6, 1927.*

HON. E. C. LACY,
*Clerk of Halifax County,
Halifax, Virginia.*

MY DEAR MR. LACY:

I am in receipt of yours of June 3rd. In this you desire to be advised whether or not candidates for town elections are required to file their notices sixty days before the election instead of thirty as has always been the custom.

In reply I will state that the present law requires at least sixty days notice before such election. The time having been changed from thirty days to sixty days by chapter 254 of the Acts of 1926, page 458.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

ELECTIONS—Eligibility of voters.RICHMOND, VA., *June 29, 1927.*

MR. R. L. WALDROP,
Cardwell, Virginia.

MY DEAR SIR:

Acknowledgment is made of your request that you be advised on the following statement of facts:

“Can a person coming 21 years of age after February 1st, 1927, go to the treasurer on the day of the general election, after being assessed, pay to him or the proper officer his capitation tax and register?”

Your question must be answered in the negative for the reason that the election books are required by section 98 of the Code to be closed thirty days before the general election.

There is nothing to prevent the young man from, at this time, having himself assessed, paying his capitation tax and registering. If he does this before the primary, or on the day of the primary, unless he lives in a city, he would be entitled to vote both in the primary and the general election, if otherwise qualified.

If he lives in a city not less than 100,000, nor more than 160,000 inhabitants it would be necessary for him to pay his tax and register at least sixteen days before the day of the primary, as the books are closed in such cities for a period of fifteen days preceding the date of any special election.

Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

ELECTIONS—Eligibility of voters—Poll tax.RICHMOND, VA., *June 6, 1927.*

HON. W. B. MASON,
Orange County Electoral Board,
Orange, Virginia.

MY DEAR MR. MASON:

I am just in receipt of your letter of June the 3rd. In this you state that in the towns of Orange and Gordonsville elections will be held on the 14th of June, which said elections you construe as regular town elections. You are correct in your construction.

You then desire to be advised whether a man who has not paid his poll tax six months prior to June 14th is eligible to vote in said election.

In reply I will state that he is not. The Constitution, section 21, provides that in order to vote poll taxes must have been paid at least six months prior to the election.

It is my opinion, which I think is entirely correct, that an election held on the second Tuesday in June in a town or city is one of the elections referred to in section 21 of the Constitution, and therefore in order for one to be able to vote in said election he must have paid his capitation taxes assessed or assessable against him at least six months prior to said election. This has been the consistent ruling of this office.

Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

ELECTION—Privilege of Confederate soldiers.RICHMOND, VA., *June 8, 1927.*

MR. JOHN PARSONS, JR.,
The Townsend Banking Company, Inc.,
Townsend, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of June 4, 1927, in which you say:

“Please give me your decision in regards to the voting privileges of Confederate soldiers in the State of Virginia. Are they required to pay poll taxes, and can they vote at *any* precinct, or are they subject to the registration and dwelling qualifications as are other citizens?”

The only exemption accorded Confederate soldiers is the right to vote without paying the capitation tax, or taxes, assessable against them. See section 22 of the Constitution.

Such veterans, however, in order to vote must comply with the other conditions prescribed by the Constitution as a prerequisite to the right to vote—such as residence, registration and so forth.

Trusting that this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

ELECTIONS—Eligibility of voters.RICHMOND, VA., *June 8, 1927.*

MR. L. D. THOMASSON,
Orange County News,
Gordonsville, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of June 3, 1927, which due to my necessary absence from the office I was prevented from answering until today. In this letter you say in part:

"At the request of a number of voters in Orange county we are writing to ask if you will advise whether or not a person eligible to vote in the fall election is eligible to vote in the municipal elections June 14th or is it necessary that the capitation tax be paid six months before June 14th."

Section 21 of the Constitution requires every person not exempt by section 22 of the Constitution as a prerequisite to the right to vote to pay, at least six months prior to the election at which he offers, all State poll taxes assessed or assessable against him under the Constitution during the three years next preceding that in which he offers to vote.

In municipalities two general elections are held—the regular municipal election in the month of June and the regular election in November. In order for one to vote in the municipal election held in June it is necessary for him to have paid all capitation taxes with which he was assessed or assessable during the three years preceding the year in which he offers to vote at least six months prior to the day on which the election is held, just as is the case with reference to the regular election held in November.

Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

ELECTIONS—Registrars—Duty to transfer names.RICHMOND, VA., *June 10, 1927.*

ROBERT A. RYLAND, ESQ.,
Attorney at Law,
81-2 Wilson Boulevard,
Clarendon, Virginia.

MY DEAR MR. RYLAND:

Acknowledgment is made of your letter of June 7, 1927, which I received on my return to the office from Wytheville, where I had gone to attend the session of the court of appeals.

In your letter you say in part:

"I am writing on behalf of the voters and the registrar of the newly created election district in this county known as Lyon Park. The precinct was created at the February term of court under section 144 of the Code of Virginia, and is made up of portions of two pre-existing precincts known as Clarendon and Arlington. A registrar has been appointed for the new precinct and the August primary is approaching, but no steps have been taken to make up the registration books or transfer the names from Clarendon and Arlington precincts.

"The registrars have been requested to transfer these names in accordance with the provisions of section 102 of the Code, and the registrars of the old precincts are apparently willing to do so but are restrained by an order from the chairman of the electoral board, Mr. Claude Thomas, who does not make his position at all clear but seems to contend that the only way the new books can be made up is by transfers, applications for which must be made in person by the voters individually regardless of whether the applications are made in writing or not. I am a member of a joint citizens' committee which was instrumental in forming the new precinct, and, on account of what appears to be a purely arbitrary and unreasonable stand taken by the chairman of the electoral board, this committee has gone on record endorsing the institution of mandamus proceedings against the registrars of the old precincts; but, before taking such a step, it occurs to me that an opinion from your office might clarify the situation so as to obviate the necessity of litigation. I do not know whether your office would render an opinion to a person not holding public office, but, as a matter of fact, I am writing on behalf of the registrar of the new precinct in whose name the mandamus proceedings if brought will be instituted."

It appears from your letter that the new election district was created in your county out of two election districts previously existing.

The provisions of section 102 of the Code are clear and free from doubt. This section provides in part:

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

From an examination of this statute it is clearly the duty of the registrars of the old districts, from a part of which the new district was created, to make out, certify, and deliver to the registrar of the new district, a list of the registered voters who have been placed by the change in the new district. The law does not require, or contemplate, that each voter shall apply for a transfer, as is the case where a voter has voluntarily removed himself from one district to another.

Trusting this will give you the desired information, I am

Very truly yours,

LEON M. BAZILE,
Assistant Attorney General.

ELECTIONS—Registration books—Closing of.

RICHMOND, VA., *June 13, 1927.*

HON. R. E. L. WATKINS,
Attorney at Law,
Franklin, Virginia.

MY DEAR MR. WATKINS:

I am just in receipt of your letter of June the 10th in which you state:

"The single question has arisen here as to when the registration books shall be closed. It appears from the statute that they may be kept open up and until

within thirty days of the regular election. My impression has been that for primary elections voters could register anytime, even to the day of the primary election. I am unable to locate any statute that changes this view, and I would thank you to advise how late a voter may register, who desires to participate in the primary election in the county and State."

I fully concur in the opinion expressed in your letter.

Of course, the registration books are closed on the third Tuesday in May—that is, for the registration of all persons who desire to vote in the municipal election, and they are closed thirty days previous to the regular election in November, but a person desiring to vote in the primary can register up to and including the day of the primary election. That would mean in a town that after the municipal election, which is held on the second Tuesday in June, the registration books would be again open for the registering of all persons desiring to vote in the primary election.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

ELECTIONS—Holding of primary.

RICHMOND, VA., June 17, 1927.

HON. WEBB MIDYETTE,
*Chairman Democratic Committee,
Stafford, Virginia.*

MY DEAR SIR:

Acknowledgment is made of yours of the 16th in which you say:

"Prior to June 2nd, several persons filed with me as chairman of the Democratic committee for Stafford county, their declarations of candidacy for county office in said county and I accepted their declarations in good faith, as I assumed from the beginning that the State central committee, declaring a primary for State officers, would automatically take care of the county candidates provided we notified the Secretary of the Commonwealth within thirty days after their declaration of candidacy.

"Following the character of the primary law concerning local committees it does not seem to me that a primary could be made possible on August for county officers.

"Our committee has not declared a primary for county officers to date, and I am writing you for an opinion concerning primaries where local committees are involved."

In reply I beg to say that section 227 of the Code of Virginia gives authority to the appropriate committees of a party to determine whether or not a primary shall be held to nominate candidates.

Section 222 of the Code provides that all nominations made by a direct primary shall be made in accordance with the provisions of chapter 15 of the Code. This section also provides as follows:

"For a member of the Senate in the Congress of the United States, or for any State office, by the duly constituted authorities of any political party for the State at large; for any district office or member of the House of Representatives of the United States, or for State Senator, member of the House of Delegates, or for any city, town, or county office, by the duly constituted authorities of any political party of the district, county, city, town, or other political subdivision of the State in which such office is to be filled."

Section 230 of the Code requires candidates for nomination to file their declaration of candidacy with the chairman, or chairmen, of the several committees, whose duty it shall be to furnish to the electoral boards charged with the duty of preparing and printing the primary ballots the names of the candidates to be printed thereon. Section 229 requires this declaration of candidacy to be filed at least sixty days before the primary.

From a consideration of all of these sections of the Code, and other sections relating to primary elections, it is my judgment that no primary can be held in any county for county officers unless the county committee has at the proper time announced its determination to hold a primary election, and that no declaration of candidacy for a county office made in the absence of such action by the county committee has any validity.

It is therefore my opinion that unless your committee has declared a primary for county officers, it is impossible for any such primary election to be held August 2nd.

Very truly yours,

JOHN R. SAUNDERS,

Attorney General.

ELECTIONS—Eligibility of voters.

RICHMOND, VA., *June 22, 1927.*

REV. COCHRAN PRESTON,
Grottoes, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of June 21, 1927, in which you say in part:

“Please give me interpretation of Virginia State law with regard to registration and voting of following. Young man becomes ‘of age’ July 3, 1927—therefore, no poll tax was assessable as of February 1, 1927.

“Is it possible for said young man to register and take part in a primary this summer and then cast a vote in November election?”

The young man in question if otherwise qualified will be entitled upon the payment of one year’s capitation tax to the treasurer to register and vote in the August primary and the November, 1927, election.

While it is true that under the Constitution no poll tax is assessed or assessable against this young man prior to January 1, 1928, nevertheless, the law requires one year’s capitation tax to be paid in advance as a prerequisite to the right to register. This tax does not have to be paid six months prior to the election, and will be credited to the tax due by him in 1928.

Trusting this gives you the desired information, I am

Very truly yours,

JOHN R. SAUNDERS,

Attorney General.

ELECTIONS—Dead man's name on ballot.

RICHMOND, VA., June 24, 1927.

G. O. SLEDGE, ESQ., *Secretary,*
Electoral Board of Southampton County,
North Emporia, Virginia.

DEAR MR. SLEDGE:

Acknowledgment is made of yours of the 22nd, in which you say:

"Being a member of the electoral board of Southampton county for 27 years and its secretary for 25 years, there has arisen a question in my county in regard to printing a candidate's name on the primary ballot. The candidate referred to filed his declaration of candidacy with the chairman of the committee as required by the primary law on or before the 2nd day of June and on the 15th day of June the candidate died, two weeks after. Now the chairman tells me he is going to certify his name to me to be printed on the primary ballot for the August primary. Now I am asking you for your opinion in this matter as to whether or not it will be legal to print his name on the ballot."

In reply I beg to say that section 229 of the Code is as follows:

"The name of no candidate shall be printed upon any official ballot used at any primary unless such person is legally qualified to hold the office for which he is a candidate, and unless he is eligible to vote in the primary in which he seeks to be a candidate, and unless at least sixty days before the primary he makes and files a written declaration of candidacy, and has complied with the rules and regulations of the proper committee of his party, which declaration shall be in the following form:" * *"

It is my opinion that it would not be legal to print the name of a dead man on a ballot, for the reason that he would not be "eligible to vote in the primary."

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

ELECTIONS—Notice of candidacy.

RICHMOND, VA., June 28, 1927.

MR. S. VAN VLUK,
Secretary Electoral Board,
2 Rogers Street,
Norfolk, Virginia.

MY DEAR SIR:

My delay in replying to your letter of June 17th is due to the fact that I have had to be out of the office for several days on official business, and this is my first opportunity to reply. Your letter is as follows:

"Miss Blanche Culpepper, of Deep Creek, Norfolk county, Va., a candidate for the House of Delegates in filing her papers for the above office failed to file with the Democratic executive committee of the city of South Norfolk, which is a part of Norfolk county, and the other candidates for the said office filed a list of fifty qualified voters with the chairman of the committee of South Norfolk and also with the chairman of the committee of Norfolk county. But through some error of hers she overlooked the committee in South Norfolk and filed all the list with the chairman of the Norfolk county committee, but did file her expense money one-half with the treasurer of South Norfolk and the other half

with the treasurer of Norfolk county. We want to know if we have the right and should put her name on the primary ballot in the city of South Norfolk, there seems to be some difference of opinion on the matter, please let us know."

You do not state in your letter whether or not Miss Culpeper filed her declaration of candidacy with the chairman of the Democratic committee of South Norfolk, but you do state that she failed to file with the said chairman a list of fifty qualified voters, though she did file this list with the chairman of the committee of Norfolk county.

The same day I received your letter I also received one from Miss Culpepper. In this she states that she paid one-half of her entrance fee to the treasurer of South Norfolk and the other half of her entrance fee to the treasurer of Norfolk county; that she had one hundred and fifty signatures from the Democratic voters of South Norfolk and more than the required number from the voters of Norfolk county.

Section 229 of the Code provides in part:

"The name of no candidate shall be printed upon any official ballot used at any primary unless such person is legally qualified to hold the office for which he is a candidate, and unless he is eligible to vote in the primary in which he seeks to be a candidate, *and unless at least sixty days before the primary he makes and files a written declaration of candidacy*, and has complied with the rules and regulations of the proper committee of his party." (Italics supplied.)

Section 230 of the Code provides as follows:

"Candidates for nomination shall file their declaration with the chairman or chairmen of the several committees of the respective parties, and it shall be the duty of such chairman or chairmen to furnish to the electoral boards charged with the duty of preparing and printing the primary ballots the names of the candidates to be printed thereon."

You will observe from an examination of section 230 of the Code above quoted that it does not attempt to declare who the proper chairman or chairmen of the several committees of the respective parties are. In order to determine this, so far as the Democratic party is concerned, it is necessary to examine the primary plan of the Democratic party adopted June 11, 1924. Section 9 of this plan found on pages 91-92 of the Virginia election laws reads as follows:

"Candidates for nomination shall file their declaration, petition and receipt for the required fee with the chairman of the State, district, or local committee under whose direction the primary is held. Where there is no chairman of a congressional, senatorial or legislative district committee, the candidate may file his declaration with the chairman of the committee for the county or city in which he resides, who shall certify to the chairmen of the other county or city committees of such district that said declaration has been filed. Where there is no chairman of a county or city committee, it shall be sufficient to file a declaration with any member of the committee."

This section of the Democratic plan clearly contemplates and requires a legislative district committee in those cases where the legislative district consists of more than one political unit.

As I understand the situation the legislative district referred to in your letter consists of the county of Norfolk and the city of South Norfolk. Therefore, the party plan requires for this legislative district a chairman of the legislative district committee consisting of the several county committees. Where there is such a chairman the candidate is required by section 230 of the Code to file his declaration of candidacy with such chairman. Where the legislative district committee has failed to select a chairman then such declaration of candidacy may be filed with the chairman of the committee

for the county or city in which the candidate resides, and that chairman is required by the party plan to certify to the chairman of the other county or city committees of such district that said declaration has been filed—upon which certification the name should be printed upon the ballot used in political unit of the district.

I am not advised whether there is a chairman of the legislative district committee above referred to. If there is no such chairman then on the statement furnished me Miss Culpepper has complied with the requirements of the party plan, and with the law, in filing her declaration of candidacy, and her name should be printed on the official ballot when certified by the chairman of the Norfolk county committee as provided by the Democratic party plan above quoted.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

ELECTIONS—Eligibility of voters—Tax.

RICHMOND, VA., *June 28, 1927.*

MR. T. A. MAXEY,
Ransons, Va.

DEAR SIR:

I am just in receipt of your letter of June 7. In this you desire to be advised whether or not a boy who became 21 years of age in June, 1927, can at any time before the general election pay his capitation tax, register and vote in the primary.

In reply I will state that he can do this. He is not required to pay his capitation tax six months prior to the general election because the Constitution provides that, in order for one to vote in the general election, he must pay such capitation taxes as are assessed or assessable against him six months prior to the election. A young man who became 21 years of age in June is not assessable with a capitation tax on the first of January, 1927, but he is required to pay one year's capitation tax before he can vote.

The proper thing for him to do, therefore, is to go to the commissioner of the revenue, have himself assessed with a year's capitation tax, pay the treasurer, take a receipt therefor and then go to the registrar and be registered.

I am very glad to give you this information.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

ELECTIONS—Widows of Confederate veterans not exempt from tax.

RICHMOND, VA., *June 30, 1927.*

HON. GEORGE P. DUANE, *Mayor,*
Stony Creek, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of June 29, 1927, in which you say:

"I would appreciate it very much if you would advise me whether or not a wife, or widow, of a Confederate veteran has to pay poll taxes as a prerequisite to vote in the coming primary. If you will advise me about this, I will appreciate it very much."

The exemption of section 22 of the Constitution, with reference to veterans of the war of secession, does not extend to the wives or widows of such veterans.

Yours very truly,

JOHN R. SAUNDERS

Attorney General.

ELECTIONS—60 day notice required.

RICHMOND, VA., *June 30, 1927.*

HON. GEORGE W. HERRING,
Woodbridge, Virginia.

MY DEAR SIR:

Acknowledgment is made of yours of the 28th, in which you refer to the conversation which you and I had at my office on June 27 in regard to a primary election to choose candidates for election to the House of Delegates. You wish specifically to be advised "whether the failure of the Stafford county authorities to take any action within 60 days of the primary relative to a primary for the House of Delegates now makes it impossible to hold such primary on August 2nd."

In reply I can only repeat what I said to you in our conference, that is, it is my construction of the primary law of this State that primaries for the House of Delegates and the State Senate are required to be held in all of the legislative and senatorial districts unless the proper authorities of those districts should meet and provide some other mode for making nominations. In the absence of such action, the candidates for nomination file their declaration with the chairman or chairmen of the several committees of the parties, pursuant to section 230 of the Code, and it then becomes the duties of such chairman or chairmen to furnish to the electoral board the names of the candidates to be printed on the primary ballots.

It would be manifestly absurd to hold that a legislative district, such as yours, embracing two counties should nominate a candidate for the House of Delegates by primary in one county and by a convention in another county. As long as the legalized primary has been in effect in this State it has been the custom, so far as I know, for primaries to be held in legislative districts consisting of more than one county, except in those districts where affirmative action has been taken to provide some other mode of nomination. This rule is in accordance with law and has been sanctioned by long custom and I can see no good reason for departing from it.

I would further add that in a conversation this morning with Mr. Hutchinson, Secretary of the Commonwealth, he advised me that he had received a letter from Mr. Midyette, chairman of the Democratic committee of Stafford county, and Mr. Frank Moncure, secretary of that committee, stating that three candidates for the legislature and two candidates for the senate have filed their names with Mr. Midyette, as chairman of the party, notifying him of their candidacy.

I, therefore, take it for granted that there can be no question but that it is proposed to hold a primary in Stafford county on August 2 to nominate a member of the House of Delegates and a State Senator.

Yours very truly,

JOHN R. SAUNDERS,

Attorney General.

ELECTION—Assisting in registration.RICHMOND, VA., *June 30, 1927.*

MR. S. P. HARRISON, *Registrar,*
Jarratt, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of June 29, 1927, in which you say:

"There is a white man here, who cannot read or write. He is a Democrat and wants to make application for registration. Have I a right to fill out the registration blank, to be signed by his mark, with a witness? Please advise me at once."

The second paragraph of section 20 of the Constitution reads as follows:

"That, unless physically unable, he make application to register in his own handwriting, without aid, suggestion, or memorandum, in the presence of the registration officers, stating therein his name, age, date and place of birth, residence and occupation at the time and for the two years next preceding, and whether he has previously voted, and, if so, the State, county, and precinct in which he voted last; * *."

It follows from this that you cannot assist such a man to register, as his disability is not a physical one.

Yours very truly,

JOHN R. SAUNDERS.

*Attorney General.***ELECTIONS—Eligibility of voters.**RICHMOND, VA., *June 30, 1927.*

HON. A. B. RICHARD, *Treasurer,*
Leesburg, Virginia.

MY DEAR MR. RICHARD:

Acknowledgment is made of your letter of June 29, 1927, in which you say:

"Please advise me by return mail, if convenient, on the following points:

"Can a Republican, who did not vote last fall in the general election, vote in the Democratic primary of August 2, 1927? If he did vote and voted for the Democratic nominee, for congress, no other contest appearing, can he vote in above mentioned primary?"

In response to your inquiry, I quote the third paragraph of section 228 of the Code, as amended, which is as follows:

"No person shall be permitted to vote for the candidates of any party in any primary unless such person is a member of such party and in the last preceding general election, in which such person participated, he or she voted for the nominees of such party; and, upon challenge, such person shall declare on oath that he or she is a member of such party and supported such nominees as hereinbefore required before being permitted to vote."

In answer to your first question, I am of the opinion that the man referred to cannot vote in the approaching Democratic primary, unless, in the last preceding general election in which he participated, he voted for the nominees of such party.

In answer to your second question, I am of the opinion that, if he voted in the November, 1926, election and in so doing voted for the nominees of the Democratic party at such election, he would be entitled to participate in the August, 1927, Democratic primary.

Very truly yours,

JOHN R. SAUNDERS,

Attorney General.

ELECTION—Destruction of registration books.

RICHMOND, VA., June 30, 1927.

R. R. SLATE, Esq., *Secretary,*
Halifax County Electoral Board,
South Boston, Virginia.

DEAR SIR:

Acknowledgment is made of yours of the 27th, in which you ask me the following questions:

“At one precinct the books were totally destroyed but the registrar saved a lot of the original applications. Can these applications be used as authority for the registrar to copy these names to the new set of poll books or shall the entire list be made up in accordance with section 90 of Virginia election laws?

“Can the voter acknowledge his affidavit before the registrar or shall he go before a notary?

“If a voter presents himself at the polls on the day of the election with his affidavit properly made out, is he entitled to vote?”

In reply I beg to say that section 90 of the Code requires that, in case of the destruction of the registration books by fire or otherwise, an order shall be made by the electoral board for a new registration at the precinct upon which it is the duty of the registrar to give notice by printed hand bills at least thirty days before the date of registration and to sit three days for the purpose of registering the voters who apply for registration. This section does not seem to contemplate that any of the original application should be copied into the new registration, but only those voters shall be registered who apply for registration in the manner prescribed. The last sentence of the section says:

“All affidavits or other evidence taken by the registrar under this section shall be preserved by him and shall be open to inspection.”

This language indicates that the registrar may take the affidavit of a voter.

Answering your last question, I would say that a voter may be registered on the day of the primary, but he is not entitled to vote without registration. Section 98 of the Code provides for registration thirty days previous to the November elections and also for registration *previous* to the regular days of registration. By implication no voter may be registered within thirty days of the November election, but may be registered on any day before that election.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

ESTATES—Recordation of receipt.

RICHMOND, VA., December 22, 1926.

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 enclose the file sent you by B. B. Roane, Esquire, clerk of Gloucester county, in re: the recordation of a receipt from the executor of George B. Field, deceased, to Catesby T. Field for \$1,000.00.

It appears that George B. Field, deceased, devised to Catesby T. Field a tract of land on the condition that the devisee pay the testator's estate the sum of \$1,000.00 within a specified time. Within the time required, the devisee paid the executor the sum of \$1,000.00, taking a receipt therefor signed and acknowledged by the executor, which receipt has been offered for record in the clerk's office of Gloucester county. The question propounded is whether this receipt is subject to tax under the provisions of section 13 of the tax bill.

Examination of section 13 of the tax bill shows that the tax is imposed by that section on the following classes of instruments: 1. deeds; 2. deeds of trust or mortgages; 3. deeds of release; 4. contracts, and 5. deeds of lease.

The receipt in question is not under seal and, therefore, cannot be classed as a deed of any character. The only question to be determined, therefore, is whether the receipt is a contract. I have been able to find only one case on the subject. *Roberts v. Vandeventer*, 152 Pac. (Okla.) 107. In this case it was held that a simple receipt was an admission only and not a contract. In my opinion this case is sound as a receipt possesses none of the requisites of a contract. 13 C. J. 237-8. The mere fact that the instrument is acknowledged before a notary public would not change its character.

Therefore, it is my opinion that the receipt in question should be admitted to record without the payment of a tax.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

EMBALMING, STATE BOARD OF—Application for licenses.

RICHMOND, VA., July 9, 1926.

L. T. CHRISTIAN, ESQ., *Secretary,*
State Board of Embalming,
Richmond, Virginia.

DEAR SIR:

Your recent letter has been unanswered because of several necessary absences from the city. In this you say:

"The State Board of Embalming requests your opinion on the law governing applicants for license.

"Section 1720, as amended by acts approved March, 1926, specifies that persons desiring to engage in the practice of embalming, etc., shall make a written application to the board, etc., accompanying same with a fee of \$25.00. Whereupon the applicant as aforesaid shall present himself before said board at a time and place to be fixed by said board. And if the board shall find upon due examination that the applicant is qualified, etc., a license shall be issued said applicant.

"The board desires to know is it not logical that the applicant anticipates presenting himself for examination at first meeting of the board following the filing of said application.

"In the event the applicant for any cause fails to present himself for examination, or should fail to pass a satisfactory examination at meeting of the board following the filing of said application, will the board be justified in extending to the applicant the privilege of appearing before said board for examination at its next meeting, or, for reexamination in case of failure at a previous meeting, without filing another application or paying additional fee?

"Under section 1719, giving the board power to adopt rules, regulation and bylaws, can the board prescribe when the privilege of the applicant to appear

before the board for examination, or the privilege of appearing for reexamination in case of failure, shall expire?

"Is the board not correct in its ruling that the applications which were filed prior to June 21, 1926, and persons filing such applications did not appear for examination, or who did appear and failed, are void. And in the event such persons desire a license, they must comply with the law as amended by acts approved March, 1926?"

In reply I beg to say that, in my opinion, the board has power under section 1719 of the Code to adopt reasonable rules and regulations, and I think those you mention are entirely reasonable.

Moreover, I am of the opinion that the board has the power to declare applications filed prior to June 21, 1926, by persons who did not appear, or who did appear and failed, to be void and to require such persons to file other applications under the act of 1926.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

FEDERAL LAW—Prescribing malt for medicinal purposes.

RICHMOND, VA., *January 24, 1927.*

MR. CHARLES T. O'FERRALL,
*303 E. Boulevard,
Charlotte, N. C.*

MY DEAR SIR:

Your letter of the 19th should have been answered earlier, but it did not reach me until Friday and I went home for the week-end.

The federal law does not permit physicians to prescribe malt for medicinal purposes, so, of course, it could not be sold to the drug stores to be in turn sold by them on prescription. A physician can only prescribe ardent spirits for medicinal purposes.

I have just talked with the federal prohibition director and he advises me that such is the law.

I am very sorry that I cannot help you in this matter.

Yours very sincerely,

JOHN R. SAUNDERS,
Attorney General.

FEES—Whether excess.

RICHMOND, VA., *October 19, 1926.*

HON. CALLOM B. JONES,
*Attorney at Law,
Mutual Building,
Richmond, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of recent date in re: the refund to Mr. L. H. Kemp, formerly treasurer of Henrico county, of \$187.21 paid by him into the treasury under protest.

It appears from the facts quoted me by you that a bond issue was had in Henrico county under authority of chapter 513 of the Acts of 1922 Pursuant to section 6 of

that act, Acts of 1922, page 891, which provides "the said treasurer shall receive as compensation for his services hereunder one-eighth of one *per centum* of the amount thus coming into his hands," Mr. Kemp collected the sum of \$187.21.

The West fee bill, as amended, section 3516 (a) of the Code of 1924 expressly provides that in determining the compensation allowed to city or county officers hereunder "any compensation allowed to such city or county officers by the respective said councils or county boards of supervisors over that commission allowed by the State law of collecting, disbursing, or in any way handling taxes or levies, or for the discharge of other duties imposed upon such officers by the councils of such cities, boards of supervisors of the counties or laws of this State, shall be disregarded."

The \$187.21 received by Mr. Kemp as treasurer of Henrico county, was paid to him pursuant to State law; namely section 6 of Chapter 513 of the Acts of 1922, which is a State law. The commission, therefore, paid to Mr. Kemp was a commission allowed by State law, and in determining the excess to be paid into the State treasury by Mr. Kemp, it was the Auditor's duty to include the \$187.21 due to and received by him under the Acts of 1922. It is, therefore, my opinion that no authority exists for refunding this item to Mr. Kemp.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

FEES—For issuing writs.

RICHMOND, VA., *April 2, 1927.*

HON. C. LEE MOORE,
Auditor of Public Accounts,
Richmond, Virginia.

MY DEAR MR. AUDITOR:

Acknowledgment is made of your communication of recent date with reference to the fees to be paid the sheriff of Prince George county for serving the various writs of *venire facias*. I note from your letter of February 17, 1927, that you ruled that section 3508 of the Code allowed you to pay \$5.00 for only one writ issued at the term of a court, whether issued under sections 4852, 4893-4895 or 5992 of the Code.

Section 3508 of the Code, which fixes the fees of sheriffs, etc., provides, so far as is applicable to the question here under consideration, as follows:

"* * For executing the first writ of *venire facias* at a term, five dollars, and one dollar and fifty cents for executing every other writ of *venire facias* at same term; provided, that where an officer goes out of his city or county to execute writ of *venire facias*, he shall receive ten dollars for executing the writ, and his actual necessary expenses, to be set out in a sworn account to be approved by the court."

I have read with much interest the very able and learned opinion of Judge Peterson with reference to this matter, in which he takes a different view from that taken by you with reference to the construction to be placed on this section. I am frank to say that, if this provision was an original enactment, I would adopt the construction placed on this statute by Judge Peterson. However, I do not believe that section 3508 of the Code can be so construed, but must be construed in the light of its prior history and the practical construction placed thereon by the Auditor's office during the last twenty years.

Section 3508 of the Code of 1919 was section 3531 of the Code of 1887. Section 3531 of the Code of 1887 allowed the sheriff \$1.50 for executing a writ of *venire facias*,

regardless of the number executed. This section of the Code of 1887 was amended by chapter 197 of the Acts of 1908 so as to read:

“For executing the first writ of *venire facias* at a term, five dollars, and one dollar and fifty cents for executing every other writ of *venire facias* at same term.”

which is the same language carried into section 3505 of the Code of 1919, as amended by the Acts of 1918, page 627.

When this history of the statute is examined, it seems clear that the intention of the General Assembly was to pay the sheriff only one fee of \$5.00 for the first writ issued at any term of the court and \$1.50 for each of the other writs issued, regardless of whether they be for a grand jury or for petty jurors.

I am informed by you that this has been the uniform construction placed on the statute by your office since 1906, and that all sheriffs have been paid in accordance with this construction. During this time it would seem clear that, if the construction placed on the statute by the Auditor's office was incorrect, the General Assembly would have taken the necessary steps to correct the same.

Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

FINE AND COSTS—Refund of.

RICHMOND, VA., May 11, 1927.

HON. J. E. PARROTT,
*Commonwealth's Attorney,
Stanardsville, Virginia.*

MY DEAR MR. PARROTT:

Your letter of May 9, 1927, addressed to His Excellency, the Governor, has been referred by him to me for attention and reply.

In your letter you state that one Herndon was convicted of a common assault and battery in your court at the September term, 1926, and his punishment fixed by the jury at a fine of \$500.00, upon which verdict the court entered judgment. You also state that subsequent to this time the fine and costs were paid by the defendant and that on May 1, 1927, after the payment of the fine and costs, Herndon filed a petition in your court under sections 2569-2574 of the Code, inclusive, for the purpose of having the judge of the circuit court certify to the Governor that he should be relieved of \$450.00 of the judgment against him. You then state that it is your opinion that these sections apply only to cases where the fine and costs have not been paid and have no application to a matter such as the case here under consideration. In this opinion I fully concur with you.

These sections clearly contemplated those cases where the fine and costs have not been paid and have no application to such a case as this. Indeed, it is now beyond the power of the General Assembly to refund any part of the fine or costs in this case by means of a special bill, as this money was regularly paid into the treasury and such an act would be prohibited by section 63 of the Constitution, subsection 9. The only way, in my opinion, by which this man could get relief would be for the General Assembly to amend sections 2569-2574 of the Code, inclusive, so as to apply to cases in which the fine and costs have been paid, or to pass some other general statute broad enough to cover such a case.

It is my recollection that some months ago Senator Early wrote this office about this case and at that time proceedings under the above mentioned sections were suggested, but his letter did not contain any intimation that the fine and costs had been paid and we were under the impression that they were still unpaid at the time we replied to him.

Trusting this gives you the desired information, I am

Yours very truly,

LEON M. BAZILE,
Assistant Attorney General.

FORFEITED RECOGNIZANCE—Fee.

RICHMOND, VA., *March 8, 1927.*

M. ANDERSON MAXEY, ESQ.,
Commonwealth's Attorney,
Suffolk, Va.

DEAR MR. MAXEY:

I have your letter of March 2, with reference to a certain fee claim of yours in the matter of proceedings upon a forfeited recognizance, in which you claim a fee of \$10.00 and 5 per cent of the recovery, amounting to \$25.00.

Section 3505 of the Code provides for a certain fee of \$10.00 and 5 per cent commission on all recoveries on such proceedings, but expressly provides that such fee and the commission shall be taxed in the costs, and that they shall, when recovered, be paid to the attorney for the Commonwealth. The fee and the commission should have been added to the amount of recognizance recovered by you and, when so recovered, those amounts should have been paid directly to you.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

FORFEITED RECOGNIZANCE—Collection of judgment based on.

RICHMOND, VA., *April 7, 1927.*

HON. C. LEE MOORE,
Auditor of Public Accounts,
Richmond, Virginia.

MY DEAR MR. AUDITOR:

Recently you transmitted to this office for consideration the file in re: The suit of *H. Gorman v. the Sheriff and Commonwealth's Attorney of Princess Anne County* pending in the circuit court of that county, in which the plaintiff seeks to enjoin the defendants from proceeding with the collection of a judgment based on a forfeited recognizance.

The bill alleges that one Gresham, a justice of the peace, in April 1925, admitted to bail one R. L. Webster for his appearance before the circuit court of Princess Anne county. The bill charges that the condition of the bond was that \$500 was for his good behavior, and \$500 for his appearance. The bill admits that Webster failed to appear and then charges that the recognizance was forfeited *scire facias* as issued thereon and execution ordered. The bill charges that the judgment is at least void as to \$500 and that the principal, Webster, died in Rhode Island under an assumed name in March-1926.

I do not have before me the warrant in the case, but I have a copy of the memorandum of the recognizance, or bail bond, in the case and it appears from this that the allegations of the bill as to the bond being in two parts—\$500 for good behavior of Webster and \$500 for his appearance is not supported by the recognizance, but wholly disapproved by the same. The recognizance shows that it was in the sum of \$1,000 and the condition was Webster “shall keep the peace and be of good behavior in the Commonwealth and shall appear before the next term of Princess Anne circuit court at Princess Anne Court House.”

When Webster failed to appear before the circuit court of Princess Anne county at its next term, April 6, 1925, to answer the charge of the warrant the bond was forfeited whether he had kept the peace or not, as one of the conditions of the bond was that he should “appear before the next term of Princess Anne circuit court at Princess Anne Court House.” *Scire facias* was issued against Webster and surety Gorman and the order entered by the circuit court of Princess Anne county on June 5, 1925, shows that a copy of the *scire facias* was served on Gorman, who being solemnly called came not, and failed to show cause against issuance of execution, whereupon the court ordered execution to issue against him for \$1,000 and costs.

If Gorman had any defense to make at that time it is certainly too late at this date for him to attempt to make the same, in my opinion, by way of a chancery suit seeking to enjoin the sheriff and Commonwealth’s attorney from proceeding with the execution ordered by the court. In this connection I call your attention to *Walker v. Commonwealth*, 144 Va. 648, 1926.

The final judgment of the circuit court of Princess Anne county awarding execution of the recognizance was entered on June 25, 1925. The term of the court at which this judgment was entered has long ago adjourned and it is now too late to reopen the judgment entered in that case by any direct proceeding, *Jordan v. Commonwealth*, 938-135 Va. 560, 1923. If Mr. Gorman had any defense to the *scire facias* it was his duty to make that defense before execution was ordered by the court. Having failed to do that and not having appealed from the decision of the circuit court of Princess Anne county within the time allowed by law—that judgment is final, and, in my opinion, cannot be affected by the proceeding which is sought to be maintained in this case.

I may add that the allegations of the bill do not set out a meritorious case, in my opinion, for the reason that Webster did not die until March, 1926, when as a matter of fact the final judgment of the case was entered on June 25, 1925.

Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

FIRE DEPARTMENT—Exempt from jury service.

RICHMOND, VA., March 2, 1927.

MR. LEROY S. LOEWNER,
Capt. Co. 1, H. F. D.,
Harrisonburg, Va.

DEAR SIR:

Acknowledgment is made of yours of February 28, in which you say:

“Will you kindly advise if a volunteer fire company in this State, organized according to the Code of Virginia, is entitled to enroll thirty contributing members who are exempt from jury service, the same as a unit of the National Guard?”

In reply I beg to say that section 5985 of the Code of Virginia, providing who are exempt from jury service, enumerates among others "active members of the fire department of a city or town and active officers and native members of any fire company therein, not exceeding one hundred members in any one company."

Trusting this will give you the information desired, I am

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

FIREARMS—Sale of ammunition for.

RICHMOND, VA., *December 18, 1926.*

MR. CLAIBORNE R. WATKINS,
c/o Watkins Cottrell Company,
Richmond, Virginia.

MY DEAR SIR:

Acknowledgment is made of your communication of yesterday, in which you call attention to section 3, chapter 158 of the Acts of 1926, and request me to advise you whether retail dealers in this State are authorized, under the law, to sell to persons for use in rifles, rifle ammunition which could be used in pistols, without requiring the person making the purchase to display the license card showing that he has registered and paid the required tax on a pistol.

This law generally provides for the registration of all pistols and the payment of a license tax thereon. *Section 3* of the law reads as follows:

"It shall be unlawful for any retailer in this State to sell ammunition *for any pistol or revolver* to any person unless the person desiring to make such purchase displays the license card of the current year provided for in this act."

It is my opinion that one who purchases ammunition for a rifle does not have to comply with the provisions of section 3, chapter 158 of the Acts of 1926, as he is not purchasing the ammunition for a pistol or revolver. The language of the act is unfortunate, but it is my opinion that the General Assembly did not intend it to apply to the owner of a rifle who merely purchased ammunition for such rifle.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

FEMALES—Not eligible as members of Board of Commissioners.

RICHMOND, VA., *July 19, 1926.*

MRS. H. D. LEWIS, *Secretary,*
Bristol, Virginia.

MY DEAR MRS. LEWIS:

Acknowledgment is made of yours of the 16th, in which you say:

"As you know, I am interested in the Confederates. We have recently lost the active members of the board, so I am asking for a ruling. Will it be lawful to appoint a woman?"

In reply, I beg to say that section 17, chapter 188, page 302, Acts of Assembly 1924, to which you refer, is in part as follows:

"Court to appoint board of pension commissioners; their duty. That there shall be appointed by the circuit court of each county in term time, or vacation, and by the corporation or hustings court of each city, or by the judge thereof in vacation, immediately after the approval of this act, and in the month of January in each year thereafter, a board of three commissioners, residents of such county or city, none of whom shall be either State, city or county officers, and any two of whom may act, and two of whom shall be ex-Confederate soldiers, or sons of ex-Confederate soldiers, and all of whom shall be freeholders and persons of good reputation, who are to serve without compensation, and to constitute a board, whose duty it shall be to examine into the merits of the applications, a list of which shall have been furnished them by the clerk, of the said court, as hereinbefore provided. * *"

You will observe that the two members of the board must be ex-Confederate soldiers, or sons of ex-Confederate soldiers, but it is not required that they should be members of the organization known as "Sons of Confederate Veterans." You will also notice that the law makes no provision for the appointment of the daughter of a Confederate soldier. The constitutional provision you mention, and a number of statutes, provide that men and women alike may be appointed, or elected, to the various offices, boards, etc., and it is rather remarkable that when this pension law was reenacted in 1924, it was not amended to permit the appointment of women to pension boards.

Respectfully yours,

JOHN R. SAUNDERS,
Attorney General.

FRATERNAL ASSOCIATIONS—License prohibited.

RICHMOND, VA., *January 20, 1927.*

MR. S. I. COTTRELL, *General Vice-President,*
National Brotherhood of Blacksmiths, Drop Forgers and Helpers,
Richmond, Virginia.

MY DEAR SIR:

Acknowledgment is made of your communication of recent date, in which you call attention to chapter 502 of the Acts of 1926 prohibiting the licensing or operation in this State of fraternal beneficiary associations, companies, orders and societies, which have both white and colored membership, etc., and request me to advise you whether this act has any application to your association which is a labor union.

It appears that the only death benefits of any kind paid by your union is a death benefit for the burial of deceased members. In my opinion your association is a labor union and not a fraternal beneficiary association, company, order or society, and, therefore, chapter 502 of the Acts of 1926 has no application to your association.

The Commissioner of Insurance has already given a similar ruling, I am advised by his assistant, Mr. Coulbourn.

I am returning your file.

Yours very truly,

LEON M. BAZILE,
Assistant Attorney General.

GENERAL ASSEMBLY—Powers of—To impose income tax.

RICHMOND, VA., December 23, 1926.

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

MY DEAR GOVERNOR:

You will recall that some days ago you requested me to investigate the power of the General Assembly to impose a net income tax upon the income of public service corporations.

There are a number of provisions of the Constitution with reference to the powers of the General Assembly in this respect. Section 170 of the Constitution authorizes the General Assembly to levy a tax on incomes in excess of \$600.00 per annum; to impose license taxes upon any business which cannot be reached by the *ad valorem* system; and to impose State franchise taxes, and, in imposing the latter class of taxes, may, in its discretion, "make the same in lieu of taxes upon other property, in whole or in part, of a transportation, industrial, or commercial corporation."

Section 176 of the Constitution provides for the assessment and taxation of real and personal property of railroad and canal companies. The last part of this section of the Constitution provides as follows:

"* * such property shall be taxed for State, county, city, town, and district purposes in the same manner as authorized by said law, at such rates of taxation as may be imposed by them, respectively, from time to time, upon the real estate and personal property of natural persons: provided, that no tax shall be laid upon the net income of such corporations."

Section 177 of the Constitution provides for an annual State franchise tax equal to one per centum upon the gross receipts of railroad and canal companies as specified in section 178 of the Constitution, which franchise tax, with the taxes provided for in section 176, this section declares "shall be in lieu of all other taxes or license charges whatsoever upon the franchises of such corporation, the shares of stock issued by it, and upon its property assessed under section one hundred and seventy-six: provided, that nothing herein contained shall exempt such corporation from the annual fee required by section one hundred and fifty-seven of this Constitution."

Section 178 of the Constitution provides, so far as applicable to the question here under consideration:

"The amount of such franchise tax shall be equal to one per centum of the gross transportation receipts of such corporations for the year ending June the thirtieth of each year, to be ascertained by the State Corporation Commission,
* *"

Section 181 of the Constitution, however, provides as follows:

"After January the first, nineteen hundred and three, the system of taxation, as to the corporations mentioned in sections one hundred and seventy-six and one hundred and seventy-seven, shall be as set forth in sections one hundred and seventy-six to one hundred and eighty, inclusive; and for that year the franchise tax shall be based upon such gross receipts for the year ending the thirtieth day of June, nineteen hundred and three, and such system shall so remain until the first day of January, nineteen hundred and thirteen, *and thereafter until modified or changed, as may be prescribed by law*: provided that, if the said system shall for any reason become inoperative, the General Assembly shall have power to adopt some other system." (Italics supplied.)

Despite the limitations and prohibitions contained in the above mentioned sections of the Constitution, I am of the opinion that, in view of the provisions of section

181 of the Constitution, the General Assembly has the authority at this time to enact legislation imposing a tax upon the net income of public service corporation, including railroad and canal companies.

Section 181 of the Constitution has not been construed by the Court of Appeals, but its language is so clear it does not require a decision of that court to determine its meaning. It is interesting to note that the General Assembly has already construed that section as authorizing it to change the State franchise tax of railroad and canal companies from the one per centum fixed by sections 177 and 178 of the Constitution to one and one-half per centum. See section 28 of the Tax Bill, as amended.

Trusting this will give you the desired information, I am

Yours very truly,

LEON M. BAZILE,
Assistant Attorney General.

GENERAL ASSEMBLY—Appropriation for Penitentiary.

RICHMOND, VA., *April 2, 1927.*

HON. J. H. BRADFORD,
Director of the Budget,
Richmond, Virginia.

MY DEAR MR. BRADFORD:

Acknowledgment is made of your communication of March 29, 1927, in which you say:

"The Superintendent of the Virginia Penitentiary has asked the Governor for authority to utilize approximately \$15,000, accumulated by the Penitentiary Industrial Department, in placing modern steel bars in the windows of the Penitentiary cell building.

"I would appreciate it very much if you would advise me whether the Governor has authority to permit the expenditure of this amount from the surplus earnings of the Industrial Department for the purpose requested by the Superintendent of the Penitentiary."

I have examined section 2073 of the Code and general appropriation bill for the years 1926-1928 with care and it is my opinion that the General Assembly having expressly appropriated \$7,500 for each year of the biennial for work and repairs on the penitentiary that it would not be legal to expend additional funds for such purposes without authority from the General Assembly.

I do not mean by this that in the case of a great emergency that the Governor would not be justified in authorizing the expenditure of other funds for the purpose of repairing the penitentiary, but this does not appear to be one of those cases.

The General Assembly is at present in session and authority could be obtained from it, I am sure, if the Governor requested it.

Trusting this gives you the desired information, I am

Yours very truly,

LEON M. BAZILE,
Assistant Attorney General.

GAME AND INLAND FISHERIES—Oyster tax.RICHMOND, VA., *September 23, 192 .*

HON. C. LEE MOORE,
*Auditor Public Accounts,
Richmond, Virginia.*

MY DEAR MR. AUDITOR:

I beg leave to acknowledge receipt of your letter of September 23rd, which is as follows:

"The General Assembly by act approved March 24, 1926, chapter 387, pages 671-673, provides a tax of one cent per bushel on oysters, and in section 7 of the act provides that the net revenue derived from this act, or so much thereof as is necessary shall be used for bacteriological work as required by the United States Public Health Bureau for the safe guarding and protection of the sea food industry of the State of Virginia, and shall be expended under the direction of the Governor. Section 10 of the act is as follows:

"All acts and parts of acts in conflict with this act are hereby repealed."

"This act was approved subsequent to the date of approval of the appropriation bill, which was approved March 12, 1926. The appropriation bill, page 177, Acts 1926, provides as follows:

"It is further provided that all revenues collected by the Commission of Fisheries, all other laws or parts of laws to the contrary notwithstanding, shall be placed in the general fund of the State treasury; and it is provided, further, that the total appropriations of sixty one thousand one hundred and eighty dollars hereby made to the Commission of Fisheries, shall be paid out of the general fund of the State treasury."

"If in your opinion there is a conflict in these acts, please advise me which act is in force; in other words, is this one cent tax per bushel on oysters oyster revenue belonging to the general fund of the State treasury, or can it be used as provided in section 7, chapter 387, page 672, Acts 1926."

In reply to your letter, will state that there is a conflict in these two acts of the legislature, and I am of the opinion that the provisions contained in section 7 of chapter 387, in as much as this act was approved twelve days after the appropriation bill was approved, are in full force and effect, and that the net revenue obtained under the provisions of chapter 387 should be expended in accordance with the provisions of section 7 of this chapter.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

GAME AND INLAND FISHERIES—License of nonresidents to hunt.RICHMOND, VA., *January 25, 1927.*

MR. G. W. THOMPSON,
*Box 134,
White Stone, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of January 21, 1927, in which you ask for an interpretation of the game law in Virginia in regard to one hunting for game on his own land with his children, grandchildren or sons-in-law. You desire to know whether

the above-mentioned group, if they were visiting you, could hunt on your land without first obtaining a license.

In reply I wish to call your attention to section 3334 of the Code of Virginia, 1924, which provides as follows:

"All resident land owners and their children and nonresident children of residents who own lands in this State, and nonresidents who own land in this State and their children, may hunt or trap on their said lands without license. Any tenant or renter may hunt upon the lands of the owner or landlord upon which such tenant or renter resides without a license, provided that such tenant or renter have the written consent of the said owner or landlord so to do."

Although this section does not in express terms give grandchildren and sons-in-law the right to hunt or trap without a license, I am of the opinion that it was the intention of the General Assembly to include them under the head of "nonresident children," therefore permitting them to hunt or trap on lands of residents without a license. Grandchildren and sons-in-law are in fact children, but of course in different degrees from one's own children.

Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

GAME AND INLAND FISHERIES—Licenses—Liability of dog owner.

RICHMOND, VA., December 3, 1926.

HON. M. D. HART, *Executive Secretary,*
Department of Game & Inland Fisheries,
Richmond, Virginia.

DEAR SIR:

Acknowledgment is made of yours of the 3rd, in which you say:

"We would like to have your opinion as to whether a game warden would be justified in arresting and prosecuting the owner of a dog who failed to put the metal license tag on a substantial collar and attached to the dog's neck, as provided for by law, (see paragraph 2 of chapter 413, Acts 1920) when he first found a dog with known ownership, whose owner had failed to carry out the provisions of this law."

In reply I beg to say that the Virginia dog law, subsection 4, provides for the notification by a game warden of the owner of a dog found at large without a license tag before such dog is killed. Subsection 7 provides for the punishment of a person failing to pay a license tax for his dog, and subsection 3 makes it unlawful for any person to permit his dog to run at large without a license tag. No doubt, many citizens pay their license tax for their dogs and obtain tags, but, through inadvertence, do not affix them promptly, or when affixed the tags become detached in some manner.

In my judgment, a reasonable application of this law would be to give a notification to the owner to put a metal license tag with a substantial collar on his dog before he is proceeded against criminally for failure to do so. I believe this would accomplish the purpose of the law and secure its enforcement without unnecessary public irritation.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

GAME AND INLAND FISHERIES—Unlawful to kill buck if horns not visible.RICHMOND, VA., *February 18, 1927.*

MR. WM. A. HITE,
Game Warden,
Warm Springs, Va.

MY DEAR MR. HITE:

Acknowledgment is made of your letter of recent date, in which you request me to advise you whether, under section 3356 of the Code as amended, it is unlawful to kill a buck fawn without horns during the open season for deer. You state that the buck fawn has no horns.

The language of section 3356, so far as applicable to this question, is:

"It shall be unlawful for any person to kill, take, injure or capture any wild deer or elk *at any time*, except a deer or elk having horns visible above the hair."

It is therefore a violation of this statute for any person to kill a buck fawn, unless it has horns visible above the hair.

Trusting this gives you the desired information, I am

Very truly yours,

JOHN R. SAUNDERS,
Attorney General.

GAME AND INLAND FISHERIES—Fishing and hunting without owner's consent.RICHMOND, VA., *November 22, 1926.*

DR. F. E. WOODS,
Covington, Va.

DEAR DR. WOODS:

Acknowledgment is made of your letter in which you state:

"Please inform me if I may be liable for trespassing if I fish and hunt without consent of the owner a stream on uninclosed mountain land west of the Blue Ridge mountains which is posted."

In reply I would say that section 3338 of the Code, as amended, says that

"If any person shoot, hunt, fish, range, trap or fowl on or in the lands, waters, millponds, or private ponds of another, without the written consent of the owner to do so, he shall be deemed guilty of a trespass and upon conviction thereof shall be fined not less than five dollars nor more than fifty dollars. The above shall not apply to, *bona fide* fox hunters hunting with hounds and deer hunters hunting with dogs where the chase begins on other lands, nor to uninclosed mountain lands west of the Blue Ridge mountains not used for cultivation except in the counties of Giles, Bland, Bath and Highland. * * * * *

Of course you would not be liable under the above section of the Virginia Code for "uninclosed land west of the Blue Ridge" is exempted. You also would not be liable under the same section because your county (Alleghany) is not mentioned.

Although you seem to be exempted by section 3338 of the Virginia Code, you could nevertheless be liable for damages in a civil action for trespass. As you well know the owner of land is entitled to quiet enjoyment and many other privileges and for any disturbance thereof, he has a cause of action against the wrong-doer.

Trusting this will give you the desired information, I am,

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

GAME AND INLAND FISHERIES—Fish Ladders—Exemption from erection of.

RICHMOND, VA., June 24, 1927.

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

DEAR SIR:

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

“Will you please advise if the provisions of section 4747 of the Code of Virginia, where the water power of said mill dam is used for grinding or manufacturing purposes, would exempt the owner from complying with the provisions of section 3193 of the Code of Virginia, requiring the erection of suitable fish ladders on all dams across rivers of the State, except such as are specially exempt by law.”

In reply I beg to say that section 4747, to which you refer, is as follows:

“Any dam or other thing, in a water course, which obstructs navigation or the passage of fish, shall be deemed a nuisance, unless it be to work a mill, manufactory, or other machine or engine useful to the public, and is allowed by law or order of court. And though a dam may have been so allowed in a water course before the first day of January, seventeen hundred and eighty-seven, yet if it cause obstruction, it shall not be rebuilt, if destroyed, until leave for that purpose has been obtained under chapter one hundred and forty. For every twenty-four hours that a dam or other thing may remain in a water course, in violation of this section, the person causing or permitting such violation shall forfeit two dollars, whereof the informer shall have one-half. This section shall not apply to mill dams across rivers, creeks, or branches within the counties of Floyd, Carroll and Grayson.”

Section 3193, which you also mention, provides a punishment for the violation of section 3192, which is as follows:

“Any person or corporation owning or having control of any dam or other obstruction in any of the rivers of this State above tidewater, which may interfere with the free passage of fish, shall provide every such dam or other obstruction with a suitable fish ladder, so that fish may have a free passage up and down said rivers during the months of March, April, May and June of each year, and maintain and keep the same in good repair, and restore it in case of destruction; provided, however, that this section shall not apply to the Meherrin river within the county of Brunswick and Greenville, nor to the Meherrin river within or between the counties of Lunenburg and Mecklenburg, nor to any streams within the counties of Lunenburg, Mecklenburg, Louisa, Buckingham, Halifax, Montgomery, Grayson, Pulaski, Franklin, Russell, Wythe and Washington, nor to that part of any stream that forms a part of the boundary of Halifax and Franklin counties.”

I think it is clear from a reading of these two sections that a mill dam erected in accordance with section 4747 is within the terms of section 3192, which has been among the statutes of Virginia in some form since 1880 and has been carried in the Code in the two revisions that have been made since then. Therefore, if full force is to be given to both sections, it is necessary to hold that all dams, whenever erected, should be equipped with fish ladders.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

GAME AND FISH—Ownership of dog by minor.RICHMOND, VA., *July 30, 1926.*HON. J. P. LEACHMAN,
Manassas, Virginia.

DEAR MR. LEACHMAN:

I am just in receipt of yours of the 29th, in which you ask whether or not a minor can own a dog legally. In reply to such: he can, and we have repeatedly held that the dog can be assessed to him.

I note what you say about persons who in order to evade the payment of capitation taxes, claim that the dog, or dogs, which they own, belong to one of their children. This is unfortunate; at the same time it is just one of those instances in which the law can be evaded. Of course, no capitation tax is assessable against an infant, and therefore, the payment thereof is not a prerequisite to obtain a license for a dog.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

GAME AND FISH—Dog tax.RICHMOND, VA., *May 31, 1927.*HON. GEORGE F. BLANKENSHIP,
Treasurer of Carroll County,
Hillsville, Virginia.

DEAR SIR:

Replying to yours of the 27th, I will say that, speaking generally, all tangible property, real and personal, may be sold by the county treasurer to pay delinquent taxes. I would suggest that you follow the advice of your Commonwealth's attorney as to the best manner in which to proceed.

Replying to your question as to a dog recently brought into this State, upon which the tax has been paid for this year in another State, I will say that such dog is taxable here for this year if brought into the State before the first of November. Otherwise, the tax is payable for next year, but not for this year.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

GAME AND FISH—Picking up unlicensed dogs.RICHMOND, VA., *May 20, 1927.*HON. M. D. HART, *Executive Secretary,*
Department of Game and Inland Fisheries,
Richmond, Virginia.

DEAR SIR:

In further reference to your letter to me of May 13th, 1927, which I requote as a matter of convenience:

"We would like to have your opinion as to whether it is illegal for any person or set of persons, not officers of the law, to pick up stray and unlicensed dogs on the streets of any city and confine or harbor same until new owners can be obtained by them."

In my reply to you of May 17, 1927, I stated that persons other than officers were not authorized to pick up stray and unlicensed dogs, except in those cases where the dog was engaged in destructive trespassing.

Of course, you are familiar with the statute law which is contained in the Code and amendments thereto relative to cruelty to animals. Please understand that the opinion which I rendered to you on May the 17th is in no manner to be construed as conflicting with the duties and powers of the officers and agents of the various societies existing in the State for the prevention of cruelty to animals, who, of course, by virtue of the existing laws relative to these societies are in reality officers—and when I used the word officer in my letter to you of May the 17th I intended, of course, to embrace the members and officials of such societies within the meaning of officers.

In this connection your attention is specifically directed to sections 4554 to 4567 inclusive, of the Code.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

GAME AND FISH—Payment of dog tax.

RICHMOND, VA., May 17, 1927.

B. C. HURST, ESQ.,
Pulaski, Va.

DEAR SIR:

Replying to yours of the 11th, I will say that, although the law requires a dog tax to be paid on the first day of May to prevent the owner from being subject to a fine, if that day falls on Sunday and the tax is paid on the following day, I do not think the fine should be imposed. As you say, to do so would be working a hardship upon good citizens who have no intention of violating the law.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

GAME AND FISH—Authority of game warden to kill dogs.

RICHMOND, VA., March 3, 1927.

HON. M. D. HART, *Executive Secretary,*
Department of Game and Inland Fisheries,
Richmond, Virginia.

DEAR SIR:

Acknowledgment is made of your letter of February 17, in which you say:

"Would a game warden be justified in killing a licensed dog which was a poultry killer when ordered to do so by the board of supervisors of his county? If not, what is the proper legal procedure to be taken in such a case?"

In reply I will say that, in my judgment, a board of supervisors has no authority to require a game warden to kill a dog. If the dog is a confirmed poultry killer, a warrant should be sworn out against the owner of the dog, and the magistrate, upon proper evidence, may order the dog killed, in accordance with subsection (4), chapter 413 of the Acts of 1920.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

GAME WARDENS—Power to act as sheriff or constable.

RICHMOND, VA., May 6, 1927.

HON. A. WILLIS ROBERTSON, *Chairman,*
Commission of Game and Inland Fisheries,
Lexington, Virginia.

MY DEAR MAJOR ROBERTSON:

Mr. Tyus brought me several days ago your letter to him of May 2, 1927, in which you say:

"Please ask the Attorney General how he reconciles his recent ruling with Code section 3318 in connection with fees allowed sheriffs and constables under section 3508. Section 3318 permits wardens to execute process of arrest in the capacity of sheriffs and constables, in addition to their power to do so in their capacity as wardens."

Section 3318 of the Code of 1919 reads as follows:

"The Commissioner and wardens may serve original and mesne process as sheriffs and constables, in all matters arising from violations of the game, fish, forestry and dog laws of this State."

This section of the Code does not declare that a game warden is a sheriff or a constable, but merely gives him the same authority to serve process as that possessed by a sheriff or constable. The fact that a game warden has such power makes him neither a sheriff nor a constable.

You are, of course, familiar with section 110 of the Constitution, which provides that each county shall have one sheriff. This section would prohibit a county from having more than one sheriff, and still this would be the effect of section 3318 if it made a game warden a sheriff. I am convinced that the General Assembly never intended to do this.

As the same reasoning would apply to constables as to sheriffs, it plainly appears that, although a game warden is clothed with power to the same extent as a sheriff and constable in the serving of processes in matters arising from the game, fish, forestry and dog laws of the State, he is, nevertheless, a game warden and not a sheriff or constable.

Sections 3486 and 3505 of the Code, which provide for arrest fees, mention only sheriffs, sergeants and constables as being entitled to the fees provided by these sections, and for that reason I do not think that a game warden is entitled to the fee taxed, under authority of these sections, for making an arrest.

Again, the legislature at one time did fix a fee for game wardens for making an arrest (Code section 3343), but the legislature of 1926 repealed this section, and evidently it must have been the purpose of the legislature, by such repealing, to abolish

the fees which had been allowed game wardens for making arrests under the provisions of the old law.

I regret very much you do not concur in our views, and the only remedy, in my judgment, is to have the law amended.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

GAME WARDEN—Fee of.

RICHMOND, VA., *April 26, 1927.*

MR. R. G. DILLARD, *Supervisor,*
Commission of Game and Inland Fisheries,
Center Cross, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of April 20, 1927, in which you say:

“When a game warden makes an arrest for the violation of the game, fish or dog law, is it lawful for him to receive fifty cents as witness fee in a magistrate’s court, in addition to a dollar for making the arrest, or is it lawful for him to receive a fee at all? Some magistrates allow both fees and some others will not allow either fee.”

A game warden, when summoned as a witness, is entitled to the fee provided by section 3512 of the Code. Prior to the Acts of 1926, section 3343 of the Code of 1919 provided for the fees to be paid game wardens for making arrests. In 1926, this section of the Code was repealed and no other provision made for taking care of such fees.

While a game warden has power to arrest for violations of the game laws under section 3220 of the Code, I do not find where he is declared to be a sheriff, sergeant or constable; and, as sections 3489 and 3508 of the Code, providing for arrest fees, mention only sheriffs, sergeants and constables, it is my opinion that no provision has been made for allowing game wardens fees for making arrests. Therefore, game wardens are not entitled to fees for making arrests.

Sincerely yours,

JOHN R. SAUNDERS,
Attorney General.

GAME WARDENS—Entitled to fines.

RICHMOND, VA., *October 12, 1926.*

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

MY DEAR MR. AUDITOR:

Acknowledgment is made of your communication of recent date, in which you request me to advise you whether a game warden is entitled at the present time to one-half of the fines imposed for violations of the fish laws. I notice from the correspondence in the file sent me with your request that some question has been raised as to this by the clerk of the circuit court of Amherst county.

Prior to the session of 1916 section 3343 of the Code authorized the payment of an informer's fee of one-half of the fine to game wardens making arrests for violations of the game and fish laws. This section of the Code was repealed by chapter 295 of the Acts of 1926 and, therefore, game wardens are no longer entitled to one-half of the fines arising from arrests made for violations of the game laws. With reference to arrests made for violations of the fish laws, however, section 3197 of the Code of 1919 makes game wardens, in addition to their regular duties, fish wardens and then provides:

"The game wardens making the arrest and securing the conviction of any offender shall receive for such service one-half of the fine imposed by the court imposing the penalty."

This section was not expressly repealed by the legislature and, in my opinion, the repeal of section 3343 by the General Assembly could not have the effect of repealing by implication section 3197 of the Code of 1919.

Therefore, game wardens are, in my opinion, entitled to one-half of the fines arising from the arrests and convictions of offenders against the fishing laws, but, in order to entitle a game warden to one-half of the fine in such case, it is necessary that he comply with section 2547 of the Code, which provides as follows:

"Although a law may allow an informer, or person prosecuting, to have part of a fine, the whole thereof shall go to the Commonwealth, unless the name of such informer or prosecutor be endorsed on, or written at the foot of, the presentment at the time it is made, or of the indictment before it is presented to the grand jury, or of the information before it is filed, or of the writ issued in the action, or the process on the warrant, or the notice of the motion before service of such writ, process, or notice."

Therefore, in no case is the game warden to receive any part of the fine unless prior to the service of the warrant he has his name placed on the warrant as prosecutor, so that, in the event it is dismissed, the costs will be assessed against him personally and not against the Commonwealth. The law contemplates that where one-half of a fine is paid to the informer, the informer must prior to the service of the process assume liability for the payment of costs in the event that no conviction results.

Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

GAME WARDENS—Entitled to one-half fines.

RICHMOND, VA., July 1, 1926.

HON. M. D. HART, *Secretary,*
Department of Game and Inland Fisheries,
Richmond, Va.

DEAR SIR:

Acknowledgment is made of your letter of the 29th ultimo, in which you say:

"You will note that chapter 295, Acts 1926, repeals section 3343 of the Code of Virginia, and that game wardens are no longer allowed \$2.50 taxed as costs and half of the fine in game and fish law cases where defendant is found guilty as charged in the warrant.

"We would like to have your opinion in re section 3197 of the Code of Virginia as to whether game wardens can still claim one half of the fine in fish law cases where the defendant is found guilty."

In reply I beg to say that, in my judgment, game wardens are still entitled to one-half of the fines under section 3197 of the Code, since that section has not been amended.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

GAME WARDENS—Whether member of General Assembly can be appointed game warden.

RICHMOND, VA., July 1, 1926.

HON. M. D. HART, *Secretary,*
Department of Game and Inland Fisheries,
Richmond, Va.

DEAR SIR:

Acknowledgment is made of yours of the 16th, in which you say:

"We would like to be advised if a member of the General Assembly of Virginia is eligible to be appointed as a game warden of this department.

"In conversation with your office on this subject a few days ago, we understood from Mr. Machen that under the provisions of the language of section 45 of the Constitution of the State of Virginia, he was of the opinion that a member of the House of Delegates could not be appointed as a game warden during the term for which he was elected to the General Assembly, and this is asking for confirmation of this opinion."

In reply I beg to say that section 45 of the Constitution of Virginia is as follows:

"The members of the General Assembly shall receive for their services a salary to be fixed by law and paid from the public treasury; but no act increasing such salary shall take effect until after the end of the term for which the members voting thereon were elected; and 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."

The question at issue is whether a game warden is an officer. In my judgment he is and, therefore, no member of the General Assembly may be appointed a game warden. I understand from you that no legislator has ever been made a warden since your department was established in 1916.

Very truly yours,

JOHN R. SAUNDERS,
Attorney General.

GAME WARDENS—Duty to give bond of.

RICHMOND, VA., September 28, 1926.

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

DEAR SIR:

Acknowledgment is made of yours of the 20th, in which you say:

"We would like to have your opinion as to whether this department would be warranted by law to pay game wardens who were appointed by the Chairman and confirmed by the commissioners of this department as of July 31, 1926, and who did not give the bond required by section 3322 until some time afterwards.

"Quite a few of our wardens failed to file their bonds upon receipt of their new certificates of appointment. You will note in chapter 295, Acts 1926, all wardens appointed prior to that time automatically ceased to be game wardens. This department feels that since most of these men who were reappointed performed their duties continuously that they should be paid, even though they neglected to have the clerks of the courts notify us officially that the proper bond was filed."

In reply I beg to say that section 3322 of the Code is as follows:

"Before entering upon the discharge of his official duties, each regular game warden shall give bond before the clerk of the circuit court of his county or of the corporation court of his city, in the penalty of one thousand dollars, and each special game warden shall give bond in the penalty of two hundred and fifty dollars, payable to the State of Virginia, with sufficient surety, to be approved by the said clerk, conditioned that he will well and truly account for and legally apply all money which may come into his hands in his official capacity, and to pay all judgments rendered against said game warden for malicious prosecution or for unlawful search, arrest or imprisonment, and that he will faithfully perform all the duties enjoined upon him by law."

It appears from this section that it is the duty of every warden to give the required bond before entering upon his duties and, strictly speaking, he is not entitled to any compensation until this bond is given. However, if, in the judgment of the Commission the failure to give bond was due to a misunderstanding or other extenuating circumstances, and the warden has rendered service in accordance with his appointment, and furthermore has given the necessary bond, it is my opinion that the Commission would be within its rights to authorize the payment of the warden's salary from the time of his appointment.

The bond provision of the law was evidently intended as a matter of protection, and where there is no possibility of any loss through an unintentional delay in giving the bond, I do not feel that this provision should be invoked to deprive a warden of compensation for services faithfully rendered.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

GAME AND INLAND FISHERIES—Hunting, trapping, etc.

RICHMOND, VA., December 22, 1926.

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

MY DEAR SENATOR ROYALL:

Acknowledgment is made of your letter of December 20, 1926, in re chapters 388 and 497 of the Acts of 1926, relating to the hunting, trapping and killing of foxes, etc., in the county of Tazewell.

The first act was approved March 24, 1926, and the second act was approved March 25, 1926. The first act did not carry an emergency clause and went into effect in the regular course. The second act was an emergency act and went into effect from its passage.

The fourth section of chapter 388 of the Acts of 1926 carried a clause expressly repealing all acts or parts of acts in conflict therewith. The law is well settled that, where two acts relating to the same subject matter are passed at the same legislative session, there is a strong presumption against implied repeal and they are to be construed together, if possible, so as to give effect to each; but, if the two cannot be reconciled, the one which is the later expression of the legislative will must prevail. 36 Cyc. 1086.

It would appear from the decision of the Court of Appeals in *Ellis v. Covington*, 122 Va. 821, 823-4 (1917), that, where two acts are passed on the same day, one being an emergency act and the other not an emergency act, that act which is not an emergency act is considered the later act.

Section 2 of chapter 388 of the Acts of 1926 provides that "it shall be unlawful to trap, poison or shoot by any means whatsoever any fox in said counties at any time," while chapter 497 of the Acts of 1926 authorizes the killing or trapping of foxes in the protection of property and when found destroying property.

I am rather inclined to think that the provisions of chapter 388 of the Acts of 1926, in view of the decision of the Court of Appeals in *Ellis v. Covington*, *supra*, would prevail over those of chapter 497 of the Acts of 1926, and that it is unlawful in Tazewell county to trap, poison or shoot by any means whatsoever any fox in that county at any time.

Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

GAME AND INLAND FISHERIES—Killing of fowls by dogs.

RICHMOND, VA., October 9, 1926.

MR. J. H. FOSTER,
Box 181,
Brookneal, Virginia.

MY DEAR SIR:

I am just in receipt of your letter of October 8th, to which I will reply at once. In reply to your two questions, which are as follows:

"First: Where the owner of the dogs is known should any damage at all be paid by the local authorities out of the dog tax fund, or should the full value of the stock or fowls killed be paid for by the owner of the dog."

"Second: May a dog be lawfully killed by warden, or any other person, if found killing domestic fowls. Or in other words, may the words 'domestic animals' as used in the acts be construed to mean domestic fowls?"

I would state that the board of supervisors are authorized to pay to the owners of stock killed by dogs out of the dog fund, the amount of the assessed value of the stock. If the stock is worth more than the assessed value, then the owner thereof can recover the difference between the amount paid by the board of supervisors and the real value, provided, of course, the owner of the dog has property out of which the debt can be recovered.

A dog cannot be killed either by the warden, or any one else, if found killing domestic fowls.

Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

GAME AND FISH—Ownership of dog by minor.RICHMOND, VA., *January 21, 1927.*

HON. J. E. PARROTT,
Commonwealth's Attorney,
Stanardsville, Va.

MY DEAR SIR:

Acknowledgment is made of yours of the 17th, in which you say:

"There seems to be a practice among certain tax evaders to list dogs such as are the subject of license tax and pay the tax thereon in the name of some minor child rather than in their own in order to avoid the payment of a capitation tax, the payment of which, or sufficient evidence of the payment of which, is required as prerequisite to the right to obtain such dog license.

"Is it not your opinion that section 2307 of the Code as amended by Acts 1923, page 120, wherein it is provided that if property be owned by a minor, it shall be listed by and taxed to his guardian or trustee, if any he has; if he has no guardian or trustee, it shall be listed by and taxed to his father, if any he has, etc., would apply and prevent such an evasion by the father?"

In reply I beg to say that this office has repeatedly held that a minor may obtain a license for his dog. The question whether a dog is really the property of the minor, or of a parent, is one for the treasurer to decide upon the best evidence obtainable. In my judgment, section 2307 of the Code applies to property taxes and not to license taxes, such as the dog tax.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

GAME AND FISH—Assessment of fowls for taxation.RICHMOND, VA., *February 9, 1927.*

HON. W. L. DAVIDSON,
Commonwealth's Attorney,
Jonesville, Virginia.

MY DEAR SIR:

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

"The board of supervisors of Lee county has requested me to ask you for an opinion on section 2323-e of the Code of Virginia. The point on which the said board wants to have your opinion is whether or not this statute permits fowls, which have been killed by dogs, to be paid for out of the dog fund where these fowls are not assessed for taxation. As a general rule throughout the State, fowls are not assessed for taxation, and the board wishes to know whether in your opinion the statute means that the fair value of the fowls are to be paid for out of this fund, whether or not they are assessed for taxation. The first part of this statute seems to indicate that, as it says, 'shall be entitled to receive compensation therefor at the assessed value of such stock and the fair value of such fowl;' but the latter part of the statute seems to put them on the same basis and indicates that where they are assessed for taxation the board can only allow damage from the dog fund for their destruction."

I have examined section 2323-e of the Code of Virginia, 1924, with care, and agree with you that its meaning is not entirely clear. However, from the history of this statute (see section 5 of chapter 390 of the Acts of 1918; section 5 of chapter 413 of the Acts of 1920), I am of the opinion that this section was expressly amended so as to provide

for the payment out of the fund derived from dog licenses for fowls killed or injured by dogs, based on the fair value of such fowls. When the history of this statute is examined, this seems clearly the intent of the General Assembly, and I understand that the statute has been so construed in those counties where the question has arisen.

Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

GARNISHMENTS—Exemption from.

RICHMOND, VA., April 6, 1927.

HON. C. LEE MOORE,
Auditor of Public Accounts,
Richmond, Virginia.

MY DEAR MR. AUDITOR:

Acknowledgment is made of your communication of April 6, 1927, with which you send me your file with reference to the garnishments pending against Mr. Alfred C. Smith, formerly a senator from Norfolk county.

I have read the letter of Nathaniel T. Green, Esq., Mr. Smith's counsel, dated April 5, 1927, in which he takes the position that under section 6559 of the Code of 1919 Mr. Smith's salary is exempt from garnishment. This section, so far as applicable, reads as follows:

"Unless otherwise exempted the wages and salaries of all employees of this State, other than State officers, shall be subject to garnishment or execution upon any judgment rendered against them.* * * *"

The exemption of State officers from garnishment is by way of exception to the general provisions of the statute, and as has been pointed out by the courts was for the purpose of preventing the State from being injured by having its officials harassed by such legal process.

While I think it probable that the courts will determine that the money in question is not subject to garnishment, still I am not entirely satisfied that the courts will necessarily reach this result as Mr. Smith is no longer a State officer, and it is possible that the courts may say that being no longer a State officer that the money is due to him as an individual, and not as a State officer. For this reason I could not advise you to pay the money to Mr. Smith at this time, but on the contrary must advise you to hold the money in question until the courts have passed on the same.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

GAME AND FISH—Hunting—Shortening season of.

RICHMOND, VA., November 15, 1926.

HON. JOHN HENRY JOHNSON,
Gate City, Virginia.

MY DEAR SIR:

Your letter of the 7th was received the day the session of the Supreme Court began. I have been in court each day until today; hence this is my first opportunity to reply.

I note from your letter that you state it is the desire of your board of supervisors to shorten the hunting season, and in order to do this they have provided in their order, that hunters be allowed to hunt on Tuesdays and Fridays of each week, thereby limiting the hunting season to only two days in each week.

You then desire to be advised whether or not they have a right to do this. In my judgment, unquestionably the board has a perfect right to make this provision in its order. If you will read chapter 520 of the Acts of 1926, which is an amendment of section 2743 of the Code, you will see that one of the amendments is to the effect that the board, in order to prevent the destruction of game, fish, wild fowl, birds, etc., has the power to limit the manner and means by which they may be taken or killed, etc. I think this section of the law gives the boards of supervisors ample authority as to fixing the time when game may be killed in their respective counties.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

HOSPITALS—Record of officers and employees.

RICHMOND, VA., July 9, 1926.

MR. H. C. HENRY, *Superintendent,*
Central State Hospital,
Petersburg, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of July 2, 1926, in which you call attention to chapter 184 of the Acts of 1926, and, after giving a list of your officers and employees to the number of 209, you say:

"It was not clear to our board as to the employees who should be recorded in the book to be kept in accordance with this act. Should the book contain a record of the absence of any one of the three (3) firemen, two (2) traveling agents, one hundred and fifty-three (153) attendants and twenty-nine (29) other employees, whose absence is shown on the time books and deduction made from pay at the close of each month? As to the two (2) traveling agents, who are sent for patients committed to this hospital, their duties take them away from one to three days depending of course in which section of the State they are sent. The time lost by traveling agents when not going for patients is deducted, and is so entered on time books.

"It seemed to our board that a record should be made in the book in case of all other officers and employees (22) as shown in this letter.

"Thanking you to render us your opinion in regard to this matter as early as practicable in order that we may keep the proper record in accordance with this act,* *."

Chapter 184 of the Acts of 1926 requires the governing boards of State institutions to cause to be kept in the main office of such institution a blank book to be known as the registration record or proper alphabetical card system "in which it shall be the duty of all officers and salaried employees of such * * institution, * * to register upon leaving the * * institution to be absent from duty for more than one day whether on official or personal business."

I am of the opinion that all officers and salaried employees of your institution are required to comply with this act, which I suppose would include all the two hundred and nine officers and employees mentioned in your letter.

Very truly yours,

JOHN R. SAUNDERS,
Attorney General.

HOSPITALS—Authority of superintendent to transmit persons to State Farm.RICHMOND, VA., *April 8, 1927.*

HON. MEREDITH E. STICKLEY,
Attorney at Law,
Luray, Virginia.

MY DEAR SIR:

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

"It now develops that three men from various parts of the State were committed to a State institution as alcoholics for treatment, who had not been convicted at any time of a misdemeanor or felony in the State, but who were sent there by their respective families with the hope that they could be rehabilitated and returned to society in shape to carry on the business of life.

"These three men were not sent to the State hospital by court order, but at the instance of their families, but, of course, under section 1068 of the Code.

"These three men because of violation of the rules of the institution incurred the displeasure of the superintendent of the institution and were by him without any judicial order of court, transferred to the State Misdemeanant Farm, which is, as you well know, a part of the State Penitentiary Farm. The authority for doing this, the institution claims, lies in section 9 of the act, first stated in this letter."

It is my opinion that the superintendent of the hospital for the insane has no authority to transmit to the State Farm persons who are not deficient mentally, and persons who are not misdemeanants, but who on the contrary are alcoholics.

You are, of course, familiar with section 9, chapter 214 of the Acts of 1926 at page 400, which provides as follows:

"It shall be the duty of all superintendents of State hospitals for the insane and feeble-minded colonies to transmit to the superintendent of said farm the names and records of all misdemeanant inmates whose mental condition is sufficiently good to enable them to be detained at said farm, in order that their beds may be released for the more acute nonmisdemeanant mental cases, and when so transferred a per diem allowance of sixty cents shall be allowed out of the criminal fund."

Certainly the superintendent of hospitals does not get his authority from the above section, for this section only provides for misdemeanant inmates whose mental condition is sufficiently good to enable them to be detained at said farm. Nowhere is mention made in this section of alcoholics.

It is, therefore, my opinion that the superintendent of hospitals is wholly wanting in authority to transmit persons like those mentioned in your letter to the State Farm.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

INTERSTATE SHIPMENT—When ceases to be.RICHMOND, VA., *May 10, 1927.*

MR. B. W. RAGLAND, *President,*
Virginia Weights and Measures Association,
Richmond, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of April 29, 1927, in which you say:

"Please give me your interpretation of an inter-state shipment?
"When does it begin to be an inter-state shipment, and when does it cease to be an inter-state shipment?"

In reply to your first question I would call your attention to the case of *Werner Saw Mill Company v. Kansas City Southern Railway Company*, 194 Mo. A. 618 at page 623 in which the court said:

"Therefore, it is said that the shipment takes on the character of either intrastate or interstate commerce at the point the shipment is started. The rule reflected in the authorities is, that if, through continuity of movement, the goods are destined at the time they are started for a point in another State, the shipment is to be regarded as inter-state commerce and therefore falling within the purview of the interstate statutes in respect of rates, rather than intra-state, though the billing when looked to alone, may suggest the latter."

I would say further that whether the movement of a commodity is intra-state or inter-state commerce is to be determined in the majority of cases from certain elemental facts. These are the intention of the shipper as indicated by the bill of lading, the continuity of the movement and the delivery of the commodity under the shipment contract.

An inter-state shipment exists when a commodity has been turned over by a shipper to a common carrier to be transported from one State to another under a contract of shipment—the definite character of the shipment being fixed when the movement of the commodity has commenced for the purpose of transportation. *State v. Public Service Comm.*, 269 Mo. 63.

In answer to your second question I would say that the inter-state shipment ceases when the shipment has reached its final destination and there has been a delivery to the consignee. In other words, I would say that it ceases when the commodity has ceased to be in the custody of the carrier.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

INTOXICATING LIQUOR—Transporting of ardent spirits—Fee of attorney when defendant pleads guilty.

RICHMOND, VA., December 6, 1926.

HON. R. O. MORGAN, *Mayor,*
Richlands, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of recent date, in which you submit for my opinion two questions with reference to the prohibition law which are as follows:

"1. Under the prohibition act, where a person is caught transporting, or having ardent spirits in his possession, or driving an automobile under the influence of intoxicants, have I the right to impose punishment, if we have ordinances covering these offenses that do not conflict with the State laws?

"2. Under any of the above acts, if the Commonwealth's attorney is present at the hearing and the defendant pleads guilty, is the Commonwealth's attorney entitled to \$5.00, \$10.00 or \$25.00? As I see it, if the defendant pleads guilty, the Commonwealth's attorney gets \$5.00, and, if he has to prosecute in the corporation court, he gets \$10.00: but, if the defendant takes an appeal to higher court and he still has to prosecute, he is entitled to \$25.00."

If you will examine section 37 of the prohibition law, you will see that the various cities and towns of the Commonwealth have been given the power by the General Assembly to pass ordinances embracing such provisions of the prohibition law as are applicable. If your town has passed ordinances covering the offenses mentioned in your first question, and they are not in violation of section 37 of the prohibition law, or of the Constitution, you, as mayor of the town, have jurisdiction to try such cases. However, I call your attention to the provision contained in the second paragraph of section 34 of the prohibition law, which requires you in such cases to notify the Commonwealth's attorney of your county of such trial in time to permit him to attend the trial. This means that you must give him such reasonable notice as will enable him to come to attend the trial.

Responding to your second question, when a case is tried in your court, if the defendant pleads guilty and the Commonwealth's attorney is present, his fee is \$10.00, except in cases where the prosecution is for drinking ardent spirits in public places or for being drunk in a public place, which latter cases, if the defendant pleads guilty, the Commonwealth's attorney is entitled to no fee. If the defendant charged with drinking ardent spirits in a public place, or with drunkenness, does not plead guilty but contests the matter and is convicted, the Commonwealth's attorney is entitled to a fee of \$5.00. In all other contested cases, where the defendant is convicted, the Commonwealth's attorney is entitled to a fee of \$25.00.

Trusting this gives you the desired information, I am

Very truly yours,

JOHN R. SAUNDERS,

Attorney General.

INTOXICATING LIQUOR—Penalty for sale of less than gallon.

RICHMOND, VA., *January 13, 1927.*

HON. S. A. THOMPSON, *Mayor,*
Stuart, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of January 6, 1927, in which you say in part:

"The question has arisen before me as mayor of the town of Stuart over the construction of section 6 of the State prohibition act, as amended by the last General Assembly and found on page 721 of Pollard's Code for 1926. The question is as to what is the minimum penalty for the sale of a gallon or less of ardent spirits. The question arises under the exception in said statute, the exception reading as follows: 'Except that the sale of any ardent spirits, or the transportation thereof in the excess of one gallon shall be punished by a fine not exceeding \$500.00 and confinement in jail not less than three nor more than twelve months.'

"The specific question is as to whether the phrase 'in the excess of one gallon' applies to both the sale and the transportation of ardent spirits, or does it apply only to the transportation."

Section 6 of the prohibition law, as amended, so far as is applicable to the question here under consideration, provides as follows:

"Any person who shall violate any of the provisions of this act, shall, except as otherwise herein provided, be deemed guilty of a misdemeanor, and be fined not less than fifty dollars, nor more than five hundred dollars, and be confined in jail not less than one nor more than six months, *except that the sale of any ardent*

spirits, or the transportation thereof in the excess of one gallon shall be punished by a fine not exceeding five hundred dollars and confinement in jail not less than three nor more than twelve months. *.”* (Italics supplied.)

In my opinion the phrase “in the excess of one gallon” applies to the transportation only and not to the sale of ardent spirits, and the legislature intended that the sale of any ardent spirits should be punished by a fine not exceeding \$500.00 and confinement in jail not less than three nor more than twelve months and intended a similar punishment for the transportation of ardent spirits in excess of one gallon.

Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

INTOXICATING LIQUOR—Fee of officer seizing car.

RICHMOND, VA., *August 11, 1926.*

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

DEAR SENATOR:

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

“Some question has arisen here in regard to the fees of the officer making a seizure and of the attorney for the Commonwealth in automobiles sought to be confiscated under the prohibition law.

“The latter part of section 4875 (28) seems to imply that in the event the automobile, etc., is not finally confiscated under this section, or if there be a valid lien on said automobile, etc., at the time of the confiscation, such fee shall be ten dollars to the officer, and in the event that the automobile, etc., is not finally confiscated under said section, or if there be a valid lien on such automobile, etc., at the time of the confiscation, the attorney for the Commonwealth shall receive a fee of \$10.00, to be taxed as therein provided.

“What I want to know is this: if an automobile is confiscated and there is a valid lien thereon, is my fee as Commonwealth's attorney limited to \$10.00 or am I entitled to a fee of \$25.00?”

In reply I beg to call your attention to chapter 231, page 417, of the Acts of Assembly, 1926, in which the latter part of section 28 of the Layman prohibition law was changed so as to read as follows:

“Whenever any automobile or other vehicle or boat herein mentioned is seized under the provision of this section, the officer making such seizure shall be allowed a fee or reward of twenty-five dollars, to be taxed against the automobile or other vehicle or boat seized and confiscated. In the event the automobile or other vehicle or boat is not finally confiscated under this section, or if there be a valid lien on such automobile or other vehicle or boat at the time of the confiscation, such fee shall be ten dollars, and in the event the automobile or vehicle or boat is not finally confiscated under this section, or if there be a valid lien on such automobile or other vehicle or boat at the time of the confiscation, the attorney for the Commonwealth shall receive a fee of ten dollars, to be taxed against the automobile or other vehicle or boat or defendant, and collected as other costs in the manner provided by law, except where it has been conclusively shown that such automobile or other vehicle or boat was stolen from the owner, then such fee shall be taxed against the Commonwealth and paid in the manner now provided by law.

“Where two or more officers unite in capturing such automobiles or other vehicle or boat, said fee shall be divided among them equally.”

It is quite plain, I think, from this amendment that where there is a valid lien on an automobile which has been confiscated the fee of the officer or officers making the seizure, as well as that of the Commonwealth's attorney, is limited to \$10.00.

Yours very sincerely,

JOHN R. SAUNDERS,
Attorney General.

INTOXICATING LIQUOR—Fee of Commonwealth attorney.

RICHMOND, VA., *March 10, 1927.*

HON. R. B. STEPHENSON,
Commonwealth's Attorney,
Covington, Virginia.

MY DEAR SIR:

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

"As you know, the prohibition law provides for the payment of a fee of \$25.00 to the Commonwealth's attorney when the same is collected off of the defendant. It sometimes happens that the fine and costs are not paid for a long while after the conviction. It often appears that the defendant is totally insolvent and, after execution is returned no property found, I charge these fees up against the State and I am paid by the Auditor of Public Accounts. When paid by the Auditor, the fee is \$15.00. After payment by the State, sometimes these defendants pay up the fine and costs. I would like to know if I am entitled to the \$10.00 on each fee when it is paid in the way I have indicated. As you will see from the Auditor's form, a copy of which I enclose, I am required to make affidavit that I will receive no part of this fee. I can see no reason why the clerk should not pay me \$10.00 in each case and remit \$15.00 to the State treasury, as I have earned the fee and it should not be paid to the State."

I have discussed the subject of your inquiry with the Auditor, and both he and I agree that, when the total fine and costs have been collected out of the defendant, you would be entitled to that proportion of the fee taxed against the accused and collected which was not paid to you out of the State treasury. All that the State desires is that that part of the costs which have been paid out of the State treasury shall be refunded to it when collected.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

INTOXICATING LIQUOR—Forfeiture of car—Lap robe exempted.

RICHMOND, VA., *April 29, 1927.*

HON. GEORGE B. ROBEY,
Attorney at Law,
Fairfax, Virginia.

MY DEAR SIR:

I am just in receipt of your letter of April 27th. In this you state that the Hitt car which was seized while used in transporting ardent spirits will be forfeited to the Commonwealth.

You further state that at the time of the seizure of this car there were two lap robes in it and it is your opinion that these robes should not be sold, as they do not constitute any part of the car.

I am of the opinion that you are correct in this view. Section 28 of the Virginia prohibition law, among other things, provides as follows:

“When any officer charged with the enforcement of this law shall have any reason to believe that ardent spirits are being transported in any wagon, boat, buggy, automobile, or other vehicle * * * contrary to law, he shall have the right and it shall be his duty to search such wagon, boat, buggy, automobile, or other vehicle, and to seize any and all *ardent spirits* found therein which are being transported contrary to law. * * * He shall also take possession of the vehicle and team, or automobile, boat or any other conveyance * * * and turn the same over to the sheriff of the county, or sergeant of the city in which such seizure shall be made, and such vehicle and team, automobile, boat or other conveyance shall be forfeited to the Commonwealth.”

You will see from the reading of this provision of the law that there is no mention of any other personal property which is contained in the car.

To illustrate—a lap robe is no more a part, or equipment, belonging to the car than an overcoat would be, and surely an overcoat which happened to be in the car, though worn by the driver, or owner, could not be sold.

You are at liberty to show this letter to Mr. Farr, your Commonwealth's attorney.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

INTOXICATING LIQUOR—Fee of Commonwealth's attorney.

RICHMOND, VA., *February 19, 1927.*

HON. THOS. W. OZLIN,
Kenbridge, Va.

MY DEAR SIR:

Acknowledgment is made of your letter of February 18th, in which you call attention to sections 20 and 46 of the Virginia prohibition law as amended, and then request my opinion as to the proper fee to be taxed for the Commonwealth's attorney where he prosecutes and secures the conviction of one charged with the manufacture of distilled ardent spirits.

I had occasion to look into this question the early part of this week for the Commonwealth's attorney of Page county, and while the question is not free from doubt I have reached the conclusion that the General Assembly intended to provide a fee of \$25.00 for the attorney for the Commonwealth when collected out of the defendant in all prohibition cases, except those which have been otherwise expressly provided for. I do not think that in any event the attorney for the Commonwealth would be entitled to a fee of \$35.00 in such a case.

I may say for your information that there are a great many confusing prohibitions in the prohibition law that ought to be corrected, but it seems to me that each time the General Assembly amends the statute new conflicts have been introduced into the statute.

Sincerely yours,

JOHN R. SAUNDERS,
Attorney General.

INTOXICATING LIQUOR—Fee of Commonwealth's attorney.RICHMOND, VA., *February 11, 1927.*

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

MY DEAR MR. SPILLER:

I am just in receipt of your letter of February 9th, in which you say:

"Recently an automobile was seized by a city officer transporting twenty gallons of liquor. The seizure was properly reported to my office, and the automobile turned over to the city sergeant. My office filed an information against the automobile. The owner under section No. 28 of the liquor act took over the car under bond for twice the appraised value. The case was regularly set for hearing, the car proved guilty, and ordered sold by the court. Upon the statement of the sergeant that the car had been delivered to the owner upon his furnishing bond, and on my motion, the order of the court directed judgment against the principal and surety on the bond. Upon executing on this judgment the sergeant collected the appraised value of the car, \$200.00. The clerk of the court in taxing the costs fixed the fee of the officer making the seizure and the Commonwealth's attorney at \$10.00 each. He has construed section 28 to mean that before the officer and the Commonwealth's attorney are entitled to the fee of \$25.00 there must be an actual sale of the car, and has asked me to obtain a ruling from your office as to what fee to tax against the money so recovered."

In reply will state that section 28 of the prohibition law was amended, as you know, at the last session of the legislature, but there was no material change in that part of the section with which your letter deals.

You are entirely correct in your construction of the law as to what the fees of the Commonwealth's attorney and the officer making the seizure in the case mentioned by you, namely that, for each officer they should pay \$25.00. The fact that the car was not sold at public auction makes no difference whatever, because the same purposes were accomplished by judgment being rendered against the obligors in the bond who came forward and paid the money, namely, the appraised value of the car. Hence, it clearly follows that the fees should be the same as if the car had been sold at public auction. Unquestionably, therefore, the Commonwealth's attorney, the officer making the seizure are both entitled to a fee of \$25.00 each.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

INTOXICATING LIQUOR—Right of police justice to try case.RICHMOND, VA., *July 9, 1926.*

D. C. CAMPBELL, Esq.,
Chief of Police,
Covington, Va.

DEAR SIR:

Acknowledgment is made of yours of the 7th, in which you say:

"Will you please advise me if a mayor of a town or police justice has jurisdiction to try a case, under section 6, page 418, Acts of Assembly 1926, except it be a felony offense; or do all offenses that are committed under section 6 have to be tried before a jury?

"I understand from our Commonwealth's attorney that the mayor or police justice only has jurisdiction to try cases under sections 17 and 18."

In reply, I beg to say that I concur in the opinion of your Commonwealth's attorney that the mayor or police justice of a town has jurisdiction to try prohibition cases under sections 17 and 18, page 419, Acts of 1926. In other cases he has only the powers of an examining magistrate and must in proper cases hold the parties for action by the grand jury.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

INTOXICATING LIQUOR—Fees of officers.

RICHMOND, VA., July 29, 1926.

MR. W. T. COOLEY,
Pipers Gap, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of July 26, 1926, in which you ask what fee should be paid the arresting officer in a case of drunkenness where the offense occurred in December, 1925, and the warrant was not issued until July 26, 1926.

The fee would be governed by the law in existence at the time of the trial, namely, by section 46 of the prohibition law, as amended by chapter 231 of the Acts of 1926.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

INTOXICATING LIQUORS—Local ordinances.

RICHMOND, VA., June 9, 1927.

HON. T. J. BARHAM,
Newport News, Virginia.

MY DEAR JUDGE BARHAM:

Acknowledgment is made of your letter of recent date, in which you call attention to sections 5, 6 and 37 of the Virginia prohibition law. As you say, sections 5 and 6 of the prohibition law declare certain offenses against that law to be felonies, while the second paragraph of section 37 of the prohibition law declares that "wherever the violation of the prohibition law of this State is made a felony and the punishment therefor is confinement in the penitentiary, or whenever upon a prosecution for a second or subsequent offense against such ordinances for such act or acts as would have constituted a felony, had the offense been prosecuted and convictions had by and for the Commonwealth under the terms and provisions of the prohibition laws of the State, then in such cases, the ordinances herein provided for shall make such offenses misdemeanors." You request me to advise you whether I know of any case in which the question has been presented to the court as to the effect of the validity of a statute which authorizes a municipality to make an offense declared to be a felony by the State law a misdemeanor under a municipal ordinance.

I know of no case in this State in which this question has been raised, and, after a careful examination of the authorities, I am able to refer you only to the cases of *People v. Hanrahan*, 75 Mich. 611, 4 L. R. A. 751 (1889), and *City of St. Ignace v. Snyder*, 75

Mich. 649 (1889). In the case of *People v. Hanrahan, supra*, the Michigan statute made the offense of keeping a house of prostitution a felony. The city of Detroit, under authority of a legislative grant, made a similar offense a misdemeanor. The court in that case held that, notwithstanding this, the ordinance of the city of Detroit was valid and upheld the conviction under the city ordinance.

The same question was raised in the case of *City of St. Ignace v. Snyder, supra*, in which the ordinance was also upheld, I also call your attention to 28 Cyc. 759, 761.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

INTOXICATING LIQUORS—Sale of soft drinks by nonresidents.

RICHMOND, VA., July 29, 1926.

MR. NAT M. PICKETT,
Madison, North Carolina.

MY DEAR SIR:

In reply to your inquiry of July 26, 1926, in re whether you would have to pay a tax for the sale of bottled beverages sent over in your truck from North Carolina into Virginia, and sold here from same, I would state that you cannot sell soft drinks in this State under section 57 of the prohibition law, unless you have a place of business in this State. It appears from your letter that you have no place of business in Virginia, but that the sale is from your truck.

As to whether you could get a peddler's license and sell in this State, it would seem from the law that peddling soft drinks in this State is prohibited.

Section 75 of the prohibition law is as follows:

"Every nonresident manufacturer of soft drinks maintaining in this State distributing or storage warehouses for the sale of soft drinks by wholesale, shall pay for such privilege the sum of five hundred dollars to the Auditor of Public Accounts."

It, therefore, appears from this section that, if you are engaged in the sale of soft drinks by wholesale, you could sell in this State by paying to the Auditor of Public Accounts the sum of \$500.00 for this privilege.

As to whether you are engaged in intra-state or inter-state commerce, I would state that if the subject of the sale is within the jurisdiction of the State at the time the sale is made, as it appears in your case, it is intra-state, and not inter-state, and subject to State regulations as to license.

Therefore, it is my opinion that, unless you are engaged in selling soft drinks by wholesale and complying with the law by paying \$500.00 to the Auditor of Public Accounts for this privilege, you cannot sell bottled beverages in this State.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

INTOXICATING LIQUOR—Transportation of ardent spirits.RICHMOND, VA., *August 11, 1926.*

CHARLES PICKETT, ESQ.,
Attorney at Law,
Fairfax, Va.

DEAR MR. PICKETT:

Acknowledgment is made of your letter of August 7, 1926, in which you ask me to advise you whether a justice of the peace has jurisdiction to try a person charged with the transportation of less than one gallon of ardent spirits.

In response thereto, I call your attention to section 35 of the prohibition law, which gives exclusive jurisdiction, except as otherwise provided in the act, to the circuit and corporation courts of all cases arising under the prohibition law. The exceptions to this section are found in sections 17 and 18 of the prohibition act, as amended, and the last paragraph of section 33 of the act, where the prosecution is under the State law and not a county or town ordinance.

I do not think that the language of the second paragraph of section 6 of the prohibition law quoted in your letter was intended to give to a justice of the peace any jurisdiction to try such a case.

Trusting this gives you the desired information, I am

Yours very sincerely,

JOHN R. SAUNDERS,
Attorney General.

INTOXICATING LIQUOR—Fees of officers.RICHMOND, VA., *August 17, 1926.*

MR. LEWIS CRAWLEY, *Clerk,*
Cumberland, Virginia.

DEAR SIR:

Acknowledgment is made of your letter of the 12th, in which you say:

"I am writing to ask your opinion as to fees in prohibition cases to be taxed against the defendant, if convicted.

"(1) If several men are convicted for operating a still, etc., the officers only receive one fee of \$50.00 for capture of still and \$10.00 for each arrest made. Is this correct?

"(2) But if the same person is charged with manufacturing and also transporting ardent spirits and convicted of both charges, does the officer receive a fee of \$10.00 for each offense as arrest fee?

"(3) Under chap. 231, sec. 20, page 420, of the Acts of 1926,

'Whenever any still is seized, etc., the Commonwealth's attorney shall receive a fee of \$10.00, which shall be taxed against the defendant, etc.'

"Sec. 46, page 425, the Commonwealth's attorney is to receive a fee of \$10.00 if he actually appears before the justice hearing; but he shall at the final hearing receive a fee of \$25.00 inclusive of the fee allowed at the preliminary hearing. Does the Commonwealth's attorney receive the \$10.00 fee under sec. 20, and also a final fee of \$25.00? In other words, is the total Commonwealth's attorney's fee \$25.00 or \$35.00 for capture of still and conviction?"

In my judgment, your first question should be answered in the negative; the second in the negative. The fee of \$10.00 is for the arrest, regardless of the number of charges. Replying to your third question, I would say that the fee of \$25.00 taxed for the at-

torney for the Commonwealth includes the fee of \$10.00 taxed at the preliminary hearing and is not in addition thereto.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

INTOXICATING LIQUOR—Right of justice to try case.

RICHMOND, VA., *October 2, 1926.*

HON. WILLING BOWIE,
Attorney at Law,
Bowling Green, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of September 30, 1926, received this morning, in which you ask my opinion on the following hypothetical case:

X was arrested for a violation of the prohibition law, in that while under the influence of intoxicants, he drove or operated an automobile. A warrant was issued for trial before a justice of the peace in one district and transferred to the proper district. X asked for three justices of the peace, which request was granted. Whereupon, after several continuances the attorney for the Commonwealth filed an information against X in the circuit court and dismissed the prosecution before the justices.

You ask me to advise you whether this can lawfully be done. Assuming that the prosecution is under the State law and not under a county ordinance, the offense mentioned in your letter is made a misdemeanor, punishable by fine and imprisonment by section 25 of the prohibition law. Under section 33 of the same law, a justice of the peace is without jurisdiction in such a case except for the purpose of holding preliminary hearings, unless a plea of guilty is entered by the defendant, in which latter event, the justice, under certain circumstances, is authorized to fix the penalty and enter judgment.

I again assume, although you do not state it in your letter, that X does not desire to plead guilty. It would, therefore, seem that jurisdiction to dispose of such a case on a plea of "not guilty" rests exclusively with the circuit court of a county, or the corporation court of a city, and that the justices referred to in your letter would be without authority to finally dispose of the matter. This being so, it is my opinion, that section 11 of the act having authorized prosecution by information that the attorney for the Commonwealth is within his rights in dismissing the proceedings before the justices and in proceeding by information instead of waiting for an indictment by the grand jury on the return of the justices, or upon witnesses sent before the grand jury on his own motion.

If the prosecution was instituted not under the State law, but under a county ordinance, a different question might arise, which I would be glad to write you about if you would advise me if the prosecution was under the county ordinance.

Yours very sincerely,

LEON M. BAZILE,
Assistant Attorney General.

INTOXICATING LIQUOR—Sheriff's fee.RICHMOND, VA., *October 29, 1926.*

HON. E. PEYTON TURNER,
Attorney at Law,
Emporia, Virginia.

MY DEAR MR. TURNER:

Yours of the 28th instant addressed to Mr. Bazile received.

In this you desire to be advised what the sheriff's fee is for the seizure of a still and making arrest of the operator, under section 20 of the prohibition law.

In reply, I will state that the fee is fifty dollars, and not sixty dollars. The statute, in my judgment, is very clear and explicit. It states "whenever any still is seized under the provisions of this act, and the party owning or operating the same is arrested, the officer making the *seizure and arrest* shall be allowed a fee or reward of fifty dollars, etc."

I do not see how there can be any other construction placed upon the statute when it clearly says that the officer making the seizure and arrest shall be allowed a fee of fifty dollars.

I would further state that this has always been our construction of the law.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

INTOXICATING LIQUOR—Fee paid in connection with prosecution for violation of prohibition law.RICHMOND, VA., *November 23, 1926.*

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 refer to me a letter written to you by Hon. E. Peyton Turner, Commonwealth's attorney, with reference to the fees to be paid to him in connection with prosecutions for violations of the prohibition law.

Mr. Turner states in his letter that on April 28, 1926, one Washington filed a plea of guilty before a justice of the peace in his county for unlawfully selling ardent spirits; that on this plea he was sentenced to serve two months in jail and to pay a fine and the costs; that Washington failed to pay the fine and costs and was kept on the road force for three months on account of this. The justice taxed a fee of \$25.00 in favor of Mr. Turner, and Mr. Turner asks whether this fine, or any part of it, is payable out of the treasury.

It is not. See my opinion to Mr. Turner dated April 15, 1925 (Report of the Attorney General, 1923-1925, pages 234,235).

Mr. Turner further says:

"Again, as I understand the present law, attorneys for the Commonwealth are entitled to receive a fee of ten dollars where defendant pleads guilty to offenses under the prohibition law before justices of the peace, except offenses under sections 17 and 18. If defendant fails to pay fine and costs, and is insolvent, can attorneys for Commonwealth collect this last mentioned fee, or any part thereof, from the Commonwealth?"

After a careful examination of the second and third paragraphs of section 46 of the prohibition law, as amended by chapter 231 of the Acts of 1926, I am of the opinion that the fees provided for the attorney for the Commonwealth under this section as amended, would be governed by my opinion to Mr. Turner above referred to, and that, where the judgment is entered on a plea of guilty before a justice of the peace, no fee is payable to the attorney for the Commonwealth out of the treasury.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

INTOXICATING LIQUOR—Revocation of license for driving car while intoxicated.

RICHMOND, VA., *November 18, 1926.*

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

MY DEAR MR. BICKERS:

I beg leave to acknowledge receipt of your letter of November 17th, in which you desire certain information relative to section 25 of the Virginia prohibition law, which deals with the running of automobiles, engines, etc., while intoxicated.

You state in your letter that several cases for violation of this provision of the law have been tried before justices of the peace and the mayor in which the jail sentence has been suspended, and the trial judges have exercised the privilege of also relieving the person convicted of the forfeiture of his driving license for twelve months, and that you are of the opinion that they did not have the authority so to do, and desire my opinion in reference to this.

I think you are entirely correct. We have written a number of opinions in reference to this, and have always held that a conviction under this section automatically revokes the license of the operator of the machine for a period of one year, unless the party be tried for a violation of a town ordinance. In that case, I think the mayor would have the authority to permit the accused to continue to operate the machine, but I do not understand that any judge has the authority so to do, where he is tried for a violation of the State law. Certainly the justice of the peace has no right to suspend sentence in a case of this kind.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

I am basing this letter upon the opinion that the county of Culpeper has not adopted any prohibition ordinance.

INTOXICATING LIQUOR—Sale of patent medicines containing alcohol.

RICHMOND, VA., *December 6, 1926.*

HON. J. E. GILLY, *Mayor,
Jonesville, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of recent date, in which you request me to advise you whether, in my opinion, a town would have the authority to pass an or-

dinance prohibiting the sale of patent medicines containing more than one-half of one per centum of alcohol by volume, except upon prescription of a duly licensed physician.

After careful examination of sections 37, 59 and 97 of the prohibition law, I am of the opinion that a town would not have the authority to pass such an ordinance.

Section 59 of the prohibition law expressly authorizes the sale of certain patent medicines. Section 37 of the prohibition law, which is the authority for the passage of town ordinances relating to the prohibition law, declares that such ordinances must not be repugnant to the Constitution and laws of the State. Section 97 of the prohibition law, which you mentioned in your letter, has reference to ordinances already in existence at the time of the passage of the prohibition law.

Trusting this gives you the desired information, I am

Very truly yours,

JOHN R. SAUNDERS,

Attorney General.

TREASURERS—Execution of bond.

RICHMOND, VA., May 25, 1927.

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

DEAR MR. AUDITOR:

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

"Mr. A. C. Stacy was elected on November 6, 1923, treasurer of Buchanan county for term of four years commencing January 1, 1924, but failed to qualify and execute bond as required by law on or before the first day of January, 1924, therefore, the office of treasurer of Buchanan county became vacant.

"Hon. William E. Burns, judge of the circuit court of Buchanan county, by vacation order entered February 4, 1924, the office being vacant between January 1, 1924, and February 4, 1924, upon the application of Mr. Stacy appointed him treasurer of Buchanan county, and Mr. Stacy executed bond to the Commonwealth of Virginia on February 4, 1924, in the penalty of \$75,000.00 with the Maryland Casualty Company as surety.

"At the time this bond was executed Code section 2698 as amended, page 785, Acts 1922, required a county treasurer to give as surety some guaranty or security company (this section in the Code of 1919 permitted a county treasurer to give as surety either personal or corporate security, but the act of 1922 so amended the section as to permit only corporate security).

"The General Assembly by act of 1924, page 684, again amended Code section 2698 and authorized a county treasurer to give as surety personal or corporate security. This act was approved March 21, 1924, but did not contain the emergency clause, therefore, Code section 2698 as amended by Acts of 1924 did not become operative until ninety days from the final adjournment of the General Assembly which passed the act, which was March 18, 1924, therefore, the date this section as amended by act of 1924 became operative was June 16, 1924.

"On July 30, 1924, Mr. Stacy appeared in court and made motion to execute personal bond, and he was allowed to do so, and did on that date execute bond in the penalty of \$100,000.00 with personal security.

"The General Assembly in 1926 again amended Code section 2698, page 894, so as to provide that a county treasurer should give some guaranty or security company as surety (personal security could not be given). This act was approved March 25, 1926, but did not contain the emergency clause, therefore, was not in force until ninety days after final adjournment of the General Assembly which passed the act, which adjournment was March 23, 1926, therefore, this section as amended became operative June 22, 1926.

"Acting upon report of R. E. Williams, commissioner of accounts, who had been required by order of the court to examine the official bond of Mr. Stacy and report on its sufficiency, Mr. Stacy was required by the court to execute new bond in the penalty of \$250,000.00, which bond he did execute on August 10, 1926, with personal security, although the law, Code section 2698 as amended by Acts of 1926, which became operative on June 22, 1926, sometime prior to the execution of bond for \$250,000.00 with personal surety; namely, August 10, 1926, required bond with corporate security."

It appears from the above statement of facts that the last bond executed by Mr. Stacy was for \$250,000.00 and was executed on August 10, 1926, after section 2698 of the Code of 1919 had been amended by the Acts of 1926, pages 894-5. This section as last amended provides:

"* * * The county treasurer shall give as surety on his bond some guaranty or security company deemed sufficient by the court, judge or clerk before whom he qualifies, and he may execute such bond on a form prescribed by the Attorney General and to be furnished by the Auditor of Public Accounts to the clerks of the several courts. The penalty of said bond shall be such as the court or judge, or clerk may require, but not less than fifty per centum of the amount to be received annually by him. * * *"

Therefore, in my judgment, when Mr. Stacy executed his new bond on August 10, 1926, he should have furnished a guaranty or security company as his surety. It is possible that the personal sureties on the bond given August 10, 1926, would remain bound under the doctrine of estoppel, but, nevertheless, the bond given was not such a bond as is required by the law and the doctrine of estoppel is entirely too precarious for the State to assume the risk of entrusting State funds to the treasurer.

It is, therefore, my opinion that you, as Auditor of Public Accounts, should bring this matter to the attention of Mr. Stacy, the judge and the commonwealth's attorney of Buchanan county, and immediate steps should be taken to require Mr. Stacy to execute a bond with corporate security as required by the law.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

JUDGES—Expense Account of.

RICHMOND, VA., *March 12, 1927.*

JUDGE H. W. BERTRAM,
Harrisonburg, Virginia.

MY DEAR JUDGE:

Acknowledgment is made of your letter of March 11, 1927, in which you say:

"Since my qualification as judge of the twenty-fifth judicial circuit, and after examination of the statute controlling the question of mileage and expenses, I have been somewhat at a loss to determine the correct answers to certain questions which I wish to submit to you for your instruction.

"I reside in Harrisonburg and every two months hold court in Luray, which, by the nearest practicable route of travel, is 34 miles distant. It is my purpose to use my own automobile the greater part of the time in attending the terms at Luray. During pretty weather it is my purpose, also, to make the trip daily.

"I notice by section 3467 circuit judges are allowed mileage not to exceed 10c per mile; by section 3467-a they are allowed travelling expenses and hotel bills while holding court in their circuits; and by section 3473 it is provided: 'Mile-

age (unless otherwise provided) shall be at the rate of 10c per mile for every mile of necessary travel.

"What I desire to know is, when using my own car am I entitled to charge the 10c per mile for the necessary travel, in addition to hotel bills, and, if this is true, whether or not I would be entitled to make such charge for daily trips or be limited in my charges for mileage to only one round trip for a term?

"I will appreciate very much your giving me your opinion on these questions."

In reply, I beg to say that section 3467 of the Code is amended, so far as certain judges are concerned, by section 3467-A of Michie's Code, 1924, Acts of 1919, page 101, which authorizes the Auditor of Public Accounts to pay actual travelling expenses and hotel bills while holding courts in their circuits, including the courts of the counties in which the judges reside, "provided the judges do not reside in the county seats of the counties in which the judges reside." The result is that circuit judges no longer receive 10c per mile, but their actual expenses instead, in addition to their hotel bills.

I am informed by the Auditor that it is customary for the judges to make up their expense accounts on their own judgment what is right and fair, and that when they use their own machines they charge from five to eight cents per mile, which is allowed for every day they are used and not once for each term.

Very truly yours,

JOHN R. SAUNDERS,
Attorney General.

JUSTICE OF PEACE—Eligibility of board of supervisors for appointment.

RICHMOND, VA., *February 21, 1927.*

MR. W. H. BALDOCK, JR.,
Lynchburg, Va.

MY DEAR SIR:

Acknowledgment is made of your letter of February 11th, in which you request me to advise whether a member of the board of supervisors of your county is eligible for appointment as justice of the peace.

Section 2702, Code of 1919, as amended, prohibits a member of the board of supervisors from holding any other office, elective or appointive, during his term of office, except certain appointive offices of which the office of the justice of the peace is not included. Therefore, a supervisor is not eligible to hold the office of justice of the peace.

Trusting this gives you the desired information, I am,

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

JUSTICE OF PEACE—Fees in lunacy cases.

RICHMOND, VA., *May 2, 1927.*

MR. GEORGE MCD. BLAKE,
Louisa, Virginia.

MY DEAR MR. BLAKE:

Acknowledgment is made of your letter of April 28th, in which you wish to know what fee is allowed the justice of the peace in lunacy cases for issuing the warrant, and also for hearing the case.

In reply, I would call your attention to section 3507 of the Virginia Code, which says that in counties and towns, and in cities of less than twenty-five thousand inhabitants the justice of the peace shall be allowed \$1.00 for issuing the warrant and a fee of \$2.00 for trying misdemeanor cases, and also a fee of \$2.00 if it is a charge of felony.

Section 3507 also provides that in cities of twenty-five thousand, or more, inhabitants the justice of the peace shall be allowed a fee of 50c for issuing the warrant, a fee of \$1.00 for trying a misdemeanor case, and a fee of \$1.00 if it is a charge of felony.

Section 1021 of the Virginia Code provides that the justice of the peace shall receive a fee of \$2.00 for his services for committing patients to State hospitals. This section also allows the two physicians a fee of \$5.00 each for their services in the connection of committing patients to State hospitals.

Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

JUSTICES OF PEACE—Issuing warrants.

RICHMOND, VA., *June 23, 1927.*

HON. A. W. LEONARD, *Mayor,*
Vienna, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of June 22, 1927, in which you say:

“Has a justice of the peace the right to issue warrants and try cases of any kind in an incorporated town when the mayor is always available, and, when the said justice of the peace resides in said town, and said town being within his magisterial district.”

In my opinion the justice of the peace has the jurisdiction to issue the warrants referred to and try cases in the town, except those of which the juvenile justice has exclusive jurisdiction and offenses against the ordinances, or bylaws of the town.

Section 3011 of the Code of 1919 as amended does not give to a mayor exclusive jurisdiction for the trial of matters arising in his town. Except by implication, I think he has the exclusive jurisdiction over offenses against the ordinances or bylaws of the town.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

JUSTICE OF PEACE—Final disposition of felony.

RICHMOND, VA., *February 8, 1927.*

HON. A. WILLIS ROBERTSON,
Commonwealth's Attorney,
Lexington, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of February 5, 1927, in which you say in part:

"Some weeks ago, two men in Rockbridge county were before the judge of the juvenile court of the county, charged with taking a minor girl to the home of one of the men, where she remained all night and all the following day, and with contributing to her delinquency. On this charge, the girl was committed to the State Welfare Board as a delinquent and the men were fined \$25.00 each and costs for contributing to her delinquency. The father of the girl being dissatisfied with the action of the juvenile court in putting a severer punishment on the girl than was inflicted on the men went before a local justice and secured a warrant charging the men in question with violating section 4409 of the Code which is a felony. On this charge, counsel for the defendants relied on section 4775 of the Code, claiming that there was only one act involved and that act was the offense for which the men had been convicted in the juvenile court, which, it was claimed, constituted a bar to the felony proceedings. The justice of the peace sustained this contention and dismissed the felony charge against both parties. While it is evident that section 4775 of the Code is capable of the interpretation placed upon it by the magistrate, it is likewise a well established fact that our general criminal procedures do not contemplate that a justice of the peace shall have the power to make a final disposition of a felony charge, which by indirection he can do under the interpretation given to section 4775 aforesaid, by taking jurisdiction of a misdemeanor when the same act involves both a misdemeanor and a felony."

I have examined section 5 of chapter 483 of the Acts of 1922 with care, and, in my opinion, the jurisdiction of a juvenile and domestic relations judge, in all cases where felony has been committed, is limited to an examining officer. I do not think that he has the authority to finally adjudicate the matter by convicting a person of some misdemeanor which may constitute a minor part of the completed felony.

Therefore, I do not see how the judgment of the juvenile justice in the case referred to could be a bar to a subsequent prosecution for a felony.

In this connection I call your attention to the case of *Murphy v. Commonwealth*, 23 Gratt. 960, in which the court held that a conviction and punishment of a party by a justice for assault and battery would not bar a prosecution for wounding with intent to kill, by the same act for which he was punished by the justice. In so holding *Moncure, P.*, said (p. 963):

"* * And as the assault and battery charged in the indictment in this case, and of which the accused was convicted by the verdict and judgment, was felonious, therefore a justice of the peace had no jurisdiction of the case; and any judgment which may have been rendered by a justice as alleged in said plea is null and void, and was no bar to the prosecution for the felony."

In my opinion, the General Assembly never intended section 4775 of the Code to operate as a bar to a prosecution for a felony under the circumstances narrated in your letter, and I would suggest that you procure indictments against the men referred to.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

JUSTICES OF PEACE—Full court.

RICHMOND, VA., February 19, 1927.

IRA M. CARTER, ESQ.,
R. 1, Box 71,
Clinchport, Va.

DEAR SIR:

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

"Sec. 6022 of the Acts of the General Assembly of 1926, page 867, in trials of all civil and criminal warrants where the defendants demand a full court of justices and the trial justice summons the other two justices and only one of them appears, and the two justices try the case, is their decision legal or not, or will there have to be three justices?"

In reply, I beg to say that the act to which you refer has changed the law so that the presiding justice no longer controls the decision in the case you state, but it is given by a majority of those sitting.

It, therefore, follows, that if only two justices are sitting, it is necessary that both should agree in order to render a judgment. In the event that they do not agree, there is no decision and the case must be heard again with three justices sitting.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

JUSTICE OF PEACE—Jurisdiction in misdemeanor case.

RICHMOND, VA., May 11, 1927.

MR. J. P. ANDREWS, *District Forester,*
University of Virginia,
University, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of May 6, 1927, in which you say in part:

"I am writing to know if a magistrate has jurisdiction to impose a fine of more than \$100.00 in a misdemeanor case. The question has been raised in a case where action has been taken against a railroad company for failure to keep its right-of-way free from inflammable matter which from its nature and condition is liable to take fire from passing trains and communicate it to adjacent forest property."

I understand from your letter that the prosecution was instituted under section 3991 of the Code as amended by the Acts of 1926. The penalty for which is provided for by section 4003 of the Code of 1919. This last section provides as follows:

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

The offense for which the railroad in question is being prosecuted is a misdemeanor. Justices of the peace are given jurisdiction in all misdemeanor cases occurring within their jurisdiction by Code section 4987. The justice having jurisdiction of such a case would have the authority to impose a fine within the limits fixed by the section, which prescribes the punishment, namely, not less than \$10.00 more than \$500.00.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

JUSTICE OF PEACE—Fee.

RICHMOND, VA., May 31, 1927.

MR. J. G. CARLTON,
Toano, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of May the 28th in which you say in substance.

Notice was given to Mrs. Anderson to appear before me on Saturday the 28th for violation of the dog law.

You state that Mrs. Anderson appeared on May the 26th, two days before the trial, and plead guilty to the charge. You further state that you fined her \$5.00 and cost (\$4.75) making a total of \$9.75. You then state that the question as to whether you had a right to charge \$3.00 or \$1.00, for writing the warrant has been raised.

In reply I would say that it is my opinion that you would have a right to charge \$3.00 under section 3507 of the Virginia Code. Even though you were a bit premature in trying this case I see no reason why you should not get the \$2.00 for the trial of the case.

Mrs. Anderson evidently waived the right to appear on the 28th by coming to your office on the 26th and pleading guilty.

In conclusion, it is my opinion that you should not be denied the right to charge \$3.00 when you try a case other than the day on which it is set.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

JUVENILE AND DOMESTIC RELATIONS—Nonsupport of.

RICHMOND, VA., July 2, 1926.

HON. JOHN W. CARTER,
*Commonwealth's Attorney,
Danville, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of June 30, 1926, which came to the office in the necessary absence of the Attorney General. I am, therefore, taking the liberty of replying to the same.

In your letter you say:

"Kindly advise whether, in your opinion, the provisions of section 1936 of the Code apply to the father of an illegitimate child. In other words, assume that a defendant admits that he is the father of certain illegitimate children but has never married their mother nor taken any steps to legitimize the children, has never undertaken the obligation of their support or agreed to support them but, perhaps, may have bought some few articles for them. Is such a defendant punishable under section 1936 for nonsupport, assuming that the children are in destitute and necessitous circumstances?"

"Also, assuming that such children are destitute, dependent or delinquent, as defined in chapter 77 of the Code, could an illegitimate father, under similar circumstances, be cited and required to support such children, under the provisions of section 1912 of the Code?"

"Frankly, I have always been of the opinion that all of the statutes in Virginia dealing with this matter apply to fathers of legitimate children only and that under the Virginia law, there being no bastardy statute, the father of a legi-

itimate child acquired no rights and no obligations, in so far as his illegitimate children were concerned. However, two very eminent and able lawyers have taken a contrary view and as I have a prosecution which will be called for trial on Tuesday, next, involving these questions, I should like very much to have your opinion in the premises."

I fully concur in the opinion expressed by you in the last paragraph of your letter.

Under the common law, which is in force in this State, an illegitimate father is neither entitled to the custody of his illegitimate children, nor is he liable for their support.

The rule is thus stated in 1 Schouler on Marriage, Divorce, Separation and Domestic Relations, section 709, page 743 (6th ed.):

"Illegitimate children are not favored in law and have only such rights as are expressly granted by statute. The common-law rule, in absence of statutes, is that the putative father is under no legal liability to support his illegitimate offspring, and a statute providing for punishment of any person who shall neglect his child has no application to illegitimate children, but the mother generally will be bound to support it. * * *"

Neither one of the Code sections referred to by you makes it the duty of the father to support an illegitimate child. In 1922 or 1924 a bill was introduced in the legislature specifically making it the duty of the father of an illegitimate child to care for and support the same, and conferred on the juvenile courts the duty to enforce this statute. The bill, however, was defeated by the General Assembly and Judge Ricks, the juvenile judge of this city, advises me that he has ruled that the father of an illegitimate child cannot be required to support it, although prior to this action on the part of the General Assembly he had been inclined to take the view that the Code sections referred to by you in your letter were broad enough to cover such a parent. I feel satisfied that the legislature never intended to place such a duty upon the father of an illegitimate child.

Very truly yours,

LEON M. BAZILE,
Assistant Attorney General.

JUVENILE AND DOMESTIC RELATIONS COURT—Jurisdiction of juvenile justices.

RICHMOND, VA., December 18, 1926.

HON. POSIE J. HUNDLEY,
Commonwealth's Attorney,
Chatham, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of December 14, 1926, with reference to the opinion given by me on January 30, 1924, to Mr. W. A. Land, of Blackstone, Virginia (Report of the Attorney General, 1923-1925, page 278), in which I held that juvenile justices were without jurisdiction other than that conferred upon them by chapter 483 of the Acts of 1922, except as conservators of the peace.

This opinion had reference to the trial jurisdiction of juvenile justices, and I am still of the opinion that they are without jurisdiction to try cases other than those which they have been expressly authorized to try.

In the case of acknowledgments, affidavits and search warrants I am of the opinion that juvenile justices, by reason of sections 274, 4819, 4821 and 5205, have the same authority as other justices to take affidavits and acknowledgments and to issue search warrants other than in prohibition cases.

You will observe that a search warrant issued by a justice under authority of section 4819 is made returnable to the justice or court having jurisdiction to try the case, and, therefore, it is my opinion that a juvenile justice is a justice within the meaning of section 4819 of the Code, although he is without authority to make the warrant returnable to him.

In the case of search warrants issued under the prohibition law, the situation is different. Examination of section 31 of that law shows that the search warrant must be returnable to the justice issuing the same. A juvenile justice being generally unauthorized to try a matter of this kind, I am of the opinion that he would not have the authority to issue a search warrant in a liquor case where his jurisdiction depended solely upon the fact that he was a special justice.

Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

JUVENILE AND DOMESTIC RELATIONS COURT—Whether court of justice.

RICHMOND, VA., *November 5, 1926.*

LEITH S. BREMNER, Esq.,
Attorney at Law,
Travelers Building,
Richmond, Virginia.

MY DEAR SIR:

Acknowledgment is made of your communication of November 4, 1926, in which you say:

"A was convicted in the juvenile and domestic relations court of the city of Richmond on January 1, 1926, for contributing to the moral delinquency of an infant under the age of fifteen years, and sentenced to serve twelve months as a member of the State convict road force and to pay a fine of \$500.00 and costs amounting to \$4.50.

"This man's time on the road force has now expired with the good behavior allowances made to him, but he is not able to pay the fine and costs, and therefore, would have to remain in jail the additional period prescribed by law for the non-payment of fine and costs.

"I have applied to the judge of the hustings court of the city of Richmond under section 4952 of the Code of 1919 for relief at the suggestion of the Governor's office, and some question arises as to whether the juvenile and domestic relations court of this city is the court of a justice within the meaning of section 4952 of the Code of 1919. Will you please give me the benefit of your opinion in this matter?"

Section 4952 of the Code, so far as is applicable to the question here under consideration, reads as follows:

"When a person is confined in jail by order of any court or justice until he pay a fine and the costs of prosecution, * * * on application to the circuit court of the county or corporation court of the city where confined, or to the judge thereof in vacation, such court, or judge in vacation, as the case may be, if to such court or judge it shall appear proper, may order the person to be released from imprisonment without the payment of the fine and costs, * * *."

The juvenile court in the city of Richmond is provided for by chapter 81 of the Code, beginning with section 1945 of the Code of 1919, as amended. This section pro-

vides that the council "shall elect a special justice of the peace, who shall be a person licensed to practice law, to be known as the judge of the juvenile and domestic relations court of such city."

Throughout the Code juvenile and domestic judges are spoken of as special justices of the peace. See Code sections 1945-1950, inclusive, as amended, and section 1950-a of the Code of 1924.

In my opinion a special justice of the peace is one of the justices contemplated by section 108 of the Constitution and, although designated as a special justice presiding over a court called the juvenile and domestic relations court, he is nevertheless a justice of the peace within the meaning of section 108 of the Constitution. *Ex Parte Settle*, 114 Va. 715 (1913).

In the *Settle* case an act was passed by the General Assembly providing for a trial justice in counties having a population greater than three hundred inhabitants per square mile. It was contended that this act violated section 87 of the Constitution, which declared that "The judiciary department shall consist of a Supreme Court of Appeals, circuit courts, city courts, and such other courts as are hereinafter authorized." The court in answering this contention called attention to section 108 of the Constitution and said (pp. 720-721): "The act under consideration creates no new office."

I am, therefore, of the opinion that the juvenile and domestic relations court of this city is the court of a justice within the meaning of section 4952 of the Code of 1919, and that the relief provided for by that section could be granted only by the corporation court of the city of Richmond, or the judge thereof in vacation.

This letter is not written with any idea of interfering with the decision that may be reached by the hustings court of the city of Richmond in the matter, but is written on your statement that the judge of that court had stated that he would not regard my opinion as an interference with the duty imposed upon him by law in construing the statute before him in this matter.

Yours very truly,

LEON M. BAZILE,
Assistant Attorney General.

JURY—Women not qualified to serve on.

RICHMOND, VA., June 30, 1927.

MRS. CHARLES P. LEE, *President,*
Virginia League of Women Voters,
Grace-Securities Building,
Richmond, Virginia.

DEAR MRS. LEE:

I beg to acknowledge receipt of yours of the 28th, in which you ask me the following questions:

- (1) The present status of women to qualify for jury service.
- (2) In the event said ruling should be that jury service is not now open to women, then set forth the steps necessary for women to qualify and serve as jurors in the State of Virginia.

In reply to your first question, I beg to say that section 5984 of the Code provides who may serve on juries as follows:

"All male citizens over twenty-one years of age who shall have been residents of this State two years, and in the county, city or town in which they reside one year next preceding their being summoned to serve as such, and competent in other respects, except as hereinafter provided, shall remain and be liable to serve as jurors; but no officer, soldier, seaman, or marine of the United States army or navy shall be considered a resident of this State by reason of being stationed herein, nor shall an inmate of any charitable institution be qualified to serve as juror. The following persons shall be disqualified from serving as jurors:

"First, idiots and lunatics;

"Second, Persons convicted of bribery, perjury, embezzlement of public funds, treason, felony or petit larceny;

"But no male citizen over sixty years of age shall be compelled to serve as a juror."

It is, therefore, my opinion that women are not qualified to serve on juries in Virginia.

Replying to your second question, I would say that, in order for women to be so qualified, it would be necessary for the General Assembly to amend that section accordingly.

Very sincerely yours,

JOHN R. SAUNDERS,

Attorney General.

LAWYERS—License for practicing.

RICHMOND, VA., May 25, 1927.

MR. A. NEAL WILLIAMS,

Attorney at Law,

Wytheville, Virginia.

MY DEAR MR. WILLIAMS:

Acknowledgment is made of your letter of May 24, 1927, in which you say in part:

"An incorporated town, having simply a mayor's court but no corporation court, provides in its charter that attorneys practicing therein shall pay a tax of \$7.50 for the privilege of practicing law in that town. The town and county are included in the twenty-first judicial circuit, and there is no separate court for the town except the ordinary mayor's court.

"An attorney pays his State revenue tax in full. In the light of the Tax Bill, section 115, etc., can he be required to pay the additional town license tax by reason of the mere fact that he resides in the town and has his office there?"

I have examined section 3072 of the Code and find that it provides in part as follows

"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; * * *."

It is my opinion that under this section the council of a town may impose a license tax upon any attorney who practices in such town, for the reason that sections 115 and 116 of the tax bill impose a State license tax upon attorneys who engage in the practice of law.

I am not unmindful of the second sentence of section 115 of the tax bill, which provides:

“* * A revenue license to practice law in any county or corporation shall authorize such attorney to practice in all the courts of this State without additional license. * *”

This in my opinion means without additional State license.

Sincerely yours,

LEON M. BAZILE,
Assistant Attorney General.

LICENSE—Dealer's tag.

RICHMOND, VA., July 7, 1926.

MR. JOHN T. MOLING,
Justice of the Peace,
Falls Church, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of July 6, 1926, in which you ask the following questions:

“First—Has a purchaser of a machine from a dealer the right to operate, etc., said machine on a dealer's tag, after the said machine has been turned over to purchaser?”

“Second—Has a dealer the lawful right to loan the use of his dealer's tag to a purchaser until such time as the said purchaser procures the regular license tags?”

Both questions should be answered in the negative. See chapter 149 of the Acts of 1926 and chapter 90 of the Code of Virginia, 1919, as amended.

Very truly yours,

JOHN R. SAUNDERS,
Attorney General.

LICENSE—Duty of commissioner of revenue to assess attorneys.

RICHMOND, VA., July 22, 1926.

HON. EARL P. ROSE,
Commonwealth Attorney for Buchanan County,
Grundy, Virginia.

MY DEAR MR. ROSE:

I beg leave to acknowledge receipt of your letter of the 20th, in which you state that while you were away on your vacation, the time expired in which the commissioner was to accept money for your license as an attorney, and he did not know what to do, and requested that you write me in regard to this.

Of course, you know that the commissioner of revenue assesses the license tax of all attorneys, and then they are paid to the treasurer. I presume from your letter that the commissioner of revenue overlooked assessing you. If such be true, all you have to do is to request him to assess you with your license tax; take the same to the treasurer, pay him and take his receipt therefor.

In further response to your letter, the law provides that the mayor shall notify you when there is a charge of violation of the prohibition law. The attorney for the Commonwealth is, of course, entitled to no fee when he does not attend, and personally or through an assistant, prosecute the same.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

LICENSE—Sale of drugs.

RICHMOND, VA., December 14, 1926.

SAMUEL L. ADAMS, ESQ.,
South Boston, Va.

DEAR SIR:

Acknowledgment is made of your letter of December the 8th in which you request an opinion as to whether a citizen who owns a drug store in South Boston can sell drugs without a registered pharmacist, where no prescriptions are filled?

In the first place I would say that the store mentioned in your letter as a drug store is not legally a drug store or pharmacy for the owner of the store (himself not a registered or an assistant registered pharmacist) has not complied with the third (3) paragraph of section 1682 of the Virginia Code which provides as follows:

"Any person, firm or corporation may own and conduct a pharmacy as herein defined, provided the same is conducted and operated under the personal supervision of a registered pharmacist, but during the temporary absence of such registered pharmacist, a registered assistant pharmacist may act in place of the said registered pharmacist."

You will therefore see from the above section that for it to be a drug store or pharmacy a registered or assistant registered pharmacist must be employed by the owner. This apparently is not true in your case.

Furthermore I might say that paragraph 2 of section 1682 of the Code says in epitome that it shall be unlawful to have on the place of business a sign "pharmacy," "pharmacist," "drug store," "druggist," "prescriptions filled" or like words, unless it has complied with paragraph 3, *supra*.

Assuming for the sake of argument merely that it is really a pharmacy or drug store, it would be permissible for one not a registered or assistant registered pharmacist, under the 4th paragraph of section 1682 of the Code to make sales (other than the compounding and sale of drugs, medicines and poisons) of patent and proprietary medicines and nonpoisonous drugs and medicines in original packages.

If it is not a drug store or pharmacy and I dare say it is not, section 1681 of the Code gives merchants and retail dealers the following authority:

"* * * and merchants and retail dealers may sell the ordinary nonpoisonous domestic remedies in original packages put up by manufactures and wholesale dealers, proprietary medicines, copperas, cream tartar, calomel, Paris green, bluestone, carbolic acid, London purple, sweet spirits nitre, paregoric, tincture of iron, and quinine in original packages which conform to the requirements of this chapter and such other medicines as the board of pharmacy may permit.
* * *"

Trusting this will give you the desired information, I am

Yours very sincerely,

JOHN R. SAUNDERS,
Attorney General.

LICENSE—Revocation of.

RICHMOND, VA., December 3, 1926.

DR. J. W. PRESTON, *Secretary-Treasurer,*
Virginia State Board of Medical Examiners,
Roanoke, Virginia.

DEAR DR. PRESTON:

I am just in receipt of your letter of November 30th. In this you state that your board has information to the effect that one Dr. William M. Morrison (Robinson) who holds a certificate to practice medicine in Virginia, on the 11th of this month pleaded guilty in New York to the violation of the narcotic act, and is now serving an indefinite term in the New York county penitentiary.

You then desire to be advised whether the Virginia State Board of Medical Examiners, under the provisions of the law, has a right to proceed at once to revoke the license of this physician, while he is serving his present sentence, or whether the board should give him an opportunity to appear in person before this is done.

I think the better course for the board to pursue would be to have a notice served on this party, requesting him to appear before the board, and give him a hearing before this license is revoked. Of course, had he been convicted in Virginia, there would be no need for this, but there may be some circumstances connected with this prosecution which the board would like to learn before revoking his license. Of course, there is no need to serve this notice on him while he is serving his term as he could not appear, but as soon as he is released, this could be done. Strictly speaking, the board might revoke his license at once, but I question the wisdom of this procedure.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

LIEN NOTE—What constitutes.

RICHMOND, VA., August 23, 1926.

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

DEAR SIR:

Acknowledgment is made of yours of the 11th, in which you say:

"I am writing you at the request of Mr. Chas. U. Williams who has been retained to represent the United Motors, Inc., on an Oakland coach sold to R. B. Godsey.

"On Godsey's application for title it shows he paid for the car with cash and a note amounting to \$1,100.00. Godsey disappeared and we have recently learned that this car figured in an accident in Florida. The driver disappeared and the car was sold by order of justice of the peace H. Dale Payne.

"I have advised Mr. Williams that in my opinion a simple open note did not constitute a lien, and he requested that I secure from you your opinion as to whether or not I am correct in my construction of the law."

In reply I beg to say that, in my judgment, you are entirely correct in holding that a simple note does not of itself constitute a lien.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

MARGINAL RELEASES—Who pays fee.RICHMOND, VA., *February 3, 1927.*HON. DAN DRINKARD, *Clerk,*
Bristol, Va.

DEAR SIR:

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

"Will you please construe the last part of section 6456 of the Code for me relative to who is to pay the fee in marginal releases—and the clerk's fee for so releasing on the margin of the page of the book wherein the incumbrance or lien is recorded shall be fifty cents, which shall be paid by the person or persons applying for the release, unless otherwise provided in the said mortgage, deed of trust, vendor's lien or mechanic's lien.' The person or persons applying for the release, does this mean the person who actually comes into the clerk's office and asks for the release or does it mean the holder of the lien who actually releases it although he does not actually physically apply for same. I have had this question come up numerous times and our lawyers vary on the way they construe this section and I will appreciate your opinion in the matter.

"Some of our lawyers take the stand that the party who pays off the lien is the one who applies for the release and is bound for the fee instead of the holder of the note.

"Of course, I am only referring to liens that are not specified in the instrument as to who pays the release fee."

In reply, I beg to say that, in my judgment, the phrase "person or persons applying for the release" can have no other meaning except what the words taken in their ordinary acceptance imply. The person applying for the release may come into the clerk's office in person or communicate with the office by mail, or send a messenger, but the applicant under this section is the person liable for the fee.

Yours very truly,

JOHN R. SAUNDERS,
*Attorney General.***MILITARY BOARD OF VIRGINIA—Insurance for National Guard.**RICHMOND, VA., *June 8, 1927.*MAJOR S. H. BAYLOR,
Assistant to the Adjutant General,
Richmond, Virginia.

MY DEAR MAJOR BAYLOR:

Acknowledgment is made of your letter of June 7, 1927, which, in the necessary absence of the Attorney General from the office, I am taking the liberty of answering. In your letter you say:

"The board on compensation insurance, appointed by the Adjutant General of Virginia, convened today and investigated the matter of compensation insurance carried by the Adjutant General's Office on the Virginia National Guard, and directed the recorder to obtain a ruling on the following from the Attorney General of Virginia:

"(a) Is the Military Board of Virginia required to carry a standard type of compensation insurance policy on the Virginia National Guard?

"(b) In lieu of the standard type of compensation insurance policy, can the Military Board of Virginia carry its own insurance on the Virginia National Guard, setting aside an appropriate amount of the military appropriation to cover such insurance?"

Section 2 (b) of the Workmen's Compensation Law was amended by chapter 534 of the Acts of 1926. Under this law as amended, officers and members of the National Guard are declared to be employees of the State, and the last sentence of this section reads as follows:

"For the purpose of this act the average weekly wage of the non-commissioned officers and members of the National Guard shall be deemed to be thirty dollars."

Section 8 of the Workmen's Compensation Law provides that neither the State nor any employee of the State "shall have the right to reject the provisions of this act relative to payment and acceptance of compensation," and section 11 of the act requires every employer to insure the payment of compensation to his employees in the manner provided in this act.

Section 68 of the Workmen's Compensation Law requires every employer subject to the act to "insure and keep insured his liability thereunder in some corporation, association, organization or State insurance fund authorized to transact the business of workmen's compensation insurance in this State, or in some mutual insurance association," or in lieu of this to furnish "to the Industrial Commission satisfactory proof of his financial ability to pay direct the compensation in the amount and manner and when due as provided for in this act." In such latter case, the Commission is authorized to require the deposit of an acceptable security, indemnity, or bond to secure the payment of compensation liabilities as they are incurred.

Answering your questions, I am of the opinion that the Military Board is required by the Workmen's Compensation Law to either insure its liability under that act in some insurance company authorized to carry on its business in Virginia, or, in lieu of this, to become a self-insurer as provided in section 68 of the Workmen's Compensation Law quoted above.

The question as to whether the Military Board will carry liability insurance or self-insurance is one of policy and not of law to be determined by the members of the board.

Trusting this will give you the desired information, I am

Very truly yours,

LEON M. BAZILE,
Assistant Attorney General.

MISDEMEANORS—Compensation paid to whom.

RICHMOND, VA., December 6, 1926.

MR. WAYNE B. WHEELER,
General Counsel and Legislative Superintendent,
30 Bliss Building,
Washington, D. C.

MY DEAR SIR:

Acknowledgment is made of your letter of December 2nd, in which you ask the following questions:

"Do magistrates or mayors of towns and villages, under the laws of your State, receive any compensation or fees in State misdemeanor cases, where a defendant is acquitted? If so, how is it paid and by whom?"

"Are there any statutes in your State of any kind, authorizing the payment into the municipal county or township treasury of any portion of the fines im-

posed by a mayor of a village or other municipality for a misdemeanor against State law? If so, where are they found and how long has such legislation existed?"

¶ In reply to your first request, section 3507 of the Code of Virginia, as amended, fixes the fees to be paid to a justice of the peace. However, when the fees are paid by the Commonwealth by reason of an acquittal of the accused, section 3504 of the Code of 1919, as amended, provides that only half of the fee prescribed by law shall be paid out of the treasury to a justice of the peace.

Responding to your second question, no part of the fine imposed for the violation of a State law can be paid into a municipal treasury. Section 134 of the Constitution of Virginia provides that fines collected for offenses against the State must be paid into the Literary fund. Therefore, any law which attempted to give a part of the fine to the locality would be unconstitutional. Several acts passed by the General Assembly, including one passed at the 1926 session, have been declared unconstitutional by this office on this account.

Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,

Attorney General.

MISDEMEANORS—Penalties for.

RICHMOND, VA., August 14, 1926.

HON. J. LEE STONEBURNER,

Justice of the Peace,

Mount Jackson, Va.

DEAR SIR:

Acknowledgment is made of yours of the 13th, in which you ask for my construction of section 66 of the recent motor vehicle law (chapter 474 of the Acts of 1926) especially in reference to the minimum fine which may be imposed. This section is as follows:

"Penalties for misdemeanors.—(a) It shall be unlawful and constitute a misdemeanor for any person to violate any of the provisions of this act except section thirty-two unless such violation is by this act or other law of this State declared to be a felony.

"Every person convicted of a misdemeanor for a violation of any of the provisions of this act for which no other penalty is provided shall for a first conviction thereof be punished by a fine of not less than five dollars nor more than one hundred dollars or by imprisonment in jail for not less than one nor more than ten days; for second such conviction within one year such person shall be punished by a fine of not less than ten dollars nor more than two hundred dollars or by imprisonment in jail for not less than one nor more than twenty days, or by both such fine and imprisonment; upon a third or subsequent conviction within one year such person shall be punished by a fine of not less than twenty-five dollars nor more than five hundred dollars or by imprisonment in jail for not less than ten days nor more than six months, or by both such fine and imprisonment."

It seems clear to me that this section applies to every offence for which no specific penalty is provided by the section prescribing the offence.

You say that one of the motor vehicle officers claims that this construction is wrong

because of section 37 (b). I find no reference in that section to any penalties whatever. In case any violator is dissatisfied with your decision, he may appeal to the circuit court.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

MOTOR VEHICLE COMMISSION—Bond required.

RICHMOND, VA., *October 25, 1926.*

LEWIS CRAWLEY, ESQ.,
*Clerk of the Court of
Cumberland, Virginia.*

DEAR MR. CRAWLEY:

Acknowledgment is made of your letter of October the 21st in which you wish to know whether the Deputy Motor Vehicle Commissioners appointed in the various counties are required to give a bond upon their qualification before the clerk.

In reply I would say that chapter 565 of the Acts of 1926 provides that a bond should be given. It would also seem that chapter 148, section 3 of the Acts of 1926 provides that a bond should be given by these commissioners.

Trusting this will give you the desired information, I am

Very truly yours,

JOHN R. SAUNDERS,
Attorney General.

MOTOR VEHICLE COMMISSION—Driving of motor truck for compensation.

RICHMOND, VA., *November 19, 1926.*

MR. W. L. PENICK,
South Boston, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of November 15, 1926, in which you state that you operate a large hardware store in South Boston, that you employ in your store five clerks and that, in hauling goods to and from the depot for your use only, these clerks drive your truck, sometimes one and sometimes another, but none of them are employed for that purpose but as clerks in the store and merely drive the truck as incident to their general employment.

The matter is governed by section 19½ of chapter 149 of the Acts of 1926, which, so far as is applicable to the question here under consideration, reads as follows:

"Any person other than the owner of a motor vehicle which has been registered and licensed to be operated in this State, *whose principal duty or occupation is the driving of a motor vehicle for compensation*, and every person who drives a motor vehicle while in use as a public or common carrier of persons or property before he shall operate a motor vehicle in this State shall first take out a chauffeur's license. * *'" (Italics supplied.)

You will see from the above quoted portion of section 19½ of chapter 149 of the Acts of 1926 that your salesmen are not required to obtain chauffeurs' licenses, if the facts furnished me by you are correct.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

MOTOR VEHICLE COMMISSION—Operation of truck—Certificate "C."RICHMOND, VA., *February 21, 1927.*C. C. BOWEN, ESQ.,
Middletown, Va.

DEAR SIR:

Acknowledgment is made of yours of the 17th, in which you say that you deliver milk, feed, ice, etc., for yourself and neighbors in a truck which you own and operate yourself.

In my judgment, you should have a class "C" certificate issued by the State Corporation Commission, but as long as you operate your own truck, it is not necessary for you to have a chauffeur's license.

Yours very truly,

JOHN R. SAUNDERS,
*Attorney General.***MOTOR VEHICLE COMMISSION—Automobiles—Reservation of lien recorded.**RICHMOND, VA., *February 21, 1927.*HON. JAS. M. HAYES, JR.,
Motor Vehicle Commissioner,
Richmond, Va.

MY DEAR SIR:

Acknowledgment is made of your letter of February 17th, 1927, in which you say in part:

"The words in section 11 of chapter 149 found on page 266 of the Acts are as follows: 'Said certificate of title, when issued by the motor vehicle commissioner showing a lien or encumbrance, shall be deemed adequate notice to the Commonwealth, creditors and purchasers that a lien against the motor vehicle exists and the recording of such reservation of title, lien or encumbrance in the county or city wherein the purchaser or debtor resides or elsewhere is not necessary and shall not be required, and motor vehicles registered under this act shall not be subject to, but shall be exempt from the provisions of section fifty-two hundred and twenty-four of the Code of Virginia, as amended, nor shall recordation of such lien in any other place for any other purpose be required if properly recorded in accordance with this act.'"

"Section 28 of the Prohibition Act at the bottom of page 423 reads: 'And provided, further, that whenever a quantity of ardent spirits is illegally transported in any automobile or other vehicle and it shall appear to the satisfaction of the court from the evidence that the owner or lienor of such vehicle and team, automobile, boat or other conveyance was ignorant of the illegal use to which the same was put, and that such illegal use was without his connivance or consent, express or implied, and that such lienor had prior to the commission of such offense duly recorded in the county or corporation in which the debtor resides, the instrument creating such lien and that 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, then such court shall have the right to relieve such owner or lienor from forfeiture herein provided; provided, however, that such lienor or innocent owner shall pay the costs incident to the capture and custody of such automobile or other vehicle and to the trial of said cause.

"The words quoted from section 11 of the automobile law were written by Mr. Leon Bazile, your assistant. The question now arises that a number of lienholders are having trouble securing possession of cars caught transporting liquor when they have complied with the automobile law and have not complied with the prohibition law."

It is true that the amendment to the Motor Vehicle Law was drawn at your request with the approval of the Governor by Mr. Bazile for the purpose of permitting a central registration for liens and reservation of title to automobiles. However, unknown to you, or Mr. Bazile, subsequent to the passage and approval of chapter 149 of the acts of 1926, the General Assembly amended and re-enacted section 28 of the prohibition law which contains the provision quoted in your letter.

The amendment to section 28 of the prohibition law having been passed and approved subsequent to the passage and approval of chapter 149 of the Acts of 1926, in my opinion, takes priority over the provision of section 11 of chapter 149 of the Acts of 1926 quoted above. And, therefore, it is necessary for the reservation of title or lien to be recorded not only in your office, but in the clerk's office of the county in which the owner of such machine resides in order to escape the forfeiture provision of section 28 of the prohibition law as amended.

A very similar situation existed prior to the re-enactment of section 11, chapter 149 of the Acts of 1926, and the Court of Appeals held in the *Piedmont Finance Company vs. Commonwealth* that the car should not be returned after seizure where the lien had not been recorded in the clerk's office of the county in which the owner of the car resided.

Trusting that this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

MOTOR VEHICLE COMMISSION—Refund on "C" permit issued 1926.

RICHMOND, VA., *February 23, 1927.*

R. F. TAYLOR, ESQ.,
Saltsville, Va.

DEAR MR. TAYLOR:

Acknowledgment is made of yours of the 17th, in which you say:

"On the 27th day of July, 1926, I purchased a "C" permit to operate a car for hire, which did not in any way conflict with other bus lines holding a different class of permit. At the time I purchased this permit it was the universal impression that this class of permit should cost \$25.00 and this amount was charged me for same. Since that time it has been discovered that it should have been only \$10.00, and the State has refunded on all errors of this nature since the first of the year 1927. I have written Mr. Hayes and have his letter before me, stating that his office cannot refund on permits issued in the year 1926. Now, it seems to me that, if this charge of \$25.00 was an overcharge, I am entitled to a refund. Please advise as to the correctness of my views in regard to this matter and greatly oblige."

In reply, I beg to say that, in my opinion, Mr. Hayes is correct in saying that, having made his settlement with the Auditor of Public Accounts for the year 1926, it is now too late to make any refund, and that the only way to secure it is through an act of the legislature.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

MOTOR VEHICLE COMMISSION—Fees for arrest.

RICHMOND, VA., August 23, 1926.

MR. H. PRINCE BURNETT,
*Attorney for the Commonwealth,
Independence, Virginia.*

MY DEAR SIR:

Acknowledgment is made of yours of the 20th, in which you say:

"With reference to the new Motor Vehicle law, especially with reference to arrests made by sheriff or constable for violation of same, I will appreciate your giving me your opinion as to how these officers are to be paid, and can they receive any fees for making arrests? From a reading of the act it seems that they must be on a fixed salary before receiving any fee."

In reply beg to say that sub-section C of section 2, chapter 149 (page 258) Acts of 1926 is as follows:

"The provisions of any or all of the motor vehicle laws of the State of Virginia shall be enforced by the motor vehicle commissioner, or any of his deputies, inspectors, or civilian appointees, who shall be in complete uniform, or shall display his badge or other sign of authority."

"Every county, city, town or other political sub-division of the State may also enforce the provisions of the motor vehicle laws of the State of Virginia through the agency of any constable, peace or police officer, sheriff or deputy, provided that such officer shall be completely uninformed at the time of such enforcement or shall display his badge or other sign of authority, and with the further provision that all officers making arrests incident to the enforcement of the motor vehicle laws of this State shall be paid fixed and determined salaries for their services, and shall have no interest in, nor be permitted by law to accept the benefit of any fine or fee resulting from the conviction of an offender against any provision of the motor vehicle laws of the State of Virginia."

It is very plain from the language of this provision that no officer may receive any fees or part of any fine resulting from the conviction for a violation of the Motor Vehicle Laws of Virginia. All compensation for such services must be paid to such officers in the form of fixed salaries.

You understand, of course, that I am construing the statute as it is written and not expressing any opinion as to its wisdom.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

MOTOR VEHICLE COMMISSIONER—Authority of constable.

RICHMOND, VA., July 10, 1926.

MR. W. A. DICKINSON,
*Attorney at Law,
Cape Charles, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of July 1, 1926, in which you ask for my opinion on the following statement of facts:

"Mr. W. H. Dix, constable for Northampton county, wants advice from you as to whether he can enforce the motor vehicle laws of this State, since he does not receive any fixed or regular salary as constable. Section 2, (c), of the

Motor Vehicle Law, as found in the pamphlet issued by the Motor Vehicle Commissioner, seems to be in conflict with the general law that a constable or any officer can enforce any laws of this State, and especially misdemeanors, when they are committed in the presence of the officer."

Sub-section (c) of section 2 of chapter 149 of the Acts of 1926 provides as follows:

"The provisions of any or all of the motor vehicle laws of the State of Virginia shall be enforced by the motor vehicle commissioner, or any of his deputies, inspectors, or civilian appointees, who shall be in complete uniform, or shall display his badge or other sign of authority.

"Every county, city, town or other political sub-division of the State may also enforce the provisions of the motor vehicle laws of the State of Virginia through the agency of any constable, peace or police officer, sheriff or deputy, provided that such officer shall be completely uniformed at the time of such enforcement or shall display his badge or other sign of authority, and with the further provision that all officers making arrests incident to the enforcement of the motor vehicle laws of this State shall be paid fixed and determined salaries for their services, and shall have no interest in, nor be permitted by law to accept the benefit of any fine or fee resulting from the conviction of an offender against any provision of the motor vehicle laws of the State of Virginia."

From a careful reading of this section I do not think that it was the intention of the act to prevent constables and other fee officers from making arrests for violations of the motor vehicle laws, but I do think that it was the intention to prohibit such officers from receiving or accepting the fees provided by law in such cases.

Trusting this gives you the desired information, I am

Very truly yours,

JOHN R. SAUNDERS,

Attorney General.

MOTOR VEHICLE COMMISSIONER—Fee of officer.

RICHMOND, VA., *March 17, 1927.*

HON. J. R. H. ALEXANDER,
Commonwealth's Attorney,
Leesburg, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of March 16, 1927, in which you request me to advise you whether a traffic officer employed by the Motor Vehicle Commissioner is entitled to a fee of \$1.50 for making an arrest for violation of the motor vehicle laws to be taxed against the defendant when convicted.

You call my attention to sub-section "C," section 2 of chapter 149 of the Acts of 1926, which provides in part:

"* * * * * all officers making arrest incident to the enforcement of the motor vehicle laws of this State shall be paid fixed and determined salaries for their services, and shall have no interest in, nor be permitted by law to accept the benefit of any fine or fee resulting from the conviction of an offender against any provision of the motor vehicle laws of the State of Virginia."

You also refer to chapter 235 of the Acts of 1926 and state that it is the contention of the motor vehicle officer that this latter section authorized him to receive the fee which is prohibited by chapter 149 of the Acts of 1926. It is my opinion that sub-section "C" of section 1 of chapter 149 of the Acts of 1926 prohibits the payment of

fees to officers making arrests for violation of the motor vehicle laws of the State of Virginia.

As you say in your letter, chapter 235 of the Acts of 1926 in no manner affects or repeals the above mentioned provision of chapter 149 of the Acts of 1926. I, therefore, concur in your opinion that the officer in question is not entitled to collect fees from defendants arrested by him and convicted of violating the motor vehicle laws of this State.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

MOTOR VEHICLE COMMISSIONER—Common carrier of passengers—Mail carrier.

RICHMOND, VA., May 16, 1927.

HON. G. W. LAYMAN,
Attorney at Law,
New Castle, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of May 13, 1927, in which you request an opinion as to whether a mail carrier who is engaged solely in carrying mail and who carries passengers along with the mail, and who receives compensation for these services, is required under chapter 551 of the Acts of 1926 to secure a license.

In reply it would seem that when mail carriers carry passengers along with the mail and receive compensation therefor that he is classed as a common carrier and should comply with the provisions of chapter 551 of the Acts of 1926.

The latter part of section 2 of chapter 555 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 the 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 551 of the Acts of 1926, 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.

Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

MOTOR VEHICLE COMMISSIONER—Adjusting of lights.

RICHMOND, VA., January 13, 1927.

HON. C. T. BEATON, *Mayor,*
Boykins, Va.

DEAR SIR:

Acknowledgment is made of yours of the 8th, in which you say:

"Some of our people have been told that it was not necessary for them to have their automobile lights adjusted unless they were going to use their cars on State Highway roads.

"For the benefit of the public, I will thank you to write me in regard to this, so that I may be able to post your letter for their information."

In reply I beg to say that section 50 of chapter 478 (p. 763) of the Acts of 1926 provides as follows:

"(a) When vehicles must be equipped. Every vehicle upon a highway within this State during the period from a half hour after sunset to a half hour before sunrise and at any other time when there is not sufficient lights to render clearly discernible any person on the highway at a distance of two hundred feet ahead, shall be equipped with lighted front and rear lamps as in this section respectively required for different classes of vehicles and subject to exemption with reference to lights on parked vehicles as declared in section fifty-eight."

The word "highway" is defined in subsection (n) in the definitions of the terms of this Act (p. 766):

"(n) 'Highway'—Every way or place of whatever nature open to the use of the public for the purpose of vehicular travel."

It will thus be seen that all of the provisions of this act as to lights on highways apply to all of the public roads of the State and not to roads in the State Highway System only.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

MOTOR VEHICLE COMMISSIONER—Chauffeur's license.

RICHMOND, VA., June 1, 1927.

LAIRD L. CONRAD, ESQ.,
*First National Bank Building,
Harrisonburg, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of May the 28th in which you say in part:

"A few days ago Officer Via, who is under the employ of the State Motor Vehicle Commissioner, issued a summons against an employee of Harrisonburg Baking Corporation, requiring him to appear before a Magistrate and answer for his failure to have a chauffeur's license. This matter was referred to me by the Harrisonburg Baking Corporation, and, upon examination of section 2129 of the Code, I was of the opinion that he was not required to obtain such a license, as this section contains the following clause:

"Except that a member of a family, or a servant regularly employed for other purposes of a licensed owner of a machine who is otherwise qualified, may operate such machine without paying additional license."

You further state that the person driving the car was a servant of the corporation and regularly employed for other purposes by the corporation, and for that reason should not under section 2129 of the Code have a license.

In reply I would call your attention to section 19½ of chapter 149 of the Acts of 1926 at page 271, which provides in part as follows:

"Chauffeurs' License; how obtained; form of license.—Any person other than the owner of a motor vehicle which has been registered and licensed to be

operated in this State, whose principal duty or occupation is the driving of a motor vehicle for compensation, and every person who drives a motor vehicle while in use as a public or common carrier of persons or property before he shall operate a motor vehicle in this State shall first take out a chauffeur's license. The applicant shall make application to the motor vehicle commissioner, which application shall give the name of the applicant, his residence, postoffice address, age and experience in operating machines, and shall be sworn to before some officer authorized to administer oaths. There shall be appended to such application a statement by two reputable citizens, that the applicant is a fit person and is competent to operate a machine."

You will notice from the above section that it has the same title as section 2129 of the Code. For this reason it is my opinion that section 19½ repeals section 2129 of the Code. As you will see from the reading of section 19½ that the provision "Except that a member of a family or a servant regularly employed for other purposes of a licensed owner of a machine who is otherwise qualified, may operate such machine without paying additional license" has been done away with.

As the law stands to date any person whose principal duty or occupation is the driving of a motor vehicle for compensation must take out a chauffeur's license. But for the abolition of the servant feature mentioned in your letter I would say then that a license is not necessary, but as stated above this provision regarding the servant of the corporation who is employed regularly for other purposes by the corporation has been done away with.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

MOTOR VEHICLE COMMISSIONER—Chauffeur's license.

RICHMOND, VA., June 21, 1927.

LAIRD L. CONRAD, ESQ.,
Attorney at Law,
Harrisonburg, Virginia.

MY DEAR MR. CONRAD:

Acknowledgment is made of your letter of recent date, with reference to my letter to you of June 1, 1927, in regard to chauffeur's license. In your letter you say in part:

"The employee is not employed for any particular type of service, but is used by the employer as the employer sees fit, and as circumstances may determine. An employee used for inside work may be sent out upon a route, or one who has ordinarily been used upon a route may be shifted to inside work. They are not selected because of any particular skill in driving a motor vehicle, nor is any particular skill required for driving trucks of the capacity used by the employer. Secondly, the duties of the employee when out upon a route are primarily those of a salesman, and the driving of the truck is merely incident thereto. Their duties, in addition to driving the truck, are to take orders for delivery at a subsequent date, to deliver the orders previously received, to collect for orders delivered upon that trip and account therefor to the corporation, or where customers are charge customers, to periodically collect for past deliveries. They are the only employees who come into contact with the customer, and are expected, as a part of their duties, to maintain satisfactory business relations between the employer and the customer, adjusting any complaint with an old customer and hunting out additional business with new customers. In brief, they are the sales force of the employer and are selected and continued in service for their ability to produce and sustain trade for the employer and to

keep the accounts receivable in their own territory in a satisfactory condition for the employer."

The language of section 19½ of chapter 149 of the Acts of 1926, so far as is applicable to the question here under consideration, is as follows:

"Any person other than the owner of a motor vehicle which has been registered and licensed to be operated in this State, whose principal duty or occupation is the driving of a motor vehicle for compensation, and every person who drives a motor vehicle while in use as a public or common carrier of persons or property before he shall operate a motor vehicle in this State shall first take out a chauffeur's license. * * *"

This office has ruled that salesmen or drummers using automobiles of employers and operating same as incidental to their duty as salesmen are not required to secure a chauffeur's license before operating the same. (Report of Attorney General, 1916, pp. 28, 32).

Therefore, if your client is a salesman who drives a truck as an incident to the sale and delivery of his employer's goods, I am of the opinion that he could do so without obtaining a chauffeur's license. On the other hand, if he is employed to drive the truck and that is his principal duty or occupation, a chauffeur's license would be necessary.

It seems to me that the question is always one of fact and that each case must necessarily be determined upon the facts involved in it.

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

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

MOTOR VEHICLE COMMISSIONER—Chauffeur's license.

RICHMOND, VA., *June 1, 1927.*

J. W. WOLFE, Esq.,
Crozet, Va.

DEAR SIR:

Acknowledgment is made of yours of the 27th, in which you say:

"I would like to have your opinion on section 19½ of the Motor Vehicle Laws as to whether a man driving a truck, selling and delivering a manufactured article such as bread, and working for a salary should take out a chauffeur's license, or would he be exempt as a salesman."

In reply I beg to say that, under section 19½ of the Motor Vehicle Law, a chauffeur's license is required of a person driving another person's car or a person driving his own vehicle which is used as a public or common carrier of persons or property.

As I understand your letter, the person you mention is operating a car which does not belong to him, and, therefore, he should take out a license.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

MOTOR VEHICLE COMMISSIONER—Chauffeur's license.RICHMOND, VA., *April 6, 1927.*

HON. J. DONALD RICHARDS,
Attorney at Law,
Warrenton, Virginia.

MY DEAR MR. RICHARDS:

I am just in receipt of your letter of April 5th in which you desire the construction of section 19½, chapter 149 of the Acts of the Assembly, 1926—a portion of which section reads as follows:

“Any person other than the owner of a motor vehicle which has been registered and licensed to be operated in this State, whose principal duty or occupation is the driving of a motor vehicle for compensation, and every person who drives a motor vehicle while in use as a public or common carrier of persons or property before he shall operate a motor vehicle in this State shall first take out a chauffeur's license.”

You further state in your letter that a number of owners of automobiles and trucks in your vicinity who drive their own cars and haul persons and property for compensation have been arrested for failure to take out a chauffeur's license. You will observe from the reading of that part of section 19½ which I have quoted above that every person who drives a motor vehicle, while in use as a public or common carrier of persons or property, is required to take out the chauffeur's license. That, in my judgment, means that regardless of the fact as to whether or not the party is the owner of the motor vehicle, where he is engaged as a common carrier of persons or property, he is required to first obtain a chauffeur's license before operating such motor vehicle.

I think the statute is very clear and very plain.

I would further add that this is the ruling of the motor vehicle commissioner and this office has so held in several opinions rendered since the Acts of 1926 went into effect.

Yours very sincerely,

JOHN R. SAUNDERS,
Attorney General.

MOTOR VEHICLE COMMISSIONER—Oath of officer.RICHMOND, VA., *August 11, 1926.*

MR. V. N. DAVIS,
1412 Confederate Avenue,
Richmond, Virginia.

MY DEAR SIR:

Acknowledgment is made of your request of recent date that I advise you whether a motor vehicle officer is required to take an oath before entering upon the discharge of his duties.

In response to your request, after examining chapter 18 of the Code, especially section 269 thereof, I am of the opinion that motor vehicle officers as well as other officers are required to take the oath prescribed by this section.

When you have qualified, section 16 of chapter 368 of the Acts of 1924 provides that you shall have police power and authority throughout the State “to arrest without writ, rule, order or process, any person in the act of violating or attempting to violate

in his presence, any of the provisions of this act," and, in addition, you are made a peace officer of this State "for that purpose."

Trusting this gives you the desired information, I am

Very truly yours,

JOHN R. SAUNDERS,
Attorney General.

MOTOR VEHICLE COMMISSIONER—Distribution of funds from classes C and E licenses.

RICHMOND, VA., June 16, 1927.

HON. J. H. BRADFORD,
Director of the Budget,
Richmond, Virginia.

DEAR MR. BEADFORD:

Acknowledgment is made of yours of the 6th, in which you say:

"The State Highway Commissioner has asked the Governor's opinion as to the disposition of revenue collected under the amendatory Motor Bus Acts of 1924 and 1926 from two classes of motor vehicles designated in these acts as C and E respectively.

"The original motor bus act passed in 1923 provided for the allocation of the revenues collected under that act between State and county highways. The subsequent acts created two additional classes C and E and the question presented is whether or not section 7 of the Acts of 1923 applies to the revenue collected from the classes designated in the Acts of 1924 and 1926 as C and E."

I have read with care the letter of Honorable H. G. Shirley, Chairman of the State Highway Commission, addressed to Governor Harry F. Byrd, under date of May 5, 1927, which you enclosed. Section 7 of chapter 161, page 195, of the Acts of 1923 is as follows:

"It shall be the duty of the secretary of the Commonwealth to keep a separate account of all moneys collected under this act, and any and all moneys so collected shall be accounted for by him and paid into the State treasury monthly. Each of the payments aforesaid shall be accompanied by a statement showing the amount collected for the use of roads comprising the State highway system and the amount collected for the use of roads comprising the county highway system of each county, the amount in each case to be computed upon a mileage basis. The amount so remitted which was collected for the use of the State highway system shall be placed to the credit of, and shall supplement, the then current appropriation made for the maintenance of the roads comprising that system; and the amount so remitted which was collected for the use of the county highway systems shall be semi-annually distributed among, and paid to, the counties shown by said statements to be entitled thereto, said payments to be made on warrants of the auditor of public accounts to the county treasurers and appropriated by the respective boards of supervisors, or other local road authorities, for the maintenance of the roads over which said motor vehicles shall operate."

I do not find that this section was amended either by the act of 1924 or that of 1926, and, therefore, it remains in full force and effect. It is my judgment that merely adding classes C and E to the classes of motor vehicle carriers does not in any way effect the disposition of license taxes accruing from them. It is, therefore, my opinion that the distribution of these funds should be in accordance with section 7 of the Acts of 1923.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

Copy to Hon. H. G. Shirley, Chairman State Highway Commission.

MOTOR VEHICLE COMMISSIONER—Tax based on capacity of truck.RICHMOND, VA., *June 15, 1927.*

J. E. PARROTT, Esq.,
Attorney at Law,
Stanardsville, Va.

DEAR MR. PARROTT:

I have your letter of the 13th, in which you wish me to advise you regarding a gentleman operating a truck in your county with capacity of two and one-half tons, but who is hauling more than two and one-half tons at a load but less than five tons. The question is whether his license should be based upon the capacity of his truck or upon the loads which he actually hauls.

An examination of chapter 161, page 195, of the Acts of 1923 clearly indicates that all of the license taxes are based upon the capacity of the various vehicles mentioned and not upon the loads actually carried. As you suggest, it is a matter of common knowledge that all trucks are at times loaded beyond their registered capacity. This fact was known to the legislature when the rates were fixed and they wisely made the standard the registered capacity of the trucks, which could be ascertained, and not the loads that would be carried, which would be unascertainable except in a few isolated instances.

You further ask my advise in regard to a gentleman who employed a neighbor to haul lumber for him at the rate of \$4.00 per 1,000 feet plus 5 per cent of the anticipated profit from the sale of the lumber; the question being whether the gentleman who does the hauling is a partner in the lumber to such an extent that he may be said to be hauling the lumber for himself and, therefore, not liable to pay the tax of \$50.00 required by section 2 of the act aforesaid.

In my opinion, this arrangement does not make the man who does the hauling a partner in the business of selling the lumber. The arrangement seems to be rather an offer of a possible bonus and does not carry with it any ownership of the lumber or any of the liabilities which would result from a partnership. It is, therefore, my opinion that the man who does the hauling is liable for the tax.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

NATIONAL OIL CO. AND DOMINION OIL CO.—Allowance of secret rebates.RICHMOND, VA., *February 18, 1927.*

HON. T. GRAY HADDON,
Amer. Natl. Bank Bldg.,
Richmond, Va.

MY DEAR SENATOR HADDON:

Acknowledgment is made of your letter of January 28, 1927, in which you, as counsel for the National Oil Company and Dominion Oil Company, request my opinion on the following questions:

"1st:—Whether it would be legal for these companies to enter into an agreement, whereby they would agree not to allow secret rebates; the payment of the expense of installing pumps and tanks, for the purpose of securing the exclusive trade of a retailer; the payment of bonuses; and the payment of expenses of improvements at retail stations and pump locations, for the purpose of securing the exclusive trade of the retailer.

"2nd:—Whether it is lawful for these companies to sell goods to a retailer at a certain price, and then allow a rebate of one, two or three cents per gallon from this price; or

"3rd:—Either to allow a rebate in the form of so-called 'sign Rentals,' or rentals to the retailer of one, two or three cents per gallon on gas sold to him; or renting the station from the operator or retailer at one price per month and then renting it back to the said operator or retailer at a very much lower price per month, upon the condition that the operator or retailer will handle exclusively the goods of these companies; or in the form of expenses for improvements at such filling stations, upon the condition that the retailer will handle exclusively the goods of these companies."

I have examined chapter 185-a of the Virginia Code of 1924 with care, particularly sections 4722 (5) and 4722 (8) thereof. When these two sections are considered it would appear that rebates paid by a vendor on the agreement or understanding that the vendee shall not use or deal in the goods, wares and merchandise, etc., of a competitor or competitors of the vendor are in violation of this chapter of the Code, when the effect of such contract may be to substantially lessen competition or to create a monopoly.

There are certain exceptions contained in the latter part of section 4722 (8) of the Code of 1924 which apparently weaken, if they do not destroy, the provisions of the earlier part of that section, but unquestionably the general spirit of the act is to disapprove of the giving of rebates of the kind referred to in the first paragraph of your letter. It would follow from this that an agreement among vendors to refrain from violating the provisions or the spirit of the Anti-Trust Law could not constitute a violation of the same.

The answer to your second question, in view of the provisions of section 4722 (8) of the Code of 1924, would depend apparently upon the purpose for which the rebate was given and the effect that resulted from the giving of such rebate. Unquestionably rebates given by a vendor to a vendee on the agreement or understanding that the vendee shall not deal in the goods, wares or merchandise, etc., of a competitor or competitors of the vendor, where the effect of such contract may be to substantially lessen competition or to create monopoly, are generally forbidden, but it would appear that the law does not prohibit discrimination in prices when made in good faith to meet competition or on account of differences in grade, quality or quantity, or to meet differences in the cost of transportation. I am inclined to think, however, that these differences in price mentioned in the last part of section 4722 (8) mean the price at which the commodity is sold and does not contemplate the giving of secret rebates.

The answer to your last question would depend upon the same considerations referred to above. If the effect of the agreement referred to is to create a monopoly or to substantially lessen competition, I am inclined to the opinion that such leases would violate the provisions of chapter 185-a of the Code of 1924.

Trusting that this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

NEWSPAPER—Place of Publication.

RICHMOND, VA., March 19, 1927.

W. F. CARNE, ESQ., *Editor,*
Fairfax Herald,
Fairfax, Va.

DEAR MR. CARNE:

Replying to yours of the 14th, answer to which has been delayed because of an

illness which I suffered for several days, I will say that my opinion has always been that the place of publication of a newspaper was governed by the post office from which it was circulated and not necessarily at the place in which it was printed. I have observed that a number of country papers are printed at a place other than that of distribution and most of them, I believe, are partly printed elsewhere.

I notice in Words and Phrases, Vol. 6, p. 5394, the following statement:

"The place of publication" of a newspaper is that indicated upon the face of the newspaper, although it is printed, and part of its issue mailed, at another town or city. *Ricketts v. Village of Hyde Park*, 85 Ill. 110.

Similar cases are cited in this work to the same effect. You can find this work, I am sure, in some lawyer's office at Fairfax.

Hoping this will give you the desired information, I am, with best regards,

Very sincerely yours,

JOHN R. SAUNDERS,
Attorney General.

NEW REGISTRATION—Authorization of.

RICHMOND, VA., February 21, 1927.

HON. E. PEYTON TURNER,
Commonwealth's Attorney,
Emporia, Va.

MY DEAR MR. TURNER:

I beg to acknowledge receipt of yours of the 19th, in which you ask my advice in the following matter:

"The registration books have been lost or mislaid in Belfield Precinct, this county, and in the town of Emporia. There is no evidence, so far as I know, that these books have been 'destroyed by fire or otherwise.' They have, as I have said, been lost or mislaid.

"Is section 90 of the Code broad enough to warrant the electoral board in providing a new registration in this case? If not, I don't know how to proceed.

"So far as I know and can discover, sections 90 and 108 cover the subject of new registrations. As I read these provisions of the law, section 108 requires the clerk of the court to provide copies of the permanent registration rolls made by the boards of registration appointed by the last Constitutional Convention, and section 90 covers new registrations with respect to all voters not on the permanent rolls. Is this your view?"

■ In reply I beg to say that, in my opinion, section 90 of the Code is broad enough to authorize a new registration in the case you mention. I believe the words "or otherwise," are sufficiently comprehensive to embrace any catastrophe by which the registration books become unavailable. As you say, unless this construction is put upon this language, there is no provision at all for securing new registration books when the old ones have been lost, stolen, or mislaid.

Yours very sincerely,

JOHN R. SAUNDERS,
Attorney General.

NOTARY PUBLIC—Seal of notary at large.

RICHMOND, VA., *November 4, 1926.*

MR. H. H. CHALKLEY,
P. O. Box 785,
Norfolk, Virginia.

MY DEAR SIR:

I am in receipt of yours of October 30th. In this you state that you have recently qualified in the corporation court of the city of Norfolk as notary public for the State at large. You then desire to be advised whether or not any special form of a certificate has been approved by this office for notaries public at large.

In reply, will state that no special form has been approved. I do not think that your present seal which reads as follows—"H. H. Chalkley, Notary Public, Norfolk, Virginia" is sufficient. It seems to me it should indicate that you are notary public for the State at large, as is described in chapter 159 of the Acts of 1926. I would, therefore, suggest the following seal:

"H. H. Chalkley,
Notary Public for State
of Virginia at large,
Norfolk, Virginia."

Trusting this gives you the information desired, I am

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

NOTARY PUBLIC—Fee for seal.

RICHMOND, VA., *June 14, 1927.*

MR. E. W. REID,
Box 1141,
Norfolk, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of June 8, 1927, in which you request me to advise you what charge a notary is entitled to make for the use of his seal when superimposed on an adhesive stamp.

The fees of a notary are prescribed by section 3480 of the Code, and no additional fee is provided in those cases where he affixes his seal to an acknowledgment or affidavit certified by him. A notary is prohibited from affixing his seal to all except certain exempted instruments without attaching an adhesive stamp, for which the State charges \$1.00 as a tax on the use of his seal. See section 16 of the Tax Bill and for the exemption see section 2402 of the Code.

You will observe from the seventh paragraph of section 3480 of the Code that it is provided that "For other services a notary shall have the same fee as the clerk of the circuit or city court for like services."

The fortieth paragraph of section 3484 of the Code, with reference to clerks' fees, provides as follows: "For annexing the seal of the court to any paper, writing the certificate of the clerk accompanying it, and writing certificates of the judge, if the clerk be requested to do," the clerk shall be entitled to a fee of fifty cents. As this fee, however, is provided for something more than the annexing of a seal, I do not think that it would be applicable to a notary public.

It is, therefore, my opinion that a notary is not entitled to charge an additional fee for the annexing of a seal to an instrument. As I have said before, however, he is prohibited from annexing his seal to any instrument without the tax stamp provided by section 16 of the Tax Bill.

Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

OFFICE—Compatibility of.

RICHMOND, VA., *December 9, 1926.*

HON. EARL H. WRIGHT,
Portsmouth, Virginia.

MY DEAR MR. WRIGHT:

In response to your inquiry over the telephone as to whether or not a member of the legislature is eligible to the office of sheriff of a city or county, I would say that he is. Section 45 of the Constitution, among other things, 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 the election by the people."

The sheriff is an officer elected by the people; hence this office is an exception of which a member of the legislature is eligible. I would state that, in many instances, members of the legislature have been appointed and elected Commonwealth attorneys during the term for which they were elected as members of the legislature, because the office of Commonwealth attorney is one filled by the election by the people. Presuming, of course, that the sheriff of the city of Portsmouth is elected by popular vote, therefore, it follows that a member of the legislature is eligible to this office.

With kindest regards, I am

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

OFFICES—Compatibility of.RICHMOND, VA., *June 10, 1927.*

MR. A. B. GARNER,
Lewisetta, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of May 27th in which you wish to know whether a person who is a deputy tax collector can retain that position and serve as supervisor if elected.

In reply I would call your attention to section 2702 of the Virginia Code which provides in part as follows:

"No person holding the office of county treasurer, sheriff, attorney for the Commonwealth, county clerk, commissioner of the revenue, superintendent of the poor, county surveyor or supervisor shall hold any other office, elective or appointive at the same time, * * *."

You will therefore see from the above section that the deputy tax collector cannot hold the office of supervisor unless he resign the office of deputy tax collector, for he cannot hold both at the same time.

While a deputy treasurer is appointed by the treasurer and holds office at the will and pleasure of the treasurer, at the same time he in reality discharges the same duties which are imposed upon the treasurer. He has the authority to collect taxes, to restrain and levy, and to do all the other things which the treasurer is empowered to do by law.

You will, therefore, see that while the statute is silent as to a deputy treasurer, at the same time it would be incompatible with the office of supervisor, because the treasurer is required to make a settlement before the board of supervisors.

I am therefore of the opinion that a deputy treasurer cannot hold his office as such, and also be a member of the board of supervisors.

Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

OFFICERS—Eligibility of Federal employees to hold State offices.RICHMOND, VA., *March 11, 1927.*

HON. WILSON M. FARR,
*Commonwealth's Attorney,
Fairfax, Virginia.*

MY DEAR MR. FARR:

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

"This morning, without the slightest opportunity for an investigation of the law, I was called by the county school board to advise it as to the qualification of one of its members, namely, Mr. Rohwer, who has been

serving as a member on the county school board from the town of Falls Church, for a considerable period of time.

"The facts stated to me out of which the question arises are as follows:

"1. Mr. Rohwer, although a *bona fide* resident of the town of Falls Church, resides in Arlington county, the incorporated town of Falls Church lying partly within Fairfax county and partly within Arlington county.

"2. Mr. Rohwer is a United States government clerk, in the employ of the Federal government since his tenure on both the School board of the town of Falls Church and the county school board of Fairfax county."

I have considered carefully all of the statutes to which you refer, and have reached the conclusion that Mr. Rohwer is not qualified to be a member of the county school board as long as he is employed by the United States government, since Fairfax county does not have a population in excess of 300 inhabitants per square mile. As you know, the general rule under sections 289-290 of the Code is that Federal employees are excluded from holding office in this State except under the exceptions set forth in section 291.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

OPTOMETRY—Certificate to practice.

RICHMOND, VA., August 6, 1926.

DR. F. D. JACKSON, *Secretary and Treasurer,*
Virginia State Board of Examiners in Optometry,
Dickson Building,
Norfolk, Virginia.

MY DEAR DR. JACKSON:

I beg leave to acknowledge receipt of your letter of recent date, which is as follows:

"The Virginia State Board of Examiners in Optometry has before it at present five cases of men of integrity and good standing in their community, of all of which we are fully convinced, who through oversight, or circumstances over which they had no control, neglected to make application for certificates of exemption in the practice of optometry prior to January 1, 1917, as required by the laws of 1916.

"Our board is fully convinced that as a matter of justice to all, these men should have certificates entitling them to practice optometry by exemption from the examination. In your opinion, have we the right to exercise our discretion?"

In reply to your question as to whether or not your board has a right to exercise its discretion in the five cases mentioned in your letter. I would state, if the law, which is applicable to these particular cases, was strictly construed, of course your board could not grant this exemption; at the same time, taking into consideration all of the facts and circumstances connected therewith, should the board see fit to exercise its discretion and grant these certificates, I know of no authority which prevents the board from so doing, and I believe it would be justified in taking this action.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

PAYMENT OF MONEY INTO TREASURY—Effect on Second Auditor.RICHMOND, VA., *August 17, 1926.*

HON. ROSEWELL PAGE,
Second Auditor,
Richmond, Va.

DEAR SIR:

Acknowledgment is made of yours of the 17th, in which you say:

"Under sections 2155 and 2165 of the Code of 1919 direction is given for the payment of public money into the treasury.

"Section 2164 says the Treasurer shall have no authority to draw any of the said money except by his check upon a warrant issued by one of the Auditors.

"It has been the custom in this office to have certified checks sent for all money collectable here.

"The legislature of 1926 amended section 2165 so as to relieve those paying money into the treasury through the Auditor of Public Accounts to have their checks certified.

"My question is—does this amendment apply to the Second Auditor's office as well as to that of the Auditor of Public Accounts.

"A speedy reply to this letter is necessary to satisfy some who have to pay money into the treasury through the Second Auditor's office.

"If this be but a rule for the convenience of the office and not a statutory requirement, I shall be very glad to follow what seems to be the intention of the legislature, and accept checks as the Auditor of Public Accounts is required to do without certification."

In reply I beg to say that in my judgment all payments of money into the treasury through the Second Auditor are governed by section 2155 of the Code. Section 2165 applies now and has always applied to payments made by officers through the Auditor of Public Accounts. Therefore the amendment of 1926 in no manner affects payments made through the Second Auditor.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

PUBLIC SERVICE CORPORATION—Refund of interest.RICHMOND, VA., *July 31, 1926.*

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

MY DEAR GOVERNOR:

In response to your request of this morning, I have examined section 4065 of the Code, as amended, and section 156-e of the Constitution with care, and, in my opinion, it is very doubtful whether a public service corporation putting into effect rates under section 4065 of the Code, as amended, could be required to refund interest in addition to the amounts which such corporation may collect or receive in excess of such rates, tolls and charges as may be fixed and determined by the final decision of the Court of Appeals.

The language of section 4065 of the Code, as amended, is that the bond shall be conditioned "to insure the prompt refund by the public utility to those entitled thereto, of all amounts which such public utility may collect or receive in excess of such rates, tolls and charges as may be fixed and determined by the final decision of the Court of Appeals."

It is true that in *Craufurd v. Smith*, 93 Va. 623, the Supreme Court said:

"* * * Generally, he who has the use of another's money must pay interest upon it from the time he receives it until he repays it, unless there be an agreement, express or implied, to the contrary."

It might be argued, however, and possibly successfully, that, if the General Assembly had intended interest to be paid on the amount required to be refunded, it would have so specified in the statute. It is, therefore, my opinion that at the very least it is doubtful whether the company would be liable for interest on any tolls or charges collected by it in excess of the rates, tolls and charges fixed and determined by the final decision of the Court of Appeals.

Yours very truly,

LEON M. BAZILE,
Assistant Attorney General.

PUBLIC WELFARE BOARD—Jurisdiction.

RICHMOND, VA., November 15, 1926.

HON. FRANK BANE, *Commissioner,*
State Board of Public Welfare,
Richmond, Virginia.

MY DEAR SIR:

Acknowledgment is made of your communication of recent date in which you state that, pursuant to section 1902-1 of the Code of Virginia, 1924, a public welfare board has been appointed for the county of Rockbridge. You ask me to advise you, first, whether that board's jurisdiction is limited to one magisterial district, or whether it has jurisdiction over the whole county.

It is my opinion that, while all the members of the board may be selected from one magisterial district in a county, the jurisdiction of the board extends to the whole county. See section 1902-n of the Code of Virginia, 1924.

You then state that the public welfare board for Rockbridge county has appointed a superintendent as authorized by chapter 77 of the Code of Virginia, 1924, who is qualified in accordance with the provisions of section 1902-o of the Code of Virginia, 1924, and that this superintendent has requested the board of supervisors to turn over to her the funds for Lexington district now administered by the overseer of the poor. You say that some question has been raised as to the right of the superintendent to receive the funds for only one district, and wish to know whether the board of supervisors would be authorized to turn over the funds for Lexington district, now administered by the overseer of the poor, to the superintendent of the public welfare.

The county superintendent of public welfare is required, before entering upon the discharge of his duties, to take the usual oath of office before the court which

appointed his board, or the judge thereof in vacation, and is also required to enter into bond with surety to be approved by the court or judge, in such sum as the court or judge may fix, conditioned upon the faithful discharge of his duties.

Among the powers given to such superintendents by section 1902-o of the Code of Virginia, 1924, is "the care and supervision of the poor and to administer the funds now administered by the overseers of the poor."

While the jurisdiction of the superintendent in this case would extend, in my opinion, to the whole county, the fact that the board of supervisors permitted him to administer only the funds of one particular district would have the practical effect of limiting his powers, so far as the administration of funds is concerned, to one district. In my opinion it would be legal for the board to turn over to the superintendent the funds for only one district and withhold those for the other districts, if so advised.

Trusting this gives you the desired information, I am

Very truly yours,

JOHN R. SAUNDERS,
Attorney General.

PUBLIC PRINTING DEPARTMENT—Authority of.

RICHMOND, VA., November 24, 1926.

HON. DAVIS BOTTOM,
*Superintendent of Public Printing,
Richmond, Virginia.*

MY DEAR MR. BOTTOM:

With further reference to your letter of November 22nd to me, in which you ask certain questions relative to your authority for printing and furnishing certain supplies, which are essential to be used in putting into effect the law passed by the last legislature known as the "pistol bill," and to which I replied on November 24th, I beg leave to state that, in my judgment, in reply to a verbal inquiry of yours this morning, that under the general provisions of the law enacted by the legislature, which deals with the duties of the public printer, you have full authority to continue the furnishing of supplies for the account of the board appointed by the Governor under the provisions of chapter 158, page 235, of the Acts of 1926, and the board is not prohibited from taking care of this expense by that provision of the law, which states that no expenditure shall be made by the board until the sum of fifty thousand dollars has been realized from the sale of said licenses. In other words, as stated to you in my letter of November 24th, I do not think that provision of the law means that the board cannot take care of the necessary expenses incident to putting into operation the law.

I have sent copies of both of my letters to Dr. J. B. Woodson, who is chairman of the board appointed by the Governor.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General

PUBLIC WELFARE BOARD—Right to dispose of certain property.

RICHMOND, VA., July 6, 1926.

DR. J. T. MASTIN, *Commissioner,*
State Board of Public Welfare,
Richmond, Virginia.

MY DEAR DR. MASTIN:

Acknowledgment is made of your letter of recent date, in reply to my letter to you of June 11, 1926, with reference to the sale of the real estate in Newport News authorized by chapter 84 of the Acts of 1923.

I have not examined the title to this property, nor have I seen an abstract of title, but the act recites that the property was conveyed on August 1, 1918, by Thos. W. and Sarah P. W. Blackstone to S. C. Hatcher, L. P. Stearnes, Peter Winston, A. L. Roper and James Belwood, who then constituted the State Board of Charities and Corrections, and to their successors in office "to be held by them in trust as a detention home for the cities of Newport News and Hampton." The act then recites that the name of the Board of Charities and Corrections had been changed to the State Board of Public Welfare and that the latter board deemed it expedient to sell and convey the above described property and to use the proceeds for the purpose of purchasing other and more suitable property to be used as a detention home for said cities. The act then provides in section 1:

"Be it enacted by the General Assembly of Virginia, That the State Board of Public Welfare be, and it is hereby, authorized to sell the above described property, on the best terms obtainable by it, and to convey the same to the purchaser or purchasers thereof in fee simple, by deed duly executed and acknowledged by the chairman of the said board, on behalf of the board, after he shall have been authorized so to do by a resolution adopted by a majority of the members of the said board. The proceeds of such sale shall be used to purchase other and more suitable property to be used for the same purpose, to-wit, a detention home for the cities of Newport News and Hampton."

If the facts stated in this act are true, the Federal government has nothing to do with the sale of this property and, even though the money may have been originally donated to the Board of Charities and Corrections by the Federal government, in the absence of some stipulation or agreement to the effect that the Federal government was to have partial control of the property, I would say that it has nothing to do with the matter.

Yours very sincerely,

JOHN R. SAUNDERS,
Attorney General.

PUBLIC WELFARE (STATE BOARD OF)—Regarding abolition of office of Superintendent of Poor.

RICHMOND, VA., November 26, 1926.

HON. FRANK BANE, *Commissioner,*
State Board of Public Welfare,
Richmond, Virginia.

MY DEAR MR. BANE:

Acknowledgment is made of your communication of recent date, with which

you send me a letter from Mr. E. J. Skidmore, chairman of the Arlington county board of public welfare, in which he says in part:

"The Arlington county welfare board is experiencing some difficulty and confusion regarding the relation of the positions of the superintendent of public welfare, the overseer of the poor and the superintendent of the poor.

"I am therefore requesting that you take the matter up with the Attorney General of the State of Virginia with a view to ascertaining the relations of these positions under the act creating the county boards of public welfare."

So far as the superintendent of the poor is concerned, the Constitution provides for his appointment, and this office, of course, cannot be abolished by the General Assembly. His duties, however, are the supervision and direction of the county almshouse and the care of such paupers as are committed to said almshouse, and, where there is no almshouse, he shall, when so directed by the board of supervisors, provide suitable places for the keeping of the poor of his county by renting or leasing suitable buildings and land. See section 2794 of the Code.

The overseer of the poor is an officer created by statute whose duties are prescribed by law, but, since the creation of that office, the General Assembly by chapter 105 of the Acts of 1922, provided that in counties where superintendents of the public welfare have been appointed such superintendents shall have the care and supervision of the poor, and shall administer the funds now administered by the overseers of the poor, thus superseding that official. See section 15 of chapter 105 of the Acts of 1922.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

**PURCHASING AGENT (STATE)—Coal contract, United Collieries, Inc.,
v. Commonwealth.**

RICHMOND, VA., *December 4, 1926.*

HON. CHARLES A. OSBORNE,
State Purchasing Agent,
Richmond, Virginia.

MY DEAR MR. OSBORNE;

Acknowledgment is made of your communication of today, with which you submit for my consideration the question as to whether the following, printed at the head of the letters of the United Collieries, Incorporated, of St. Charles, Virginia, forms a part of the contract between the Commonwealth and the United Collieries, Incorporated, so as to permit the coal company to advance the price fixed by the contract seventy-five cents per ton on account of the wages of the miners having been increased since the making of the contract. The phrase referred to is as follows:

"All contracts are contingent upon strikes, accidents or other causes beyond our control."

This is printed at the head of the letter above the name of the coal corporation, and is in no manner referred to in the typewritten part of the contract.

It is my opinion that this matter printed in small type, as a part of the letter-head, forms no part of the contract between the Commonwealth and the United Collieries, Incorporated. *Rosenbaum Hardware Company v. Paxton Lumber Company*, 124 Va. 346, 351 (1919), and authorities there cited.

I am aware of the opinion of the court in *Bardach Iron and Steel Company, Inc. v. Tenenbaum*, 136 Va. 163, 174-5 (1923), but, after a careful examination of the same, I am of the opinion that the decision in that case does not apply to the case here under consideration, but that this contract is governed by the decision of the court in *Rosenbaum Hardware Company v. Paxton Lumber Company*, *supra*.

I am further of the opinion that, even if the matter in the letterhead above quoted does form a part of the contract, it is not sufficient to justify an advance in price to the Commonwealth for the cause assigned by the coal company. You will notice that the contingency is upon "strikes, accidents or other causes beyond our control." An advance in price to the miners is neither a strike nor an accident, nor a matter similar thereto.

In *Davids Co. v. Hoffman-LaRoche Chemical Works*, 166 N. Y. S. 179, 178 App. Div. 855 (1917), the court had under consideration a contract that contained in the body thereof this provision:

"Contingencies beyond our control, fire, strike, accidents to our works or to our stock, or change in tariff, will allow us to cancel this contract or any part of the same at our option."

The contract was made in December, 1913. In January, 1915, during the life of the contract, the defendant declined to furnish any more carbolic acid, which was the subject of the contract, on the ground that the governments of the European countries, whence it obtained its supplies, had placed an embargo on its exportation. The defendant notified the plaintiff that this was a contingency "beyond our control," and, therefore, entitled it to discharge the contract. The plaintiff sued. The court held that an embargo could not reasonably be likened to a change in tariff and said (N. Y. S., p. 181):

"* * * We think the reasonable construction of this contract is to be found by applying to it the rule *ejusdem generis*, and that the words 'fire, strikes, accidents to our works or to our stock, or change in tariff' (all of which events are or may be beyond the control of the parties), must be held to limit and qualify the 'contingencies beyond our control,' and to confine the happenings which would justify the cancellation of the contract to those of a like nature to the ones enumerated, which an embargo is not. We therefore believe that the cancellation of the contract by the defendant was unjustified, and it is liable in damages therefor. * *"

By this contract the United Collieries, Incorporated, bound itself to furnish coal to the Commonwealth for a certain agreed price and the Commonwealth bound itself to purchase and accept from the United Collieries, Incorporated, the agreed amount of coal at the price fixed by the contract. If the market price on coal had dropped any time during the life of the contract, the Commonwealth would not have been at liberty to cancel the contract or demand a reduction in the price.

It is, therefore, my opinion that the United Collieries, Incorporated, is not entitled to demand an increase in the price of the coal sold by it to the Commonwealth, and that, on the other hand, the purchasing agent would not be authorized under this contract to pay the increase demanded.

Yours very truly,

JOHN R. SAUNDERS,

Attorney General.

**PURCHASING AGENT (STATE)—Coal contract, Terry Coal Company
v. Commonwealth...**

RICHMOND, VA., *December 4, 1926.*

HON. CHARLES A. OSBORNE,
*State Purchasing Agent,
Richmond, Virginia.*

MY DEAR MR. OSBORNE:

I am advised by you that the Terry Coal Company, Incorporated, of Staunton, Virginia, with whom the State has a contract to purchase coal, has notified your department that, due to the fact the operators have increased the wages of the miners, it is necessary for this company to advance the price on coal sold by it to the Commonwealth.

The contract between the Terry Coal Company, Incorporated, and the Commonwealth is, that the coal company will furnish the agreed number of tons of coal at a fixed and definite price, in return for which the Commonwealth has agreed to purchase the coal contracted for at a fixed and definite price per ton.

I am also advised by you that the position taken by the coal company is that, because the letterheads of the company contain the following clause, namely, "contracts made contingent upon all causes beyond our control," it is entitled to demand an increase in price from the Commonwealth because of the wage increase.

In view of the decision of the Court of Appeals in *Rosenbaum Hardware Co. v. Paxton Lumber Co.*, 124 Va. 346, 351 (1919), I am of the opinion that this clause printed on the letterhead of the coal company cannot have the effect of giving to it any such privilege.

I am aware of the decision of the court in *Bardach Iron and Steel Company, Inc. v. Tenenbaum*, 136 Va. 163, 174-5 (1923), but in my opinion, after careful examination of the latter case, it does not apply to this particular case.

You will observe that the Commonwealth is bound by this contract to pay a fixed and definite price for the coal bought by it. If the market had gone down, the Commonwealth would not have been entitled to demand a reduction in the price of the coal bought by it. No meritorious reason, therefore, exists why the coal company should now demand a higher price for the coal which it agreed to sell to the Commonwealth at a definite and fixed price, at which price the Commonwealth is bound to take the coal.

Yours very truly,

JOHN R. SAUNDERS,

Attorney General.

**PURCHASING AGENT (STATE)—Coal contract, Massey Coal Company
v. Commonwealth.**

RICHMOND, VA., *December 4, 1926.*

HON. CHARLES A. OSBORNE,
State Purchasing Agent,
Richmond, Virginia.

MY DEAR MR. OSBORNE:

Acknowledgment is made of your communication of December 3, 1926, in which you advise me that the A. T. Massey Coal Company, Incorporated, of this city, with which the State has a contract for the sale and delivery to it of coal, has notified you that, due to an increase in the wages of the miners, the price on the coal sold by it to the Commonwealth will be advanced approximately seventy-five cents per ton over the price at which it contracted to sell the coal to the Commonwealth by its contract of July 26, 1926.

You also advise me that the company takes the position that it has the right to do this for two reasons: first, because of certain matters printed in the body of the letter; and, second, because certain conditions are printed on the back of the sheets on which the offer of the A. T. Massey Coal Company, Incorporated, was made, which sheets are made a part of this contract. The matter contained in the letter, just before the body of the letter begins, reads as follows:

"Quotations subject to change without notice. All agreements are contingent upon strikes, lockouts, failure of car supply and other unavoidable casualties. Initial railroad weights to govern settlement."

The cause assigned for the increase in the price of the coal did not result from a strike, lockout, or the failure of car supply.

In *David Co. v. Hoffman-La Roche Chemical Works*, 166 N. Y. S. 179, 178, App. Div. 855 (1917), the court had under consideration a contract that contained in the body thereof this provision:

"Contingencies beyond our control, fire, strike, accidents to our works or to our stock, or change in tariff, will allow us to cancel this contract or any part of the same at our option."

The contract was made in December, 1913. In January, 1915, during the life of the contract, the defendant declined to furnish any more carbolic acid, which was the subject of the contract, on the ground that the governments of the European countries, whence it obtained its supplies, had placed an embargo on its exportation. The defendant notified the plaintiff that this was a contingency "beyond our control," and, therefore, entitled it to discharge the contract. The plaintiff sued. The court held that an embargo could not reasonably be likened to a change in tariff and said (N. Y. S., p. 181):

"* * * We think the reasonable construction of this contract is to be found by applying to it the rule *ejusdem generis*, and that the words 'fire, strikes, accidents to our works or to our stock, or change in tariff' (all of which events are or may be beyond the control of the parties), must be held to limit and qualify the 'contingencies beyond our control,' and to confine the happenings which would justify the cancellation of the contract to those of

a like nature to the ones enumerated, which an embargo is not. We therefore believe that the cancellation of the contract by the defendant was unjustified, and it is liable in damages therefor. * * *

As to the conditions printed on the back of the pages on which the letter of the A. T. Massey Coal Company, Incorporated, was written, which pages are made a part of this contract, I am of the opinion that, while these conditions are broad enough to apply to a case of this kind, they are not binding upon the State in this instance, for the reason that the type in which they have been printed does not comply with the provisions of chapter 257 of the Acts of 1920.

It, therefore, follows that you should decline to pay the A. T. Massey Coal Company, Incorporated, any advance over the price at which it contracted to sell the coal to the Commonwealth. In this connection it may be said that the Commonwealth has bound itself to purchase the coal in question from the coal company. If there had been a decrease in the price of the coal, the Commonwealth would not have been at liberty to demand a reduction or to cancel the contract.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

**PURCHASING AGENT (STATE)—Coal contract, E. P. Murphy & Son
v. Commonwealth.**

RICHMOND, VA., *December 4, 1926.*

HON. CHARLES A. OSBORNE,
State Purchasing Agent,
Richmond, Virginia.

MY DEAR MR. OSBORNE:

Acknowledgment is made of your communication of yesterday with reference to the contract between the Commonwealth and E. P. Murphy & Son, Incorporated, of this city.

This contract appears to consist of several letters passing between E. P. Murphy & Son, Incorporated, and the State Purchasing Agent. At the bottom of the letters of E. P. Murphy & Son, Incorporated, printed in small type below the signature of the corporation, is the following:

"All sales are made contingent upon strikes, accidents, delays of carriers and other causes unavoidable or beyond our control. Quotations subject to change without notice."

You advised me that the corporation has notified you that, due to the fact that the wages of the miners have been increased since the making of this contract, the price of the coal sold to the Commonwealth will be advanced seventy-five cents per ton over the price at which the corporation agreed to sell the coal to the Commonwealth and at which the Commonwealth agreed to purchase the coal.

After a careful examination of the printed matter relied on, it is my opinion that the case of *Rosenbaum Hardware Co. v. Paxton Lumber Co.*, 124 Va. 346, 351 (1919), controls this case, and the printed matter relied on at the foot of the letters forms no part of the contract in this case.

I am aware of the decision of the court in *Bardach Iron and Steel Company, Inc. v. Tenenbaum*, 136 Va. 163, 174-5 (1923), but, after a careful examination of the opinion of the court in this case, I have concluded that it does not govern the matter here under consideration but it is controlled by the case of *Rosenbaum Hardware Co. v. Paxton Lumber Co.*, *supra*.

I am further of the opinion that, even if the phrase relied on by E. P. Murphy & Son, Incorporated, was a part of the contract, it is not sufficiently broad to justify an advance in the price of coal for the cause assigned by E. P. Murphy & Son, Incorporated. You will observe that it is declared that sales are made contingent "upon strikes, accidents, delays of carriers and other causes unavoidable or beyond our control." Clearly, an increase in the wages of the miners is neither a strike, accident nor a delay on the part of the carriers.

In *Dauids Co. v. Hoffman-La Roche Chemical Works*, 166 N. Y. S. 179, 178 App. Div. 855 (1917), the court had under consideration a contract that contained in the body thereof this provision:

"Contingencies beyond our control, fire, strike, accidents to our works or to our stock, or change in tariff, will allow us to cancel this contract or any part of the same at our option."

The contract was made in December, 1913. In January, 1915, during the life of the contract, the defendant declined to furnish any more carbolic acid, which was the subject of the contract, on the ground that the governments of the European countries, whence it obtained its supplies, had placed an embargo on its exportation. The defendant notified the plaintiff that this was a contingency "beyond our control," and, therefore, entitled it to discharge the contract. The plaintiff sued. The court held that an embargo could not reasonably be likened to a change in tariff and said (N. Y. S., p. 181):

"* * * We think the reasonable construction of this contract is to be found by applying to it the rule *ejusdem generis*, and that the words 'fire, strikes, accidents to our works or to our stock, or change in tariff' (all of which events are or may be beyond the control of the parties), must be held to limit and qualify the 'contingencies beyond our control,' and to confine the happenings which would justify the cancellation of the contract to those of a like nature to the ones enumerated, which an embargo is not. We therefore believe that the cancellation of the contract by the defendant was unjustified, and it is liable in damages therefor. * * *"

By this contract E. P. Murphy & Son, Incorporated, bound itself to furnish coal to the Commonwealth for a certain agreed price and the Commonwealth bound itself to purchase and accept from E. P. Murphy & Son, Incorporated, the agreed amount of coal at the price fixed by the contract. If the market price on coal had dropped any time during the life of the contract, the Commonwealth would not have been at liberty to cancel the contract or demand a reduction in the price.

It is, therefore, my opinion that E. P. Murphy & Son, Incorporated, is not entitled to demand an increase in the price of the coal sold by it to the Commonwealth, and that, on the other hand, the purchasing agent would not be authorized, under this contract, to pay the increase demanded.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

PRISONERS—Completing of unexpired term.RICHMOND, VA., *August 31, 1926.*

MAJOR R. M. YOUELL, *Superintendent,*
The State Penitentiary,
Richmond, Virginia.

MY DEAR MAJOR YOUELL:

I have examined the court orders in the case of Eugene Elliott, who was convicted of bribery on March 20, 1925, in the hustings court of the city of Portsmouth and sentenced to serve a term of eighteen months in the penitentiary. It appears from the additional orders furnished you that Elliott was not confined in jail at any time during his prosecution until September 23, 1925, although the first order sent you indicated that he had been confined on March 20, 1925. From the corrected copies of the orders in his case, however, which have just been furnished you, it appears that his jail term commenced on September 23, 1925. Due to a mistake this man was released about four months before his term expired and you have requested me to advise you what you should do in the matter.

From an examination of *May v. Dillard*, 134 Va. 707, I am of the opinion that Elliott should be rearrested and returned to the penitentiary for the purpose of serving the remainder of his term. I would, therefore, suggest that you have the city sergeant or chief of police of Portsmouth apprehend Elliott and, when he has been arrested, have him brought back to the penitentiary to complete the serving of his sentence.

Trusting that this gives you the desired information, I am,

Very truly yours,

LEON M. BAZILE,
Assistant Attorney General.

PRISONERS—Allowance for ill health.RICHMOND, VA., *August 11, 1926.*

MR. R. R. PENN, *Superintendent,*
State Prison Farm,
State Farm, Va.

MY DEAR MR. PENN:

In response to your request, through Honorable Lucan H. Schrader, that I advise you whether a person who has been sentenced to the convict road force but on account of ill health was unable to go, and was later admitted to the State Farm, is entitled to ten days per month for good behavior, it is my opinion that such person is entitled to an allowance of ten days per month for good behavior. Of course, such prisoner, if suffering from a contagious disease, must be held in accordance with the State Prison Farm Act, even after his term has expired, as to which I advised you some time ago.

Very truly yours,

JOHN R. SAUNDERS,
Attorney General.

PRISONERS—Suspension of jail sentence.RICHMOND, VA., *October 5, 1926.*

HON. J. E. BURWELL,
Commonwealth's Attorney,
Floyd C. H., Va.

MY DEAR MR. BURWELL:

I beg leave to acknowledge receipt of your letter of October 1st.

In this you quote the last paragraph of section 33 of the prohibition law, which paragraph deals with the case where a person charged with a misdemeanor can enter a plea of guilty in the presence of the Commonwealth's attorney, and the justice, judge, or other officer, has the right to fix the punishment, etc.

You then submit the following case, in which you desire an opinion as to whether or not the justice hearing the case can suspend the jail sentence:

"Suppose A, on a warrant charging him with unlawfully storing three quarts of ardent spirits, is brought before a justice of the peace, and upon arraignment the defendant enters the plea of guilty, and with the consent of the Commonwealth's attorney entered of record, could the justice, under the law, fine said defendant A less than \$50 and costs and give a jail sentence in addition thereto of thirty days."

In reply, will state that he cannot, and the law gives him no authority so to do.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

PRISONER—Sentence.RICHMOND, VA., *May 17, 1927.*

MAJOR R. M. YOEUELL,
Superintendent of the Penitentiary,
Richmond, Va.

MY DEAR MAJOR YOEUELL:

On yesterday one William Snead, sentenced to the penitentiary from the hustings court of the city of Danville, Virginia, was released on *habeas corpus* by the circuit court of the city of Richmond. I was unable to interpose a defense in the case for the reason that all of the law was against me, and I was compelled to tell the judge that, from my examination of the authorities, I was satisfied, if Snead had served the maximum sentence imposed, he was entitled to be released.

The facts in the case were practically this: At the March, 1923, term of the corporation court of the city of Danville, Snead was convicted of grand larceny and sentenced to five years' confinement in the penitentiary. At the May, 1923, term of that court he pleaded guilty to two additional indictments of grand larceny and was given one year in the penitentiary on one indictment and eighteen months in the penitentiary on another indictment. The judgments in the last two cases did not provide that these sentences were to be served after the completion of the first sentence.

Aside from statute, the authorities seem to hold without dissent, so far as I

have been able to find from a most thorough examination of the cases, that the subsequent sentences run concurrently with the first sentence, unless it is specified in the subsequent judgment, or judgments, that such subsequent term, or terms, are to be served after the completion of a prior term or terms.

In 8 R. C. L., p. 242, section 242, it is said:

"It is familiar practice that wherever the court imposing several sentences desires to have one begin on the expiration of another, that fact is expressly stated in the sentence; and whenever the court inadvertently fails to have the sentence recorded in that form, or from leniency intentionally omits to add such a provision, and the defendant is committed in pursuance of such sentences, he is either voluntarily released by the jailor, or discharged on *habeas corpus* at the expiration of the longest term named in either of the sentences. No presumption will be indulged in favor of sustaining the sentence as cumulative. Accordingly, the rule is that where the defendant is already in execution on a former sentence, and the second sentence does not state that the term is to begin at the expiration of the former, the second will run concurrently with the first, in the absence of a statute providing a different rule; but when the different sentences are imposed by different courts it seems that it is not necessary that the sentence should state that the second term is to begin at the expiration of the first."

See also 16 C. J. 1307; 25 Am. & Eng. Ency. of L., 307; *Ex parte Myers*, 44 Mo. 279; *Ex parte Kirby*, 76 Calif. 514; *Ex parte Dubin*, 102 Mo. 100; *In re Breton*, 93 Me. 39, 74 A. S. R. 335.

It would seem that this rule has no application to those cases where the sentences were rendered by different courts, although Georgia is the only State that appears to have passed on this question, but the rule as laid down by the Georgia court is stated as being the rule in the above-quoted section of Ruling Case Law.

In a case where all of the sentences were given at the same term of the court, it is my opinion that section 4786 of the Code would apply. This section reads as follows:

"When any person is convicted of two or more offenses, before sentence is pronounced for either, the confinement to which he may be sentenced upon the second, or any subsequent conviction, shall commence at the termination of the previous term or terms of confinement."

A similar statute was so construed by the Supreme Court of Missouri in *Ex parte Myers*, 44 Mo. 279 (1869). It also call your attention to *Sullivan v. Clarke*, 156 Ga. 706 (1923), and *Ex parte Kluge*, 128 S. E. (S. C.) 882, 886 (1925).

With my best wishes, I am,

Very truly yours,

LEON M. BAZILE,
Assistant Attorney General.

PRISONERS—Sentence, credits on.RICHMOND, VA., *November 6, 1926.*

MAJOR R. M. YOELL,

*Supt. Virginia State Penitentiary.**Richmond, Va.*

MY DEAR MAJOR YOELL:

I am this morning in receipt of your letter of November 6th, enclosing a letter addressed to Mr. Larkin C. Garrett by his counsel, Mr. L. O. Wendenburg, which deals with the question as to when the sentence of Garrett began. You also enclose a court order in connection with the case.

You further state in your letter that Mr. Garrett was received in the penitentiary on June 24, 1924, and was never in jail before or after his trial in Cumberland county, his only confinement having been in the State Penitentiary, which began on June 24, 1924.

I have carefully read the letter of Mr. Wendenburg. In this he takes the position that Mr. Garrett should be entitled to a credit on his service in the penitentiary from March 13, 1924, which was the date of judgment, up to June 24, 1924, at which time he was actually received into the penitentiary. In other words, that notwithstanding the fact that no time was actually spent in jail by Garrett between these dates, that he should receive a credit on his term in the penitentiary.

I have carefully read the provisions contained in section 5019 of the Code of 1919, and each of its amendments, which section, as finally amended, reads as follows:

"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; but any person who may hereafter be sentenced by any court to a term of confinement in the penitentiary, or by any court or justice to a term of confinement in jail for the commission of a crime, or in jail for default of the payment of a fine, shall have deducted from any such term *all time actually spent* by such person in jail awaiting trial or pending an appeal * * *."

In my opinion, from a reading of the provisions of this section, it is very clear and plain that the legislature intended that only such time as was actually spent in jail, either while awaiting trial or pending an appeal, should be deducted from the time of service designated in the judgment of the court whether it be in jail or in the penitentiary. To construe the law otherwise under some circumstances, a party might escape altogether service in the penitentiary for any crime which he had committed.

Of course, if Mr. Wendenburg has any doubt as to this construction of the law, he could easily apply to the Supreme Court of Appeals for a writ of *habeas corpus*.

Yours very truly,

JOHN R. SAUNDERS,

Attorney General.

PRISONERS—Labor for nonpayment of fine.RICHMOND, VA., *April 13, 1927.*

MR. SAM C. STOWERS,
Attorney at Law,
Altavista, Va.

MY DEAR SIR:

Acknowledgment is made of your letter of recent date addressed to the Auditor and the Attorney General, in which you say:

"Code section 2095 says, 'no person shall be held to labor in any chain gang for the nonpayment of any fine imposed upon him for a period longer than six months.'

"Code section 4953 provides a three months' confinement in jail, and from these sections I cannot tell clearly how long a man has to stay in jail to work out a fine. For example, suppose a man is given six months' flat time and then a fine of \$250.00, at the end of six months is he entitled to be released or must he then stay and work out his fine, and, if so, under which section of the Code? A party has asked me about this, and I advised him that at the end of six months he is entitled to be discharged, though he is given six months' flat time and also fined \$250.00."

Section 2095 of the Code has application only to persons who have been sentenced to the State convict road force, or jail prisoners who, not having been sentenced to the State convict road force, are actually members thereof under the provisions of sections 2073-2088 of the Code, same as amended.

Section 4953 of the Code has application to jail prisoners who have not been sentenced to the State convict road force and who served their time in jail. Therefore, where a man is sentenced to six months' flat time in jail and a fine of \$250.00, he should be confined in jail for a period of six months less four days per month for good behavior, as provided by section 2860 of the Code, in satisfaction of the jail sentence. In addition thereto, he must be confined under section 4953 of the Code, where he fails to pay the costs, for a period of three months less four days per month for good behavior.

Your advice to your client was, therefore, wrong so far as you advised him that he was entitled to a discharge when the flat time had been served.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

PRISONERS—Sentence.RICHMOND, VA., *May 20, 1927.*

MAJOR R. M. YOELL, *Superintendent,*
The State Penitentiary,
Richmond, Virginia.

MY DEAR MAJOR YOELL:

I have examined the judgments in the matter of Frank McGee and find that he was sentenced at the January term, 1921, of the King George county court to five years in the penitentiary; that at the March term, 1921, he was sentenced to

ten years in the penitentiary, the second judgment not providing that the last sentence should be served after the expiration of the first sentence. On February 19, 1921, he was convicted by a justice of the peace and given one year in jail for jail breaking, the judgment providing that his term was to commence "at the time he is discharged from the penitentiary house of this State."

It is my opinion that this man should be held in the penitentiary for a period of ten years, the maximum sentence provided, less such time as he may be entitled to for good behavior. While the penitentiary sentences run concurrently, he should, nevertheless, be held for the maximum period provided in any one of the judgments that run concurrently. See the authorities referred to in my letter to you of several days ago with reference to W. M. Snead.

After he has completed his penitentiary term on the basis above stated, he must be confined in jail, or on the public roads, for a period of **one year less time for good behavior**, as the judgment in that case provides that that sentence is to be served after the completion of his time in the penitentiary.

Yours very truly,

LEON M. BAZILE,
Assistant Attorney General.

PRISONERS—Credit for time spent in jail.

RICHMOND, VA., *December 11, 1926.*

MAJOR R. M. YUELL, *Superintendent,*
The State Penitentiary,
Richmond, Virginia.

MY DEAR MAJOR YUELL:

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

"I enclose herewith a court order, which I received today in the case of R. A. Hughes. This man was received in the penitentiary April 21, 1926, with a two years' sentence. We have given him credit for the time served in jail from July 11, 1923, to September 18, 1923, and from December 3, 1925, to April 21, 1926, but we have not given him credit for time spent in the asylum from September 18, 1923, to December 3, 1925. If he should have received credit for the time spent in the asylum before trial while under observation, he would have served his sentence before he got here.

"I write to inquire if I must allow him credit for the time spent in the asylum under observation and before trial between September 18, 1923, to December 3, 1925. If so, I shall have to discharge him at once."

The order entered by the corporation court of the city of Norfolk, in which court the accused was convicted, provides, after sentencing the accused to confinement in the penitentiary for two years, as follows:

"It is further ordered by the court, and it so appearing from the record that the prisoner was confined in the jail in the city of Roanoke, Virginia, under the charge for which he was convicted, from July 11, 1923, to September 18, 1923, and from December 3, 1925, to April 21, 1926; it is further ordered that the prisoner be allowed credit on his sentence aforesaid for the above mentioned time spent in jail; and it further appearing that on September 18, 1923, the prisoner was sent by order of this court for observation,

to the State asylum at Marion, Virginia, as a criminal insane prisoner, and remained there as such until December 3, 1925, on which date he was returned to the Roanoke city jail, the court not at this time passing upon the question of whether the prisoner is entitled to credit on his sentence for the time he spent in said asylum, to which action of the court in overruling the said motion and pronouncing judgment against him, the defendant by counsel then and there accepted."

The matter in my opinion, so far as you are concerned, is governed by section 5019 of the Code of 1919, as amended, which provides in part as follows:

"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; but any person who may hereafter be sentenced by any court to a term of confinement in the penitentiary, or by any court or justice to a term of confinement in jail, for the commission of a crime, or in jail for default of the payment of a fine, shall have deducted from any such term all time actually spent by such person in jail awaiting trial, or pending an appeal, and it shall be the duty of the court or justice when entering the final order in any such case to provide that such person so convicted be given credit for the time so spent. * *"

This section, in my opinion, places a mandatory duty upon the judge of the trial court not only to ascertain the credit to which the accused is entitled for time spent in jail pending his trial but in entering the final order in the case to provide what credit the prisoner is entitled to on account of such confinement in jail. The order entered in this cause having failed to so provide, it is my opinion that you are not authorized to allow him any credit for time spent in jail pending his trial, which the trial court has not ordered allowed him.

I have examined section 4910 of the Code of 1919, but in my opinion that section has application only to those cases where the time spent in confinement in an insane hospital was so spent after conviction.

Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

PRISONERS—Stipulated bonds for.

RICHMOND, VA., November 26, 1926.

HON. R. R. PENN, *Superintendent,*
State Prison Farm,
State Farm, Virginia.

MY DEAR MR. PENN:

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

"Will you please give us a ruling on the question of stipulated bonds for jail prisoners, especially in cases where the trial judge fails to give a fixed sentence in lieu of such bond. This applies to peace, good behavior and other bonds given in addition to sentence. It has been inferred that prisoners have to be returned to jurisdiction of court and expiration of regular sentence for these bonds. Kindly clarify us on this also."

Section 4791 of the Code, which authorizes conservators of the peace, including judges, justices, etc., to require persons to furnish a recognizance for good behavior, provides in part:

"* * unless such recognizance be given, he shall commit him to jail by a warrant, stating the sum and time in and for which the recognizance is directed. * *"

If the judgment does not comply with this section, there is nothing for you to do but return the prisoner to the court or the justice committing him.

If the prisoner was required to give a bond on account of a violation of the prohibition law, the matter would be governed by section 41 of the prohibition law, which provides in part:

"* * if said bond shall not be given, the defendant shall be committed to jail until it is given, or until he is discharged by the court, provided that he shall not be confined for a longer period than six months, * * *."

I would say that in the case of a person required to give a bond under the prohibition law you should hold him for a period of six months, unless the court requiring the bond of him orders him to be discharged prior to that time.

In the case of vagrants section 2809 of the Code provides that, unless a bond is given, the prisoner shall be punished as for a misdemeanor. Therefore, a vagrant could not be held because of his failure to give a bond after the punishment imposed for the misdemeanor has been discharged. Therefore, in the case of a vagrant he should be turned loose, when the term fixed by the court has been served.

In the case of a violator of the prohibition law, who has failed to give a bond, you should hold him six months unless sooner ordered to discharge him by the court requiring the bond. In the case of persons required to give peace bonds, etc., if the time to be served is not specified in the judgment of the court, you should return such prisoners to the court or the justice committing them.

Trusting that this gives you the desired information, I am

Very truly yours,

JOHN R. SAUNDERS,
Attorney General.

PRISONERS—Charge of expense; suspension of sentence.

RICHMOND, VA., *November 24, 1926.*

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

MY DEAR MR. CRUSH:

Acknowledgment is made of your letter of November 22, 1926, in which you state that a man was convicted for a violation of a town ordinance and sentenced to the road force; that, after being delivered to the road force, he was returned to the jail on account of sickness or through misunderstanding and served the balance of his time in jail. You ask whether the jailor should render his account for this

man as a State prisoner, or whether his expenses should be charged against the town.

His expenses should be charged against the town. He was a town prisoner and, as such, the State would not be liable for his care, even though he had served his time as a member of the convict road force. See section 2077 of the Code, which requires the superintendent of the penitentiary to charge the expenses for the keeping of members of the convict road force, where such members are serving terms for violations of town ordinances, to the respective towns from which they were committed. Even in the absence of statute, there would be no authority for imposing such a charge upon the Commonwealth. See also section 2080 of the Code, which authorizes the return to jail of prisoners who have become sick.

You next state that a man was convicted of housebreaking in April and sentenced to one year in the penitentiary; that the execution of the sentence was suspended until the next term of the court to allow time for an appeal, and that subsequent to that time motion was made to have the sentence suspended and the accused put on probation under authority of section 1922-b of the Code. You then state that the matter has been continued for argument, and ask me to give you the benefit of my opinion as to whether the court has the authority at this time to suspend the sentence.

In the absence of statutory authority, the court is without jurisdiction to grant a new trial or to entertain motions generally after the expiration of the term at which the final judgment was entered. See *Earley v. Commonwealth*, 131 Va. 664, and *Allen v. Commonwealth*, 114 Va. 826.

If you will note the provisions of section 1922-b of the Code, you will see that it confers no authority upon the court to suspend the sentence at a term subsequent to the term at which the final sentence was entered. The language of the statute is:

"After a plea or a verdict of guilty in any court having jurisdiction to hear and determine the offense with which the prisoner at the bar is charged, if there be circumstances in mitigation of the offense, and if it appear compatible with the public interest, or in any case after a child has been declared delinquent or dependent, the court may suspend the imposition or the execution of sentence, or commitment * * *."

You will see that the only case in which the statute has conferred authority upon the court to suspend the sentence, after adjournment of the term at which the final sentence was entered, is in those cases where a child has been declared delinquent or dependent. Of course, it is possible that, where a motion to suspend the sentence has been made at the term at which the final sentence was entered, this motion could be docketed and the hearing on the application for suspension continued for action at some future term, but, where the motion for suspension is first made at a term subsequent to the term at which the final sentence was entered, or overruled at the term at which the final sentence was entered and renewed at some subsequent term, it is my opinion that the court is without authority to suspend the sentence except in cases of juvenile delinquents or dependents.

Yours very truly,

JOHN R. SAUNDERS,

Attorney General.

PRISONERS—Communication with.RICHMOND, VA., *November 15, 1926.*MR. N. E. BRIDGERS,
Ettrick, Virginia.

MY DEAR SIR:

In reply to your letter of November 12th, I beg leave to state that section 2858 of the Code provides that it will be unlawful for any person other than the officers of the law in charge of the prisoners, the counsel of the prisoner, or such other persons as may be authorized by the court in whose custody said prisoner may be, to hold any communication by word, sign, or writing, with said prisoner or prisoners confined in any jail in the Commonwealth of Virginia, except in the presence of the sheriff or his deputies, or of the jailor regularly in charge of said prisoner or prisoners. The law further provides that any person who violates this law shall be fined not less nor more than fifty dollars.

Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,
*Attorney General.***PRISONERS—Crediting time spent before sentence.**RICHMOND, VA., *November 18, 1926.*HON. S. B. BARHAM, JR., *Clerk,*
Surry, Virginia.

MY DEAR MR. BARHAM:

Acknowledgment is made of your letters of recent date in re the proper order to be entered in criminal cases where the accused is entitled to an allowance for time spent in jail awaiting trial, as provided for by section 5019 of the Code.

Your first letter reached me on the day before the term of the court of appeals opened, and, as this office had the first cases in that court, it was impossible to attend to it at that time. As our docket was not concluded until yesterday, this is the first opportunity I have had to answer your letter.

In your letter you ask me whether the following provision in such an order would comply with section 5019 of the Code:

"It is, therefore, considered by the court that the said
be confined in the penitentiary of this Commonwealth for the term of.....
....., subject to a credit for the time spent in jail awaiting trial.
And the prisoner was remanded to jail."

Section 5019 of the Code, as amended, so far as is applicable to the question here under consideration, 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; but any person who may hereafter be sentenced by any court to a term of confinement in the penitentiary, or by any court or justice to a term of confinement in jail, for the commission of a crime, or in jail for default of the payment of a fine, shall have deducted from any such term

all time actually spent by such person in jail awaiting trial, or pending an appeal, and it shall be the duty of the court or justice when entering the final order in any such case to provide that such person so convicted be given credit for the time so spent. * * * (Italics supplied.)

It is my opinion that the above section of the Code, as amended, places a mandatory duty upon the judge to ascertain what credit the prisoner is entitled to, and, in entering judgment, to see that the order is certain as to the credit to which the prisoner is entitled on account of having been confined in jail pending the trial of his case.

Therefore, it is my opinion that the above quoted language from the order submitted by you to me is not a compliance with this section of the Code, as amended, as in its present form it makes a vital part of the judgment uncertain.

I would, therefore, suggest that in entering such orders they be made to read as follows:

"It is, therefore, considered by the court that the said
be confined in the penitentiary of this Commonwealth for the term of.....
....., subject to a credit of days for the time spent in jail by
said, from the day of....., 19.....,
to the.....day of....., 19....., while
awaiting his trial. And the prisoner was remanded to jail."

With my best wishes, I am

Sincerely yours,

JOHN R. SAUNDERS,

Attorney General.

PILOTS—Whether public officers.

RICHMOND, VA., September 13, 1926.

W. D. CARDWELL, ESQ.,
Attorney at Law,
Mutual Building,
Richmond, Va.

DEAR MR. CARDWELL:

After an examination of the case of *Petterson v. Board of Commissioners of Pilots for the Port of Galveston*, 24 Tex. Civ. App. 33, referred to in your letter, and other authorities, I have come to the conclusion that Virginia branch pilots are not State officers.

The *Texas Case*, holding that pilots are State officers, and strongly relied on by you, would, of course, be persuasive authority in this State if the statutes concerning pilots were analogous. But after examining the statutes in both Virginia and Texas concerning pilots, I find one vital difference which would materially affect a different holding in this State. It has to do with taking and subscribing the official oath.

Article 8271 of the Texas Code of 1925 says in part:

"* * * Each pilot shall also take and subscribe the official oath which shall be endorsed on said bond, and together with the bond, shall be recorded

in the office of the county clerk of the county in which such port is situated before being forwarded to the Governor. * * *

This statute was in effect in 1900 when the above *Texas Case* was decided.

The Virginia Code is silent on the question of Virginia pilots taking and subscribing an oath, yet it seems to be required in all cases of public offices in this State.

Section 34 of the Constitution of Virginia in part reads as follows:

"Members of the General Assembly, and all officers, executive and judicial, elected or appointed after this Constitution goes into effect shall, before they enter on the performance of their public duties, severally take and subscribe the following oath * * *."

Then follows the form of oath in Virginia, which it is not necessary to quote. Section 269 of the Code of Virginia in part reads as follows:

"Every person before entering upon the discharge of any function as an officer of this State shall take and subscribe the following oath: * * *."

Furthermore, in the case of *Childrey et als. v. Rady et als.*, 77 Va. 518, at page 533, Richardson, J., speaking for the court, says:

"* * * the Constitution peremptorily requires the oath of office. The duty of taking the oath as a prerequisite is imposed in terms that admit of no doubt. It is required of every officer. It applies to all; and it is made penal by statute to exercise any function of office without first taking and subscribing the oath. Oaths and bonds (when bond is required) constitute the only guarantees of official fidelity; the one appealing to the conscience and the other to the purse. * * *"

In 11 Ency., page 471, one finds this:

"This oath is a condition precedent to the discharge of official duties, and the failure to take this oath causes a vacancy."

It would seem from the foregoing that taking an oath in Virginia is mandatory for State officers and not a mere incident of office. If this be true, how can Virginia pilots be considered State officers when they are not required to take an oath? It would seem that as long as a statute failed to make an oath necessary in this case, a fair and natural conclusion would be that the State legislature did not intend to make them State officers.

To say that pilots in this State are public officers (when the statute concerning pilots is silent as to taking an oath) is to contravene section 269 of the Code of Virginia, which requires an officer of this State to take an oath before entering upon the discharge of any function as an officer of the State. I repeat that it is but natural to say that it was not the intention of the General Assembly to make them public officers because no oath is required of them, yet an oath is required of all public officers. To hold that pilots are State officers in the fact of this would be most unsound reasoning. For the above reason, the decision in the *Texas Case* should not be followed in Virginia.

The question as to whether pilots exercise any functions of government was

tactfully evaded in the *Texas Case* already referred to. On page 41 of the above case, it is said, in attempted refutation that pilots were not State officers because they did not exercise any functions of government, "whether a pilot exercises any of the functions of government as to what department he is properly assignable," are questions which we will not stop to determine. That the legislature intended to make them officers is manifest from the terms of the law. This does not seem to be controverted.

Certainly it is not so manifest in Virginia, therefore, the question as to whether they (pilots) exercise any governmental functions must be more fully considered. It would seem that they do not exercise any functions of government, and are a part neither of the legislative, executive nor judicial departments. It has been held in *Dean et als. v. Healy*, 66 Ga. 503, that pilots are not public officers.

At page 504 of the above case it is said:

"A pilot is one who steers a ship or vessel, a guide, and in no sense exercises or discharges the function of a public office. No portion of the sovereignty of the country attaches to his position or duty. It is neither legislative, executive, nor judicial. * * *"

In the syllabus to the above case it is said in part:

"* * * Their licenses, as well as the requisites to obtain them, are but safeguards for the protection of the marine commerce of the State, and are similar to other licenses."

In Mechem on Public Officers, section 4, page 5, it is said:

"The most important characteristic which distinguishes an office from an employment or contract is that the creation and conferring of an office involves a delegation to the individual of some of the sovereign functions of government, to be exercised by him for the benefit of the public—that some portion of the sovereignty of the country, either legislative, executive or judicial, attaches, for the time being, to be exercised for the public benefit. * * *"

Just because pilots have public functions is no reason to say that they are public officers for, unless the powers conferred are of the nature referred to above, the individual is not a public officer. There have been numerous cases holding that certain persons with public functions are not public officers. In the following cases it has been held that the particular person, whose status was in question in each case, was not a public officer, either generally or within the meaning of particular statutory or constitutional provisions, to-wit: a sheriff's special deputy, a deputy clerk of the county court, the treasurer of a city, a licensed pilot, the members of a water committee designated by name in a statute, and empowered thereby to purchase water works for a city, and issue city bonds therefor; firemen in cities and villages; a special deputy sheriff; a carrier of the mail employed by a contractor with the United States to carry the mail over the mail route—all with public functions and yet held not to be public officers. Thorp on Public Officers, section 12, page 1273.

Trusting this gives you the desired information, I am,

Very truly yours,

JOHN R. SAUNDERS,
Attorney General.

PLEDGE OF S. N. P. A.—Whether enforceable.

RICHMOND, VA., March 7, 1927.

E. O. FIPPIN, ESQ.,

*Executive Secretary and Treasurer,
State Conservation and Development Commission,
Richmond, Va.*

MY DEAR MR. FIPPIN:

Acknowledgment is made of yours of the 3rd, enclosing forms of pledges and certificates for subscriptions to the Shenandoah National Park Association, in which you ask the following questions:

"The Conservation and Development Commission would like to have your office interpret each of the two forms of pledges used in the Shenandoah National Park campaign as to the extent to which they are enforceable at law, in the same manner as notes, against either the individual making the pledge, or his estate or successors. For example—

"Suppose a person had died before full payment was made, can we enforce this pledge against his estate?

"Suppose a company has gone into liquidation, do these pledges stand as creditors to its residue like all other creditors?

"Suppose a concern making a pledge sells out its business to another concern, is the pledge enforceable as against the purchase?"

In reply, I beg to say that, in my opinion, the pledges to which you refer are promises to pay and, therefore, are enforceable at law in the same manner as other similar promises, though they are not negotiable as notes are and do not waive the homestead exemption, which amounts to \$2,000, and cannot be subjected to the debts of a householder or the widow of a householder, unless this exemption is waived in the obligation.

Replying to your first question, I would say that I see no reason why payment cannot be enforced against the estate of a person making such a pledge.

If a company has gone into liquidation, I think these pledges would be claims against its assets like those of other creditors.

If a concern makes a pledge and sells its business to another concern, I do not construe the pledge enforceable against the purchaser unless he has agreed to assume all the obligations of the seller.

Yours very sincerely,

JOHN R. SAUNDERS,
Attorney General.

POOLROOM—Regulations of.

RICHMOND, VA., February 3, 1927.

MR. J. M. DENTON,
Big Island, Va.

MY DEAR SIR:

Acknowledgment is made of your letter of February 2, 1927, in which you say:

"There is a poolroom operated in Big Island which is becoming quite a nuisance, and I would thank you to let me know the regulations governing the operation of poolrooms in unincorporated villages."

The only statute on the subject is section 4697-a of the Code of Virginia, 1924 (Acts of 1918, page 536), which prohibits minors from frequenting, playing or loitering in public poolrooms, or billiardrooms, which are located outside of the corporate limits of towns and cities.

However, the act further provides:

"But nothing in this act shall apply to any poolroom or billiardroom located at a health resort with a natural mineral spring."

A violation of this act is made a misdemeanor.

Of course, if the proprietor of the poolroom referred to, or those who frequent it, are guilty of other violations of the law, they could be proceeded against for violations of the same.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

PRIZE FIGHTING—Sparring matches for money.

RICHMOND, VA., *September 25, 1926.*

HON. J. P. REARDON,
Winchester, Va.

MY DEAR SIR:

I am just in receipt of yours of September 24th, in which you say:

"There is a young man now in Winchester who has organized a Business Man's Athletic Club, and in this connection he desires to put on public sparring matches from time to time, for which, of course, he charges a small admittance fee to cover expense money.

"The State law prohibits prize fighting, where this is done for a purse and side bets are made, but I am not advised as to how far the law permits public sparring exhibitions."

I am of the opinion that this would be a violation of section 4426 of the Code of Virginia. I feel sure you will concur in this view.

With kind regards and best wishes, I am

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

PISTOLS—Taxes on.

RICHMOND, VA., *November 24, 1926.*

HON. DAVIS BOTTOM,
*Superintendent of Public Printing,
Richmond, Va.*

MY DEAR SIR:

Acknowledgment is made of your letter of November 22, 1926, in which

you call attention to chapter 158 of the Acts of 1926, providing for the levying and collection of a license tax on pistols. You call attention to the last sentence of section 8 of the act, and state that you have been requested by the board to furnish it with the necessary application blanks, license cards, record books, etc., and also requested to distribute the same to the various treasurers of the State. You ask me to advise you whether you will be entitled to reimbursement for the advances made by your department out of the funds collected from the pistol license prior to the time the amount of \$50,000.00 has been accumulated.

On yesterday Hon. C. Lee Moore, Auditor of Public Accounts, gave you an opinion with reference to this matter, in which he said:

"Your letter of the 22nd relative to expenses of printing blank forms, license cards and postage for sending same out to administer the law imposing tax on pistols and revolvers, has been received. Unless the State bears this expense, until there are proceeds from the tax, it will be impossible to administer the law, and I believe it is the intent of the General Assembly that the law be enforced and expenses paid out of license tax. It is true the wording of the act is not as clear as it might be, at the same time I believe the General Assembly intended this law to be enforced, and I believe I will be authorized to pay you out of license tax realized, upon the order of the board charged with administration of the law, the expenses the State has been put to through your department in aiding the board in administering the law by supplying blank forms and paying the postage."

I fully concur in the opinion expressed by the Auditor. The General Assembly clearly intended this law to be enforced, and it was not its intention by the last sentence of section 8 of the law to prevent the enforcement of the act by depriving the board of the necessary means for carrying it into effect. The prohibition contained in that sentence, in my opinion, has no application to the expenses incident to the operation and enforcement of the law, and, as I have said above, I am clearly of the opinion that the position taken by the Auditor is right.

Yours very truly,

JOHN R. SAUNDERS,

Attorney General.

PISTOL LAW—Exemption of tax.

RICHMOND, VA., December 13, 1926.

W. T. BROADDUS, ESQ.,

Assistant Postmaster,

Dutton, Va.

MY DEAR BROADDUS:

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

"I have a .38 caliber Smith-Wesson pistol, which is my private property. I keep it in the postoffice for protection of government property, cash, etc., and have done this for a number of years.

"Will you kindly write me whether or not the State of Virginia has any control over this pistol?"

In reply, I would say that, inasmuch as the postal laws and regulations require you to be armed to protect the mails, etc., you are exempt by section 5 of chapter 158 of the Acts of 1926 from paying the \$1.00 tax on pistols.

Section 5 of chapter 158 of the Acts of 1926, at page 286, relieves officers who are authorized by law to carry pistols from paying a tax on such pistols when they are carried in the discharge of their duties, but requires them to list their pistols or revolvers with the treasurer of the county or city annually by January 1.

In conclusion, it is my opinion that assistant postmasters are exempt from the \$1.00 tax on pistols.

Trusting this gives you the desired information, I am

Yours very sincerely,

JOHN R. SAUNDERS,

Attorney General.

PISTOLS—Officers exempt from tax.

RICHMOND, VA., *December 16, 1926.*

MR. C. E. MCCLINTOCK,

Maidens, Va.

MY DEAR MR. MCCLINTOCK:

I am in receipt of your letter of the 14th, the contents of which I have carefully noted.

I presume, of course, that the pistols which are carried by officers and State employees connected with your institution are owned by the State. Such being the case, they should not be taxed, but should be registered as the property of the Virginia Industrial School for Boys.

I am enclosing copy of a letter written Maj. Youell, Superintendent of the State Penitentiary.

Trusting this is the information you desire, I am

Yours very truly,

JOHN R. SAUNDERS,

Attorney General.

PISTOLS—Sale of ammunition.

RICHMOND, VA., *January 13, 1927.*

J. C. MATTHEWS & COMPANY,

Galax, Va.

GENTLEMEN:

Acknowledgment is made of your letter of January 10, 1927, in which you say:

"We are dealers in pistols and cartridges, we are located about eight miles from the North Carolina line, we have people who buy from us both wholesale and retail, and in the State of North Carolina they do not have to register their pistols. Please tell us if we have the right to sell these people cartridges."

In response thereto, I call your attention to section 3 of chapter 158 of the Acts of 1926, which reads as follows:

"It shall be unlawful for any retailer in this State to sell ammunition for any pistol or revolver to any person unless the person desiring to make such purchase displays the license card for the current year provided for in this act."

In my opinion it would be unlawful for you to sell pistol ammunition to any person in this State, regardless of his place of residence, without complying with this section. Of course, this section would not prevent you from shipping the ammunition to bona fide customers residing out of the State, but, as I have said, it would prevent you from selling it to them over the counter in Virginia.

Yours very truly,

JOHN R. SAUNDERS,

Attorney General.

PISTOLS—Exemption of tax.

RICHMOND, VA., *December 2, 1926.*

F. H. ELMORE, ESQ., P. M.,
Snowville, Va.

DEAR SIR:

Acknowledgment is made of your letter of November the 26th in which you say:

"Please advise if postmasters, mail carriers and other postal employees are exempt from paying tax on pistols. The law says officers are exempt, but does not name them. The postal laws or regulations require postal employees to be armed to protect the mails and it does not seem right to require them to pay taxes on weapons."

In reply, I will say that I am familiar with section 5 of chapter 158 of the Acts of 1926, which relieves officers authorized by law to carry pistols from paying a tax on such pistols when they are carried in the discharge of the official duties.

Section 4534 of the Virginia Code provides for the punishment of persons who carry concealed weapons, but exempts any police officer, town or city officer, constable, sheriff, conservator, of the peace, carriers of the United States mail in the rural districts and collecting officer while in the discharge of his official duties from punishment.

As to mail carriers, especially those employed by a mail contractor, though technically not public officers, as was held in the case of *Sawyer v. Corse*, 17 Gratt. (Va.) 230, it was, I dare say, the intention of the General Assembly to exempt them from paying a tax on pistols, when carried in the discharge of their duties. Reading section 5 of chapter 158 of the Acts of 1926 with section 4534 of the Virginia Code, to arrive at the intention of the legislature, it would seem that the General Assembly did not use the word "officer" in a technical sense, but all those persons who are authorized by law to carry pistols in the discharge of

their duties and those who are exempt by section 4534 of the Code from punishment, which, as you see, includes mail carriers.

I might say that the Auditor of Public Accounts and the State Tax Commissioner concur in this opinion.

Unquestionably, postmasters who exercise some portion of the sovereign functions of government and for the public benefit are exempt from paying this pistol tax.

In conclusion, therefore, I would say that mail carriers and postmasters who are required by law to carry pistols while in the discharge of their duties are exempt from paying a tax on pistols, but must by section 5 of chapter 158 of the Acts of 1926 list his pistol or revolver with the treasurer of his county or city annually by January the first.

Trusting this will give you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,

Attorney General.

PISTOLS—License for.

RICHMOND, VA., *November 29, 1926.*

MAJOR R. M. YUELL,

Superintendent of Penitentiary,

Richmond, Va.

MY DEAR MAJOR YUELL:

I have examined chapter 158 of the Acts of 1926, commonly known as the pistol license law, and, in view of the language of section 1 of that act, I am of the opinion that the pistols owned by the penitentiary and the State convict road force should be registered in the names of the penitentiary and the State convict road force in Richmond, which is headquarters of both institutions.

There is some question in my mind as to whether the law has any application to pistols owned by the Commonwealth or its departments. The safest course, however, would probably be to register these pistols in the names of the departments owning them. They should not be registered in the names of the guards or employees carrying them, as they are not the owners thereof. In those cases where a guard owns the pistol which he carries, it should be registered in his name, as provided for in section 5 of the act.

Yours very truly,

JOHN R. SAUNDERS,

Attorney General.

PISTOLS—Treasurer's duty in connection with pistol law.

RICHMOND, VA., *May 20, 1927.*

HON. C. B. HALL, *Treasurer,*

Ashland, Va.

MY DEAR MR. HALL:

Mr. V. H. Thompson, of Hanover, is in the office now with reference to

the pistol license law (chapter 158 of the Acts of 1926). He has requested me to advise him on the following question:

Where a pistol is registered by an officer and, for that reason, is not subject to tax, is he entitled to a license card from the treasurer?

He states to me that you have some doubt as to whether you could issue a license card in this case.

The act is badly drawn, and its meaning can only be determined by construing the evident intent of the General Assembly from the various provisions of the act. It is true that section 1 of the act requires a license card to be issued when the license is paid. Section 5 of the act, however, expressly provides:

"The provisions of this act shall not apply to any officer authorized by law to carry a pistol or revolver nor to the pistol or revolver of such officer when such pistol or revolver is carried in discharge of his official duty, except that every officer shall list his pistol or revolver with the treasurer of his county or city annually by January first; * * *."

Section 2 of the act requires the retailer selling a pistol or revolver in this State to keep a record of the name and address of the purchaser and the number, make and caliber of the pistol or revolver, and to report once a month to the treasurer of his county or city the names of such purchasers, together with the information which he is required to keep in this record.

As you will recall, section 1 of the act requires that the license card contain the number, caliber, make and owner of the pistol or revolver registered.

Section 3 of the act makes it unlawful for any retailer to sell ammunition for any pistol or revolver to any person, unless the person desiring to make such purchase displays the license card for the current year provided for in this act.

It follows from this that, if a license card were not issued to a person who registers his pistol, but is exempt from tax under section 3 of the act, he would be unable to purchase ammunition for his pistol in this State. I am, therefore, of the opinion that the legislature intended that the treasurers should issue license cards to officers registering their pistols under section 5 of the act, although the same are exempt from tax, with the suggestion to you that in issuing the cards you write on the face of them, "no tax paid, this pistol being exempt from license tax."

This is the practice pursued by the treasurer of the city of Richmond, and, in view of the fact that an officer would be unable to purchase ammunition if a card were not issued to him, it seems clear that the proper construction of the act requires that the treasurer issue such card. Of course, his report should show that no tax was paid and the reason why it was not paid.

Very truly yours,

LEON M. BAZILE,
Assistant Attorney General.

POTOMAC RIVER—Construction of statute.

RICHMOND, VA., June 23, 1927

HON. SWEPSON EARLE, *Commissioner,*
Conservation Department,
512 Munsey Building,
Baltimore, Md.

DEAR MR. EARLE:

Your letter of the 15th, addressed to Mr. M. D. Hart, executive secretary of the Virginia Commission of Game and Inland Fisheries, enclosing copy of opinion by Chief Judge Bond, of the Court of Appeals of Maryland, in the case of *Middlekauff, et al. v. E. Lee Le'Compte and Albert Crampton*, has been referred to me, at your request, for the purpose of having me give you my construction of the Potomac river statutes, concurrently enacted by the States of Maryland and Virginia, in the light of the opinion of the Court of Appeals of Maryland. Your own view is expressed in the following paragraph:

"We are enclosing herewith a true copy of decision rendered by Chief Judge Bond of the Court of Appeals of Maryland, which is now reported in Maryland Reports, 149, page 621. I am unable to add anything to this, as it speaks for itself, but will say that we have the same law as Attorney General Saunders refers to as chapter 129, section 3299 of the Code of Virginia, which we term concurrent laws for Maryland and Virginia, governing the Potomac river. It is not, however, an interpretation of the Compact of 1785, and the enclosed opinion deals with the Compact. The concurrent law, therefore, as we interpret it, governs both States on that part of the Potomac river which is navigable. The opinion goes further and, in short, rules that it is not necessary that Virginia concur in any laws enacted by the State of Maryland for the Potomac river in and for those waters which are unnavigable."

The opinion delivered by Judge Bond states that the appellants were residents either of Maryland or West Virginia, and I assume that the relationship between Virginia and Maryland was not pertinent except as to the statutes at the time of the separation of West Virginia from Virginia. Since that time, to-wit, in 1912, the legislatures of the States of Maryland and Virginia have enacted the concurrent statute to which you refer, and which is chapter 129, section 3299 of the Code of Virginia, which is chapter 126, page 233, of the Acts of Assembly of Virginia, 1912. The first section of this law is as follows:

"It shall be lawful for any citizen of the State of Maryland or of the State of Virginia to take fish, oysters or crabs from the Potomac river after complying with the requirements of the laws of the State of which he is a citizen for the taking of fish, oysters or crabs from the waters of such State; and any citizen of either State who takes fish, oysters or crabs from the Potomac river without having complied with the requirements of the law of his State as to the taking of fish, oysters or crabs in its own waters, shall be considered guilty of violating the laws of the State of which he is a citizen, and shall be prosecuted, according to such laws. It shall not be lawful for any person to take or catch fish, except by hook and line, or oysters or crabs in any manner whatever in the waters of the Potomac river unless he be a citizen of Maryland or of Virginia, and shall have been a resident of the State of which he is a citizen for twelve months immediately preceding. Any such nonresident

violating this section shall be subject to a fine of five hundred dollars; furthermore, any vessel, with its equipment and cargo, or any net or other appliances used in violating this section, shall be deemed forfeited to the State."

If, as you contend, this section applies only to the navigable portion of the Potomac river, it seems strange that the section itself does not so confine its application. The eighth section of the Compact between Maryland and Virginia, which is section 14 of the Code of Virginia, is not inconsistent with this Act of 1912, as may be seen from this language:

"All laws and regulations which may be necessary for the preservation of fish, or for the performance of quarantine in the river Potomack or for preserving and keeping open the channel and navigation thereof, or of the river Pocomoke, within the limits of Virginia, by preventing the throwing out ballast, or giving any other obstruction thereto, shall be made with the mutual consent and approbation of both States."

If the application of this section had been limited to the navigable portion of the Potomac, it would have been easy to so state it in the Compact. In the absence of such statement, by all the rules of statutory construction the words are to be taken, according to their ordinary intent and meaning.

It so happens that one of my assistants and myself, when members of the State Senate of Virginia, were members of the joint legislative commission for the purpose of formulating the concurrent statutes. I feel sure that it was never for a moment contemplated that these statutes would not apply to the entire length of the Potomac, so far as it constituted the boundary between the two States. If it should be held otherwise, there should certainly be other joint statutes to carry out what was always understood to be the purpose of the Compact, which was the maintenance of mutual rights as to fishing of citizens of Maryland and Virginia.

Yours very truly,

JOHN R. SAUNDERS,

Attorney General.

POLICE JUSTICE—Fee for issuing warrant.

RICHMOND, VA., June 3, 1927.

HON. CHARLES D. SCHAKELFORD,
Attorney at Law,
Charlottesville, Va.

MY DEAR JUDGE:

Acknowledgment is made of your several letters, which, due to the pressure of work in my office at this season of the year, I have been unable to answer heretofore. You request me to advise you whether a civil and police justice is entitled to a fee of fifty cents for issuing executions on judgments rendered by him under authority of the provisions of sections 3481 (8) and 3484 (36) of the Code of Virginia, 1919, as amended.

In view of the provisions of section 3100 of the Code of 1919, which ex-

pressly provides that the civil and police justice in a city containing ten thousand inhabitants, and less than forty-five thousand inhabitants, shall receive a salary to be paid out of the treasury of the city, and the further provision that "he shall receive no other compensation for his services as such civil and police justice from said city," I am of the opinion that the civil and police justice of such a city would not be entitled to fees for issuing executions.

As to whether the city into whose treasury all costs and fees, under section 3104 of the Code, must be paid would be entitled to have the police justice charge such fees and pay them into the treasury, I prefer not to express an opinion, as I think that is a matter which falls within the jurisdiction of the city attorney of your city.

Trusting that you appreciate my position in the matter, I am

Very truly yours,

JOHN R. SAUNDERS,

Attorney General.

PHARMACY, STATE BOARD OF—Permit to conduct and register a pharmacy.

RICHMOND, VA., July 19, 1926.

HON. A. L. I. WINNIE, *Secretary,*
State Board of Pharmacy,
Richmond, Va.

MY DEAR MR. WINNIE:

Acknowledgment is made of your request of this morning that you be advised whether your application form for the year 1926 for a permit to conduct a pharmacy and registration of a pharmacy with the Board of Pharmacy of Virginia is in proper form, and whether your board has a right to require the information contained in this application under oath.

The laws relating to the practice of pharmacy are found in chapter 70 of the Code, beginning with section 1655 and extending through section 1762 of the Code of 1919, as amended.

Section 1674 of the Code, as amended, requires the Board of Pharmacy to require and provide for the annual registration of every pharmacy doing business in Virginia. The section in part provides:

"* * * the proprietor of every pharmacy opening for business after the taking effect of this act shall apply to the Board of Pharmacy for registration and it shall be unlawful for the pharmacy to do business until so registered; * * *."

This section of the Code also requires the Board of Pharmacy to provide for the annual registration of every registered pharmacist and registered assistant pharmacist engaged in business in this State, which permits must be renewed annually.

Where a registration permit is revoked or cancelled in accordance with the statutes or rules and regulations of your board passed by authority of the Code, it is my opinion that a new permit must be obtained just the same as if a prior

permit had never been issued before the proprietor can continue to operate the pharmacy as such.

I have examined your form above referred to with care, and, in view of the clear intention of the law that no permit shall be issued to one not entitled, within the meaning of the law, to operate or conduct a pharmacy, it is my opinion that this application form contains nothing which your board is not entitled to know and to require information prior to granting the permit or certificate of registration.

I am further of the opinion that it is a wise precaution, and one which your board is clearly authorized to take, to require applicants to support the statements contained therein by affidavit.

Yours very truly,

LEON M. BAZILE,
Assistant Attorney General.

RACIAL SEGREGATION ACT—Validity of Virginia statutes.

RICHMOND, VA., *November 23, 1926.*

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

MY DEAR GOVERNOR:

Acknowledgment is made of your communication of recent date, with which you send me a letter from Hon. Clifton A. Woodrum with reference to the validity of the Virginia statutes providing for the segregation of the races.

It is true that the Supreme Court of this State in *Hopkins v. City of Richmond* and *Coleman v. The Town of Ashland*, reported in 116 Va. 692, did hold that such an ordinance was a valid exercise of the police power. I am extremely familiar with that case, as I was counsel for Coleman. Subsequent to the decision of this case, however, the Supreme Court of the United States in *Buchanan v. Warley*, 245 U. S. 60, held that such statutes were illegal as being in violation of the fourteenth amendment to the Federal Constitution.

As was pointed out by the Supreme Court in that case, "the Federal Constitution and laws passed within its authority are, by the express terms of that instrument, made the supreme law of the land."

This being so, I do not know of any method by which the condition spoken of by Judge Woodrum can be remedied by law. It is an unfortunate situation, but one of those over which the State is without control. The same conditions mentioned by Judge Woodrum were advanced as reasons why the ordinance of the city of Louisville should be held valid, but the Supreme Court of the United States rejected these arguments and said (p. 81):

"* * * Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution."

and, in concluding its opinion, said (p. 82):

"We think this attempt to prevent the alienation of the property in

question to a person of color was not a legitimate exercise of the police power of the State, and is in direct violation of the fundamental law enacted in the fourteenth amendment of the Constitution preventing State interference with property rights except by due process of law. That being the case, the ordinance cannot stand. * * *

Trusting this gives you the desired information, I am, with my best wishes,
Very truly yours,

LEON M. BAZILE,
Assistant Attorney General.

REGISTRATION FEE—Refund of.

RICHMOND, VA., January 27, 1927.

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

MY DEAR SIR:

I beg to acknowledge receipt of your letter of the 24th, in which you request an opinion as to your right to refund a registration fee assessed by the State Corporation Commission for the current year when the corporation is dissolved by order of the State Corporation Commission prior to February 15th of the current year.

The particular case deals with the Yorco Power Company, Incorporated, which was assessed with a registration fee of \$15.00 for 1927, and which was paid into the State treasury on January 7, 1927, and the corporation was afterwards dissolved by the State Corporation Commission on January 17, 1927.

I am of the opinion that, under the circumstances, you would be entirely justified in returning the registration fee.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

REAL ESTATE—License.

RICHMOND, VA., January 17, 1927.

W. B. RUDD, Esq., *Secretary,*
Real Estate Commission,
Richmond, Va.

MY DEAR MR. RUDD:

Acknowledgment is made of your communication of January 17, 1927, in re license of Mr. M. Clay Franklin.

It appears from the statement given by you that on December 8, 1926, Mr. Franklin was tried before the police justice of Roanoke on the charge of operating as a real estate broker without a license during the year 1925. At the trial of the case the police justice decided in favor of Mr. Franklin and against the contention of the Commonwealth. No appeal was taken from this decision, and

it has become final. You ask me to advise you whether the Real Estate Commission would have the authority to withhold a license from Mr. Franklin for the year 1927 on account of his failure to obtain a license from the commission for the year 1925.

You further state that Mr. Franklin applied for a license for 1926, but that, although he paid the license fee, it was withheld on account of his refusal to pay the fee for 1925, it being Mr. Franklin's contention that he did not operate as a real estate broker during the year 1925 and, therefore, was not required to obtain a license, in which position he was sustained by the police justice of Roanoke.

In my opinion the question as to whether or not Mr. Franklin was required to obtain a license for 1925 was finally and definitely settled by the judgment of the police justice of Roanoke when that judgment became final. It is now too late to appeal the case, if the Commonwealth has the right of appeal, and, as more than thirty days have elapsed, it is too late to apply for a rehearing. Therefore, it has been finally adjudicated by the court having jurisdiction of the matter that Mr. Franklin was not required to obtain a license for the year 1925.

The matter having been settled by the court, it is my opinion that the Real Estate Commission has no authority to act again in granting or refusing to grant a license for Mr. Franklin for the year 1927.

Of course, if Mr. Franklin has been guilty of any misconduct, or any reason exists other than his failure to obtain a license for the year 1925, the commission would have the authority to consider these, but, so far as the commission is concerned, it has been settled by the court that Mr. Franklin was not required to obtain a license for the year 1925 and that the commission has no authority to reopen the matter.

Yours very truly,

LEON M. BAZILE,
Assistant Attorney General.

RECOGNIZANCE—Forfeiture of.

RICHMOND, VA., *November 15, 1926.*

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

MY DEAR MR. HEUSER:

Acknowledgment is made of your letter of November 4, 1926, in which you say:

"Where a demurrer to a *scire facias* upon a forfeited recognizance in a prohibition case is sustained because of a variance or other irregularity, can the Commonwealth appeal?"

"Our judge has just taken under advisement two cases, \$750.00 cash, and from his questions during argument I fear he is against me. The recognizance was written on the back of the warrant of arrest, but there is no caption to the recognizance affirmatively showing the J. P.'s county. *Alls' Case*, 131 Va. 640, ought to decide the demurrer, but may not."

In my opinion the Commonwealth would have the right of appeal in such a case. A proceeding for the recovery of a forfeited recognizance is not a criminal but a civil proceeding, and the prohibitions contained in sections 8 and 88 of the Constitution would have no application.

I looked this question up some months ago in connection with a case which the Commonwealth expected to appeal, pending what it was believed would be an adverse decision by the trial court, and satisfied myself at the time that the Commonwealth would have the right of appeal in such a case.

I further desire to call your attention to the case of *Walker v. Commonwealth*, 35 Va. App. 130, which shows you how a recognizance taken by a justice may be corrected or amended so as to speak the truth of what actually took place.

Very truly yours,

LEON M. BAZILE,
Assistant Attorney General.

ROAD LAWS—Funds subscribed for.

RICHMOND, VA., November 12, 1926.

W. EARLE CRANK, ESQ.,
Attorney at Law,
Louisa, Va.

MY DEAR MR. CRANK:

Acknowledgment is made of yours of the 9th, in which you say:

"By the Acts of the General Assembly of 1924, page 290, a special road law was passed for Louisa county, by which all road funds allocated to the several districts were to be paid over to the supervisor of each district, respectively, and disbursed by him. Section 2 of the act undertook to specify how the fund dispensed should be accounted for, etc.

"By the Acts of the General Assembly of 1926, page 706, section 2 of the said act was amended and re-enacted, but section 1 of the act was not changed.

"By the Acts of the General Assembly of 1926, page 846, it is provided 'that all funds receivable unto a treasurer of a county, whether for general county, school or road purposes, expended by the constituted authorities of the county, shall be paid to the county treasurer and expended only through his office and upon warrants legally made and issued.'

"I will thank you for an opinion as to whether chapter 496 of the Acts of the Assembly, 1926, page 846, can be construed not to affect the special road law for Louisa county or whether, in your judgment, it supercedes the acts referred to affecting the road funds of Louisa county.

"You will observe that chapter 496 of the Acts of Assembly of 1926, page 846, is a subsequent law as to both section 1 and 2 of the road law of Louisa county, as section 1 was re-enacted at the 1924 session and section 2 re-enacted at the 1926 session was an emergency act and went into force from its passage."

In reply, I beg to say that, in my judgment, chapter 496, page 846, of the Acts of 1926, seems to be applicable to such funds as those referred to in section 1 of chapter 180, page 290, of the Acts of 1924. Chapter 496 of the Acts of 1926 is as follows:

"Be it enacted by the General Assembly of Virginia, That all funds receivable into the treasury of a county, whether for general county, road or school purposes, expendable by the constituted authorities of the county, shall be paid to the county treasurer and expended only through his office and upon warrants legally authorized and issued."

Therefore, it seems to me the special road law of Louisa county has been automatically amended by chapter 496 of the Acts of 1926. It was the evident intention of the legislature to prescribe a uniform rule for the manner in which such funds should be received and disbursed.

Yours very truly,

JOHN R. SAUNDERS,

Attorney General.

RIVERS AND STREAMS—Regarding certain rights riparian owners.

RICHMOND, VA., July 26, 1926.

DR. J. S. DEJARNETTE,

*Superintendent Western State Hospital,
Staunton, Virginia.*

DEAR DR. DEJARNETTE:

In reply to yours of July 22, 1926, in regard to whether lower riparian owners have any claim for damages against the hospital for using the stream as stated, that is, "taking all the water in the stream for irrigation," I will state that the use to which you are putting this stream is an unreasonable one.

It is a well settled general rule on this point that each riparian proprietor has *ex jure naturas* an equal right to the reasonable use of water running in a natural course, through or by his land, for every useful purpose to which it can be applied. The use must be a reasonable one, and not inconsistent with the reasonable enjoyment of the stream by others. A fortiore, if the irrigation takes all of the water in the stream, it is, I dare say, most unreasonable.

Of course, being a part of the State of Virginia, you are immune from suit or an injunction, but I would suggest a more reasonable use of the stream. For instance, a use that would not wholly during the day deprive the lower riparian owner of water for his cattle, which is, I think, quite as necessary as the use which you are making of the stream.

Yours very truly,

JOHN R. SAUNDERS,

Attorney General.

SALARIES—Raising of.

RICHMOND, VA., April 4, 1927.

HON. J. H. MEEK, *Director,*

Division of Markets,

Richmond, Virginia.

MY DEAR SIR:

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

"Please refer to chapter 113, Acts of the Assembly 1924, an act to authorize and provide for a voluntary inspection service for agricultural products, etc.

"Under this act we are collecting voluntary fees for inspection service, and these fees are being used to pay employees for carrying out the service. Chapter 88, Acts of the Assembly of 1926, limits the raising of the salary of State officials or employees unless authorized by the Governor and the board, or commission under which the employee works. We can carry on our service much more economical and efficient by having authority to raise, or lower the pay of these employees paid from the fees that we take in for inspection as their services and the activity may justify.

"Please give me your opinion as to whether or not the law referred to above with reference to raising salaries requires that this office secure permission from the Governor, and the board under which we operate before any increase can be given employees paid from our inspection fund created from voluntary inspection fees collected under the law mentioned above."

The language of chapter 88 of the Acts of 1926 so far as applicable to the question here involved is as follows:

"That the salary of no State officer or employee which is payable by the State and which is not specifically fixed by law, and the salary of no officer or employee of any State institution, board, commission or agency 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."

I have also examined chapter 113 of the Acts of 1924 with care and it appears from this act that the inspectors authorized are there designated as "employees, or licensed agents of the Division of Markets of the Department of Agriculture." This being so it is my opinion that the above quoted language of chapter 88 of the Acts of 1926 is applicable to such agents or inspectors, and before any increase can be made in the pay of such agents that the provision of this letter act must be complied with.

Yours very truly,

JOHN R. SAUNDERS,

Attorney General.

SALARIES—Officers.

RICHMOND, VA., July 14, 1926.

HON. C. LEE MOORE,

Auditor of Public Accounts,

Richmond, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of recent date, which is as follows:

"Article V of the Constitution of Virginia relates to the Executive Department. Section 82 of the Constitution of Virginia designates as one of the officers of the Executive Department the Auditor of Public Accounts, and section 83 of the Constitution of Virginia provides as follows:

"The salary of each officer of the Executive Department, except in

those cases where the salary is determined by this Constitution, shall be fixed by law; and the salary of no such officer shall be increased or diminished during the term for which he shall have been elected or appointed.'

"In compliance with the provisions of section 83 of the Constitution of Virginia, the General Assembly of Virginia, by act approved February 27, 1920, amended and re-enacted section 3435 of the Code of Virginia, and fixed the annual salary of the Auditor of Public Accounts at \$5,000.00, and provided that all fees of office accruing to him shall be paid into the treasury. There are no fees provided by statute to the Auditor of Public Accounts, therefore, he receives none.

"The term of office which I am now serving as Auditor of Public Accounts commenced March 1, 1924. During this term of office the General Assembly of Virginia, by act approved March 20, 1924, amended and re-enacted section 44 of the Tax Bill, which relates to tax on inheritances. Subsection 20 of section 44 as amended and re-enacted by act approved March 20, 1924, provides as follows:

"The expense of the execution of this act shall be paid by the Auditor of Public Accounts out of the funds collected hereunder, but the Auditor shall not, under the authority of this section, pay out of said funds the salaries of any employees and the Auditor of Public Accounts shall receive one thousand dollars per annum, payable out of the funds collected hereunder as compensation for additional duties hereby imposed upon him.'

"This act was passed during the term of office which I am now serving, and makes provision to compensate the Auditor of Public Accounts out of the funds collected from inheritance taxes for the additional duties imposed upon that officer to the extent of \$1,000.00 annually.

"While it is my opinion the act of the General Assembly approved March 20, 1924, amending and re-enacting section 44 of the Tax Bill, providing this compensation of \$1,000.00 annually out of funds collected from inheritance taxes for additional duties placed upon the Auditor of Public Accounts by that law, does not violate the provisions of the Constitution of Virginia, forbidding an increase in the salary of the Auditor of Public Accounts during his term of office, because the compensation is to be paid out of the funds collected from inheritance taxes, and is special compensation for the additional duties placed upon the Auditor of Public Accounts, which were not placed upon him at the time the General Assembly fixed the annual salary of that officer, as the law makes it my duty to pass upon this matter, but being personally interested I deem it eminently proper, in fact absolutely essential, that before acting favorably in my own behalf I should have the opinion of that officer of the State who is made the legal adviser of the Auditor of Public Accounts so that it will neither be paid nor received contrary to the Constitution and statute law of Virginia, and I will be obliged if you will let me have your opinion if it is lawful for this money to be paid out of the funds collected on inheritance taxes and to be received by me as Auditor of Public Accounts, having discharged the additional duties placed upon me by the act of March 20, 1924, amending and re-enacting section 44 of the Tax Bill."

An examination of section 44 of the Virginia Tax Bill prior to its amendment by the Acts of 1924 shows that certain very important duties were imposed by that law upon the Auditor of Public Accounts with reference to the assessment and collection of inheritance taxes.

It is true that the assessment of the tax under section 44 of the tax bill, prior to its last amendment, was made by the various courts or clerks thereof on report of commissioners designated for the purpose of investigating and reporting on the

value of the estate of every decedent whose gross estate amounted to more than one thousand dollars, unless specially directed by the court. The clerk, however, was required to certify a copy of this order to the Auditor of Public Accounts, who was required under the law to charge the treasurer with the tax. See subsections 5 and 6 of the act as amended by the Acts of 1918 and 1919.

In those cases where it was impossible to compute the present value of any interest in property passing through the decease of the former owner, the court or clerk engaged in determining the amount of tax was authorized, subject to the approval of the Auditor of Public Accounts, to effect a compromise settlement (subsection 7). Moreover, any application by the taxpayer for a correction of an assessment could be made only after notice was given to the Auditor of Public Accounts (subsection 12), and, under the provisions of subsection 14 of the act, "if from the statement of the facts or other evidence, the Auditor of Public Accounts shall be of opinion that the order of the court, or the orders of the clerk, determining the taxes is erroneous," he was authorized, within one year from the date of the assessment, to file a petition for a rehearing or review of the order. This section provided that the filing of the same should operate as a supersedeas, and the matter should be reheard or the order reviewed by the court and witnesses examined in the same manner as if no previous determination had been made. The Auditor was fully vested with the power to appeal in the event that the decision was adverse to his contention.

As contrasted with the above resume of the Auditor's duties under section 44 of the Tax Bill prior to its amendment by the General Assembly of 1924, it may be noted that in this section as amended, in addition to the report to be made by the clerk to the Auditor as provided by subsection 7 of the amended section, the personal representatives or beneficiaries of estates are also required to report to the Auditor (subsections 5 and 6).

The tax is no longer determined or assessed by the court or clerk thereof, but is now determined and assessed by the Auditor of Public Accounts (subsection 10), and the tax imposed is now payable to the Auditor of Public Accounts instead of to the treasurer (subsection 11). Instead of charging the treasurer with the tax, the Auditor forwards the bill, if it is unpaid, to the sheriff or sergeant for collection by levy (subsection 12). If the taxpayer wishes to apply for relief, the Auditor must be notified (subsection 13), and, if the Auditor is dissatisfied with the decision of the court, he is authorized to apply for a rehearing on behalf of the Commonwealth and, if not satisfied with the result, to apply to the court of appeals for a writ of error (subsection 16).

It is true, as pointed out above, that section 44 of the Tax Bill, as amended by the Acts of 1924, did make certain changes with reference to the duties imposed on the Auditor of Public Accounts relative to the assessment and collection of inheritance taxes, but in my opinion it is very doubtful whether these changes and additional duties, which were placed on the Auditor of Public Accounts, were not such as were within the scope of his office.

There is a line of authorities which hold that a constitutional provision prohibiting the increase or decrease of an officer's compensation during his term of office does not prohibit the Legislature from changing the duties of public officers by either adding to or taking from them, and that where new duties are imposed upon a public officer *which are not within the scope of his office*, an extra compensation is provided therefor, and such increase in compensation is not within the constitutional prohibition. 22 R. C. L. sections 228-9, pages 534-5.

While it is true that reports are now made to the Auditor by the personal representative or beneficiary of a decedent in addition to the report made by the clerk, and it is true that the taxes are determined and assessed now by the Auditor and not by the courts or clerks, under section 44 of the Tax Bill, prior to its amendment by the Acts of 1924, the law required the clerks to keep the Auditor informed as to all assessments made and the Auditor was authorized and required, in any case in which the statement of facts or other evidence caused him to be of the opinion that the assessment was erroneous, to proceed for a correction of the same. Therefore, the Auditor exercised supervisory control over the enforcement of the inheritance tax law prior to the amendment of section 44 of the Tax Bill by the General Assembly of 1924.

This leads me to the conclusion that it is very doubtful whether it could be said that the additional duties, which were imposed upon the Auditor of Public Accounts by section 44 of the Tax Bill as amended by the Acts of 1924, could be called new duties which are not within the scope of his office.

In addition to this, I call your attention to the case of *Johnson v. Black*, 103 Va. 477, 489, where, quoting with approval from Dillon on Municipal Corporations, the Court of Appeals said:

“* * * To allow changes and additions to the duties properly belonging or which may properly be attached to an office to lay a foundation for extra compensation would soon introduce intolerable mischief. * * *”

While it is true that this case is not in point with the facts in your case, the above language rather indicates the attitude of the Court of Appeals with reference to salary increases.

I, therefore, believe that the proper course for you to pursue in the matter would be to test it in court, as I feel that in a case involving a doubt, as this case does, it would be the duty of the Auditor to resist the payment of the additional compensation. In my opinion, the simplest way to test the matter would be for you as an individual to proceed by mandamus against the Auditor of Public Accounts in the Court of Appeals.

Trusting this gives you the desired information, I am

Very truly yours,

JOHN R. SAUNDERS,

Attorney General.

STATE ACCOUNTANT—Auditing accounts.

RICHMOND, VA., May 20, 1927.

HON. WM. F. SMYTH,
State Accountant,
Richmond, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of May 13, 1927, in which you call attention to chapter 417 of the Acts of 1922 and chapter 545 of the Acts of 1926, and then ask the following questions:

“First—Does chapter 545 of the Acts of 1926 repeal chapter 417 of the Acts of 1922?

"Second—May the funds now appropriated to the State Accountant for the year to end February 29, 1928, "for examination of the accounts of city and county officials and agencies handling State funds" be used to pay the cost of auditing accounts of boards of supervisors, county school boards, county and district road boards, which officers do not handle State funds?

"Third—In connection with all audits made since January 1, 1927, on which date chapter 545 of the Acts of 1926 became effective, should I bill the localities for the whole cost or only one-half of the cost incurred by the State in making such audits?

"Fourth—Does section three of the act of 1926 impose upon me the duty of making public any shortage of an officer found to exist as a result of the audit, or is this duty imposed upon the board of supervisors of the county?"

Section 1 of chapter 417 of the Acts of 1922 requires the State Accountant at least once in every two years "to audit all accounts and records of every city and county official and agency in this State handling State funds, making a detailed written report thereof to the Governor within thirty days after each audit." Section 2 of the act requires the locality, whose officials or agencies are audited in pursuance of this act, to reimburse the State to the extent of one-half of the expense connected with such audit.

Chapter 545 of the Acts of 1926, which requires the boards of supervisors of the counties and the councils of cities and towns to prepare and publish annual budgets, etc., by section 3 thereof provides in part as follows:

"It shall be the duty of the State Accountant, either in person or through an assistant, annually to audit all accounts and records of every county, *in so far as they relate to local funds*, and to make a detailed written report thereof to the board of supervisors within thirty days after each audit. * *"
(Italics supplied.)

Nothing is said in chapter 545 of the Acts of 1926 as to any repeal of chapter 417 of the Acts of 1922. Repeals by implication are never favored, and the law is well settled that to repeal a statute by implication there must be such a positive, plain and visible repugnancy between the provisions of the new law and the old that they cannot stand together or be consistently reconciled. It is also well settled that a subsequent statute may be inconsistent with part of a former one, and so operate as a repeal of that part by implication; or it may not be wholly inconsistent with any part of the former one, so as to repeal it, but it may operate to modify the construction and effect of the former law. *Anderson v. Commonwealth*, 18 Gratt. (59 Va.) 295 (1868).

There are a number of county officials who handle State funds. On the other hand, there are a great many accounts and records in every county that relate to county affairs only. The language of section 3 of chapter 545 of the Acts of 1926, however, is that the State Accountant shall audit "all accounts and records of every county, in so far as they relate to local funds," and, further, that "the cost of such audit shall be borne by the county receiving the service of said accountants, as provided for in section five hundred and sixty-five of the Code of Virginia." This provision is, therefore, in conflict with that part of section 2 of chapter 417 of the Acts of 1922, in so far as that section provides that the cost of auditing the accounts of certain local officials shall be borne one-half by the State and one-half by the county.

In as much as chapter 545 of the Acts of 1926 requires you to audit all

accounts and records of every county, in so far as they relate to local funds, and further requires the county to pay the cost of such audit, it is my opinion that you are now required, under the provisions of chapter 417 of the Acts of 1922, to audit only that part of the accounts of the officials mentioned in that act in so far as they relate to State funds handled by such county officials or agencies, for which audit the State should pay. It is further my opinion that, under the provisions of chapter 545 of the Acts of 1926, you are required to audit all accounts and records of every county, including the accounts and records of the officials and agencies handling State funds, in so far as they relate to the county affairs, for which the counties must pay the cost as provided for in section 565 of the Code of Virginia. You will observe, however, that section 3 of chapter 545 of the Acts of 1926 relates exclusively to counties, and, therefore, the provisions of chapter 417 of the Acts of 1922 remain in full force with reference to cities.

Therefore, it is my opinion that chapter 417 of the Acts of 1922 has not been repealed by chapter 545 of the Acts of 1926, except as above stated.

With reference to your second inquiry, it is my opinion that the funds appropriated for the performance of the duties imposed on you by chapter 417 of the Acts of 1922 cannot be used to defray the cost of auditing the accounts of county officials and agencies which do not handle State funds.

Section 3 of chapter 545 of the Acts of 1926 expressly provides that in such case "the cost of such audit shall be borne by the county receiving the service of said accountants, as provided in section 565 of the Code of Virginia

You will see from my answer to your first inquiry how your third question should be answered.

With reference to your fourth question, you will observe that section 3 of chapter 545 of the Acts of 1926 requires you to make a detailed written report of your audit to the board of supervisors within thirty days after each audit. This section then provides:

"* * * Any shortage existing in the accounts of any officer, as ascertained by the said audit, shall be made public within thirty days after such shortage is discovered, and a brief statement thereof shall be sent by the accountant who makes the audit, to the court having jurisdiction thereof, and filed in the clerk's office of said court."

I am not entirely satisfied as to the meaning of this section, but I am inclined to think that the safest course for the State Accountant to pursue, in view of the above-quoted language, would be to proceed to make public any shortage existing in the accounts of any officer, as ascertained by the said audit, by his report to the board of supervisors and to the court having jurisdiction of the matter. This, it seems to me, is the only publication contemplated by the act to be made by you.

Your attention is called to the fact that it is provided in section 4 of chapter 545 of the Acts of 1926 that "the provisions of this act shall not become effective until January first, nineteen hundred and twenty-seven."

You will recall that the audits provided for by chapter 417 of the Acts of 1922 are to commence on the first of July of the years in which such audits are made. I am advised by you that it takes you practically one year to audit the accounts of the various officers mentioned in chapter 417 of the Acts of 1922 in the one hundred counties and several cities of the State, and that as of January

1, 1927, there were a number of such localities in which the accounts of such officers had not been audited by you.

It is my opinion that in contemplation of law these audits were to be made as of July 1, 1926, and that, in those cases where through lack of force or for other cause you were unable to complete the audits which should have been made beginning with July 1, 1926, the cost of such audits should be paid for in the manner prescribed by chapter 417 of the Acts of 1922.

Yours very truly,

JOHN R. SAUNDERS,

SALES—Sale of magazines and papers devoted wholly to probable results of races, etc., prohibited.

RICHMOND, VA., November 6, 1926.

COLONEL B. MORGAN SHEPHERD, *Vice-President*,
Southern Planter Publishing Co., Inc.,
Richmond, Va.

MY DEAR COLONEL SHEPHERD:

You will recall that you asked me this morning whether I had ever had an occasion to look into the validity of an ordinance of a city or town prohibiting the sale of magazines or papers on the streets, or in public places.

Since talking with you, I have looked into the question a little and the only authority which I have been able to find on the subject is the case of *Scott v. Pilliner*, 2 K. B. D., L. R. (1904), at page 855, in which the English court of king's bench division held that such an ordinance was void as being unreasonable.

In that case the ordinance provided as follows (p. 855):

"No person shall frequent and use any street or other public place, either on behalf of himself or of any other person, for the purpose of selling or distributing any paper or written or printed matter devoted wholly or mainly to giving information as to the probable result of races, steeplechases, or other competitions. Every person contravening any of the foregoing provisions shall be liable to a penalty not exceeding 51."

In so holding the court, speaking through Kennedy, J., stated (pp. 857-858):

"* * * It seems to me that we must endeavor to construe such a by-law entirely on legal principle, and apart from any consideration of what might be desirable as new legislation. That which renders a person liable to a penalty under this by-law is the selling or distributing of written or printed matter 'devoted wholly or mainly to giving information as to the probable result of races, steeplechases, or other competitions.' Now it cannot be disputed that such information may be given without any breach of the law at all. It is not, in itself, immoral. It is not necessarily information as to bets, or as to where they may be made. It is harmless to most people. The words are wide enough to include information as to the probable result of any athletic contest.

"I should be slow to think that it was reasonable to penalize the sale or distribution of papers giving information as to these things merely because those who buy such a paper will have an additional opportunity of getting knowledge or suggestions which may lead them to make bets. One may have a strong view as to the mischief of betting, but one's objection

to betting ought not to govern the decision of this case. The question for us is whether it is reasonable for the county authority to penalize the sale or distribution of such newspapers or other documents as may be held to come within the very wide description given in the by-law.

"We must, I think, deal with the question on broad grounds. I quite agree with my Brother Phillimore as to the large liberty which ought to be given to local authorities to make by-laws for the good government of their districts; but I think it is going too far to say that a by-law which makes the sale or distribution of papers unlawful (independently of any question of nuisance) merely because the bulk of the information contained in those papers may help or tempt persons to make bets is reasonable and ought to be so held by this court."

Lord Alverstone, C. J., also delivered an opinion in which he said (pp. 658-859):

"* * * I also think that it is desirable for the good government of a locality that by-laws should be clear and definite and free from ambiguity, and also that such by-laws should not make unlawful things which are otherwise innocent. Of course, a local authority may make a by-law for stopping street betting by means of tipsters, and if that was all that this by-law did it would, in my opinion, be valid. I do not wish to be understood to say that a by-law cannot be made to that effect. But it seems to me that the main objection to this by-law is that it is too wide, and that it would include cases where the sale of the paper was not in aid of street betting or of any betting at all.

"If the paper were conducted or the office of the paper were used on behalf of persons carrying on street betting as a fact, then a by-law striking at the evil might be perfectly reasonable; but the by-law in its present form brings within its purview papers which may be found to be mainly devoted to giving information as to the probable results of competitions on which there might be no betting at all. There may be perfectly innocent sales of such papers, and their publication and distribution might not conduce to any betting offence at all, and yet they would fall within this by-law. I think, however, that a by-law might be framed so as to hit the real mischief, and so as to be confined to it.

"Therefore, both on the ground of uncertainty, and mainly on the ground that it may strike at perfectly innocent sales of papers, I think that this by-law is bad and cannot be supported. The appeal must, therefore, be allowed."

Sincerely yours,

JOHN R. SAUNDERS,
Attorney General.

STATE ACCOUNTANT—Adjustment of compensation.

RICHMOND, VA., October 14, 1926.

HON. W. F. SMYTH, *Secretary,*
State Fee Commission,
Office of State Accountant,
Richmond, Va

DEAR SIR:

Your letter of the 13th, addressed to the Attorney General, is received at this office, but as the Attorney General will be out of the city for several days,

I am taking the liberty to respond to your inquiry, subject, of course, to any correction which he may deem it necessary to make after his return. You say:

"At a meeting of the State Fee Commission held today his excellency the Governor, who is chairman of the commission, laid before the commission communication from Shewmake and Gary, counsel for Joseph B. Anderson, formerly commissioner of the revenue for Danville city, with respect to charge of interest by the Auditor of Public Accounts on excess fees, allowances, commissions, etc., determined by that officer to be due the Commonwealth, and I am directed by the commission to refer this communication to you with request that you advise the commission if it is within the jurisdiction of the commission to consider and act upon his request; that is, has this commission authority to release this interest if, in its judgment, under the circumstances, it should be released."

In reply, I beg to say that I have carefully considered the question which you propound, and in that connection have read the letter of Messrs. Shewmake and Gary, and also copy of my letter to Joseph B. Anderson, Esq., dated January 24, 1921. Section 7, chapter 198, page 352, of the Acts of 1926, is as follows:

"The said commission is hereby authorized and empowered to adjust equitably all questions of the division of compensation, allowances for deputies and assistants, office expenses and premiums on bonds which may arise under this act by reason of the change of incumbents in any such offices or from any other cause; provided, however, that all adjustments shall be made as nearly as possible in accordance with the intent of this act. And the said commission is hereby further authorized and empowered, on written application from any of the said officers, and on good cause shown, to increase the allowance made to said officers for deputies and assistants, office expenses and premiums on bonds; and in case the said commission grants any increase of allowance hereunder, it shall set out in its report its reasons therefor. The board of supervisors of a county or common council or other governing body of a city may by resolution adopted and certified lay before the State Fee Commission any recommendation it may desire to make with respect to the expense account of any office mentioned in section one of this act as to increase or decrease of expense."

This section vests the commission with wide powers in adjusting equitably all questions of division of compensation, etc., but I can find no power to remit any part of a sum found by the commission to be due the State, nor any part of interest on such sum. The general action in such cases is that the interest follows the principal as the shadow the substance. Moreover, if an officer has the use of money for a period of five years, which has been due the State during that period, it seems equitable that he should be chargeable with interest thereon. Since the interest is as much a part of the debt as the principal, it seems clear to me that there is no power in the State government to release the interest except the legislature.

Yours very truly,

LEWIS H. MACHEN,

Assistant Attorney General.

SHERIFF—Eligibility for.RICHMOND, VA., *February 28, 1927.*

G. E. LAYMAN, ESQ.,
Deputy Sheriff,
Waynesboro, Va.

DEAR SIR:

Replying to yours of the 25th, I would say that, in order for a man to be eligible for the office of sheriff of any county, it is necessary that he be a resident of the county or of the city wherein the courthouse of said county is. See Code section 2703.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

STATE ENTOMOLOGIST—Fee of out-of-State nurserymen.RICHMOND, VA., *April 1, 1927.*

G. T. FRENCH, ESQ.,
State Entomologist,
Richmond, Va.

DEAR SIR:

Acknowledgment is made of your letter of March 22, 1927, in which you say in part:

"I would like to have your opinion concerning the constitutionality of sections of the Virginia crop pest law which require out-of-State nurserymen to register and to pay a fee of \$10.00 in order that they may be permitted to sell nursery stock in this State."

In reply, I would call your attention to the opinion of the Hon. John Garland Pollard, then Attorney General of this State. This opinion, dated May 15, 1916, to W. J. Schoene, Esq., State Entomologist, Blacksburg Virginia, and found in the Report of the Attorney General, 1914-1917, holds in substance that the State can require out-of-State nurserymen to register and pay a fee of \$10.00 before they will be permitted to sell nursery stock in this State.

Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

STATE BOARD OF HEALTH—Loan from State treasury.RICHMOND, VA., *March 23, 1927.*

HON. J. H. BRADFORD, *Director of the Budget,*
Governor's Office,
Richmond, Va.

DEAR MR. BRADFORD:

I am just in receipt of your letter of March 22nd, which is as follows:

"The Auditor of Public Accounts has asked the Governor for his opinion as to whether the State Board of Health is entitled to draw out of the treasury an unexpended balance of \$56,420.97 in the special tax for the eradication of tuberculosis, and to receive in addition during the current appropriation year, the equivalent out of the general fund, of the estimated yield of \$193,755 from the Mill tax for tuberculosis. The Auditor's letter is enclosed and is believed to be self-explanatory."

"For the Governor's information, will you kindly let me have your opinion on the questions raised by the Auditor."

I have carefully read the letter of the Auditor's to the Governor, dated March 11, 1927, and am of the opinion that he is entirely correct in the views which he expresses in connection with this matter and that the State Board of Health is entitled to draw out of the State treasury the unexpended balance of \$56,420.97, and to receive in addition during the current appropriation year the estimated yield of \$193,755. I do not think there can be any doubt as to this.

Yours very truly,

JOHN R. SAUNDERS,

Attorney General.

STATE OFFICE—Vacancy; higher salary.

RICHMOND, VA., *April 21, 1927.*

HON. J. H. BRADFORD,

Director of the Budget,

Governor's Office,

Richmond, Va.

MY DEAR MR. BRADFORD:

- Acknowledgment is made of your letter of April 20, 1927, in which you say in part:

"A vacancy has occurred at a State institution and it is proposed to appoint a new employee to the position at a higher salary than was paid his predecessor. This proposed new employee is now engaged in a similar work at another State institution at a lower salary than has been paid heretofore in the position offered him."

You then request me to advise you whether chapter 88 of the Acts of 1926 applies to this case so as to require the approval of the Governor before the person referred to can be employed by the other institution at a salary higher than he is receiving at present.

Chapter 88 of the Acts of 1926, so far as is applicable to the question here under consideration, 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 this statute has no application to the question submitted in

your letter. The salary of the employee referred to is not being increased by the institution at which he is now employed. The facts are that he has been offered a new position by a different institution.

The statute referred to, in my opinion, is limited to those employees whose salaries are increased by the institution at which they are employed at the time when the increase is made.

I would further add that in my conversation with you on yesterday that the salary of this position, which is now offered this employee at the other institution, is not fixed by law, but is left to the discretion of the board of visitors of that institution. Such being the case, unquestionably the institution in question would have a right to offer a higher salary to a new employee, even though said employee may come from another State institution.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

STATE OFFICE—Vacancy and appointee; without approval of Governor.

RICHMOND, VA., *June 8, 1927.*

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

MY DEAR GOVERNOR:

Acknowledgment is made of yours of the 6th, in which you ask the following questions:

“When a position filled by an employee at a salary not specifically fixed by law becomes vacant and an employee receiving a lower salary in the same department is appointed to the vacancy, can such appointment be accompanied by an increase in the employee’s salary without the Governor’s approval?”

“When a rearrangement or reorganization of the work of a department is made involving a change in the title, or work and responsibility, or both, of an employee whose salary is not specifically fixed by law, can the salary of such an employee be increased without the Governor’s approval?”

In reply to your first question, I would say that I do not think the consent of the Governor is necessary where the employee is transferred to a position which has become vacant, even though that position should carry with it a higher salary than the appointee had previously received.

Answering your second question, I would say that, if in the rearrangement or reorganization of a department a position is created carrying a certain salary, I would not think that the transfer of an employee into that position, even though the salary were greater than that which the employee had previously received, would be considered an increase in the salary attached to the position. Of course, the mere change of name or title to a position would not justify the head of the department in increasing the salary of an employee without the Governor’s approval.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

STATE INCOME TAX REPORT—What included in.

RICHMOND, VA., *March 16, 1927.*

MRS. VIOLA B. JETT,
516 Mistletoe St.,
Petersburg, Va.

DEAR MADAM:

Acknowledgment is made of yours of the 12th, in which you say:

"Will you kindly inform me whether, in making out a State income tax report, money received as pension from the United States government should be included?"

In reply, I beg to say that, in my opinion, it is not necessary to include in your State income tax report money received as pension from the United States government.

Yours respectfully,

JOHN R. SAUNDERS,
Attorney General.

SUNDAY LAW—Sale of merchandise violation of.

RICHMOND, VA., *October 14, 1926.*

HON. R. L. PERROW,
Sheriff of Campbell County,
Rustburg, Va.

MY DEAR MR. PERROW:

Your letter of October 4, 1926, addressed to the Attorney General, relative to the enforcement of the Sunday laws in your county, has been referred to me for attention.

After referring to the report of the grand jury which directed that notice given to all parties believed to be violating this law before further proceedings were taken, you say:

"My object in writing you is to know how I should proceed in this matter, and I want you to advise me what constitutes a violation of the Sunday law. Is selling a soft drink, ice cream, gasoline, or other articles of merchandise on Sunday a violation of the Sunday law?"

Allow me to say that the subject of your inquiry is one which you should take up with the Commonwealth attorney of your county, and you should act under and be guided by his advice in the matter. I will say for your information, however, that Code section 4570 provides that "if any person on a Sunday be found 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, he shall be deemed guilty of a misdemeanor."

The Court of Appeals has held under an ordinance similar to this statute that it was a violation of that ordinance to sell soft drinks on Sunday. *Ellis v. Covington*, 122 Virginia 821. The Court of Appeals laid down the ruling in the

case of *Lakeside Inn Corporation v. Commonwealth*, 134 Virginia 696, that "necessity," as that term is used in this section, means not a physical and absolute necessity, but a moral fitness or propriety of work or labor done under the circumstances of each particular case, and that no fixed and unvarying definition of "necessity," as used in the statute, could be given; that what may be a necessity in one place, may not be in another, and that every case must stand on its own peculiar facts and circumstances.

In *Pirky Bros. v. Commonwealth*, 134 Virginia 713, it was held to be a violation of law to open a cavern in Augusta county to the public on Sunday. I understand that some of the *nisi prius* courts of this State have held that the sale of gasoline on Sunday is a work of necessity. The matter has never been tested in the Court of Appeals. I should say that the sale of articles of merchandise on Sunday was a clear violation of the statute.

Trusting this gives you the desired information, I am

Yours very truly,

LEON M. BAZILE,
Assistant Attorney General.

STATUTES—Conflict of sections.

RICHMOND, VA., January 31, 1927.

L. B. FARLEY, ESQ.,

*Sealer of Weights and Measures,
County of Nottoway,
Blackstone, Va.*

DEAR MR. FARLEY:

Yours of the 10th would have been answered sooner, but for recent pressure of work in connection with the Court of Appeals and the State Board of Education.

Replying to your question whether section 14 of chapter 145 of the Acts of 1926 is in conflict with any of the provisions of section 22 of the same act, my judgment is that there is no conflict between the two sections. Section 22, as you know, applies only to ice. Section 14 applies to commodities in general and does not conflict with the specific provisions of other sections.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

STATE CONSERVATION AND DEVELOPMENT COMMISSION— Payment per diem to commissioners.

RICHMOND, VA., December 6, 1926.

E. O. FIPPIN, ESQ.,

*Executive Secretary and Treasurer,
State Conservation and Development Commission,
Richmond, Va.*

MY DEAR SIR:

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

"For the guidance of this commission, I should like to present to you the following question for interpretation and ruling:

"The law creating the State Conservation and Development Commission contained in chapter 169, page 307, in laws of 1926, provides that the commissioners shall be paid ten dollars (\$10.00) per diem for each day or part thereof devoted to the affairs of the commission. Is this per diem payable only on the actual dates when they are in attendance at meetings of the commission, or is it also payable for additional days or part of days required for them to reach the meetings of the commission, and for other days when they may devote part of their time to commission matters in other directions?"

The law referred to, so far as is applicable, provides as follows:

"* * * Members of the said commission shall receive no salaries, but shall be paid their necessary traveling and other expenses incurred in attendance upon meetings, or while otherwise engaged in the discharge of their duties, and the sum of ten dollars (\$10.00) a day for each day or portion thereof in which they are engaged in the performance of their duties. * * *

In my opinion the per diem provided for in the act is payable for additional days or parts of days required by members of the commission to reach the meetings of the commission, and also for other days when the members may devote a part of their time to the necessary affairs of the commission.

Yours very truly,

JOHN R. SAUNDERS,

Attorney General.

SLOT MACHINES—Legality of.

RICHMOND, VA., November 23, 1926.

MR. J. E. JORDAN,
*Justice of the Peace,
Driver, Va.*

MY DEAR SIR:

Acknowledgment is made of your letter of November 22, 1926, with reference to slot machines.

All slot machines are not illegal. A great many of them are. It is impossible from the description furnished by you for me to tell whether the machine referred to violates the law or not. I will say, however, that the matter is one which falls under the jurisdiction of the Commonwealth's attorney of your county, and you should take the matter up with him and be governed by his advice in this connection.

I call your attention to the case of *Ferguson v. State*, an Indiana case reported in 99 N. E. 806, 42 L. R. A., N. S. 720, and Annotated cases 1915-c, 172. Another case on the subject is *Territory v. Jones*, 14 N. M. 579, 20 Annotated cases 128, with an extended note. Other notes on the subject will be found in 20 L. R. A., N. S. 239, and 34 L. R. A., N. S. 573.

Trusting this will give you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,

Attorney General.

STATE FARM—Deductions of time.

RICHMOND, VA., July 20, 1926.

CAPTAIN R. R. PENN, *Superintendent,*
State Farm, Va.

DEAR CAPTAIN PENN:

Acknowledgment is made of yours of the 3rd, in which you say:

"Under the new law creating a State farm for defective misdemeanants at the present State farm, we have received one man, Lloyd Beverly, from Amherst county.

"Please advise us as to what deductions of time should be allowed, if any, from the full sentence received from the sentencing court; for the proportionate part of sentence served in jail, and the remainder at State farm.

"Also please advise as to the length of actual time to be served for each fine and for each cost, with schedule of deductions, if any."

In reply, I beg to say that, in my opinion, persons committed to the State prison farm for misdemeanors, under chapter 214, page 399, of the Acts of 1926, are entitled to the following credits:

1. All time spent in jail awaiting trial, or pending appeal, or awaiting transfer to the farm (section 5019, as amended), except when they have been guilty of attempts to break jail.

2. The good conduct time allowed by law:

(a) If a jail prisoner, four days per month (Code, sections 2860 and 2861).

(b) If sentenced to the convict road force, ten days per month (Code, sections 2094 and 5017).

3. If required to pay a fine and the costs of prosecution, in addition to jail sentence, to be held until fine and costs are paid (Code, sections 2559, 4949, not to exceed the limitations fixed by Code, section 4953 and section 2095 in case of prisoners sentenced to the convict road force).

4. If a prohibition case and additional time has been given for failure to pay the fine and costs, as authorized by section 8 of the prohibition law, in addition to the time to be served as required under paragraph 3 above, such additional time must be served in full or until the fine and costs are paid in full.

5. If the prisoner is suffering from a venereal or contagious disease, until free of contagion, if period of holding for this cause does not exceed one year (section 14, chapter 214, Acts of 1926).

Trusting this will give you the desired information, I am

Very truly yours,

JOHN R. SAUNDERS,

Attorney General.

STATE FARM—Allowance for board.

RICHMOND, VA., July 12, 1926.

CAPT. R. R. PENN, *Superintendent,*
State Farm, Va.

DEAR CAPTAIN PENN:

Acknowledgment is made of yours of the 3rd, in which you say:

"We received Lloyd Beverly, a defective misdemeanant, from the Amherst county jail on July 2, 1926, and on that date there were eight prisoners in that jail, including Beverly.

"As you know, the State allows the State farm the same rate of board as the Commonwealth would have to pay sheriffs or jailors, if this man or others were left in county jails.

"Do we collect at the same rate paid jailor throughout the period of this man's sentence as the State was paying for him at the time of transfer to the State farm?

"If this rate has to be changed every time that the rate is changed at the jail from which prisoners are received, same will take a tremendous amount of correspondence and bookkeeping."

In reply, I beg to say that, in my judgment, section 13 of chapter 214, page 399, of the Acts of 1926, contemplates the same rate of board at the State farm for defective misdemeanants as that allowed at the jails from which they were removed, to commence at the dates on which they were transferred from the jails to the farm.

Yours very truly,

JOHN R. SAUNDERS,

Attorney General.

STATUTES—Title of bill.

RICHMOND, VA., *March 24, 1927.*

HON. JULIEN GUNN, *Chairman,*
Committee for Courts of Justice,
Senate Chamber,
Richmond, Va.

MY DEAR SENATOR:

Acknowledgment is made of your communication of March 23, 1927, received this morning, in which you say:

"I am directed by the Committee for Courts of Justice to request that you will give it your written opinion on whether or not the title to Senate bill No. 1 is unconstitutional."

I have before me Senate bill No. 1 entitled—

"A bill to reorganize the administration of the State government in order to secure better service, and through co-ordination and consolidation, to promote economy and efficiency in the work of the government; to create and establish or continue certain departments, divisions, offices, officers, and other agencies, and to prescribe their powers and duties; to abolish certain offices, boards, commissions and other agencies, and to repeal all acts and parts of acts inconsistent with this act to the extent of such inconsistency."

Section 52 of the Constitution is as follows:

"No law shall embrace more than one object, which shall be expressed in its title; nor shall any law be revived or amended with reference to its title, but the act revived or the section amended shall be re-enacted and published at length."

The Court of Appeals has frequently had under consideration the sufficiency of titles to acts within the meaning of section 52 of the Constitution. In the recent case of *Southern Ry. Co. v. Russell*, 133 Va. 292, 298, 299 (1922), the court, speaking through Burks, J., said:

"We have so often laid down the rules for the construction of the language of section 52 of the Constitution that there is practically nothing left to be said on the subject."

The court then quoted from *Narrows v. Giles County*, 128 Va. 572, 582-3 (133 Va. 298-9):

"* * * "The constitutional provision was never intended to hamper honest legislation, nor to require that the title should be an index or digest of the various provisions of the act, and it is rare that the generality of the title is a valid objection thereto. The fact that many things of a diverse nature are authorized or required to be done in the body of the act, though not expressed in its title, is not objectionable, if what is authorized by the act is germane to the object expressed in the title, or has a legitimate and natural association therewith, or is congruous therewith, the title is sufficient. This subject is fully discussed by Judge Riely in *Commonwealth v. Brown*, 91 Va. 762, 21 S. E. 357, 28 L. R. A. 110. See also *Ingles v. Straus*, 91 Va. 209, 21 S. E. 490; *Commonwealth v. Willcox*, 111 Va. 849, 69 S. E. 1027; *Commonwealth v. Chesapeake & Ohio Ry. Co.*, 118 Va. 261, 87 S. E. 622; *Cochran v. Commonwealth*, 122 Va. 801, 94 S. E. 329; *Lucchesi v. Commonwealth*, 122 Va. 872, 94 S. E. 925, and cases cited. Furthermore, if there is doubt as to the sufficiency of the title, the doubt must be resolved in favor of its sufficiency, as courts will not declare an act of the legislature unconstitutional unless it is plainly so. *City of Roanoke v. Elliott*, 123 Va. 393, 96 S. E. 819, and cases cited. Of course, the title must not be made a cover for surreptitious or incongruous legislation, nor be such as to mislead the legislature or the people, but should fairly state the general subject covered by the body of the act. *Powell v. Supervisors*, 88 Va. 707, 14 S. E. 543. Subject to these limitations, the generality of the title is not a valid objection.'"

after which the court said:

"Nothing remains to be done now but to test each case by the rules heretofore laid down. * * *"

In *Southern Ry. Co. v. Russell*, *supra*, the title of the act was as follows:

"An act to regulate the time and manner in which common carriers doing business in this State shall adjust and pay just freight charges, and claims for loss or damage to freight and claims for storage, demurrage and car service."

Section 3 of the act provided that, when any action was instituted pursuant to the act before a justice of the peace, or a civil justice court, either party could file an affidavit relating to the subject matter, etc., and that, unless the other party gave reasonable notice to the party filing the affidavit and took the deposition of the affiant or affiants, such affidavit should be read with the same force and effect as if taken in the form of a deposition after due notice to the other party.

It was contended that this section of the act was broader than the title, and, therefore, that section 3 of the act was void.

The reasoning of the court is set out on pages 300-301, in the course of which this court, speaking through Burks, J., said:

"* * * The character of evidence which either party may use in the adjustment of the claim would seem to be germane to and congruous with the regulation of the manner of adjusting the claim. It is true that the title is to regulate the manner in which the *common carrier* shall adjust, etc., but in regulating the rights and duties of the common carrier, the rights and duties of the shipper are necessarily affected, and what effects the latter must be germane to what effects the former."

Other cases upholding the validity of acts whose titles were alleged to be insufficient are cited in the course of the opinion, but it is to be noted that this court said that it was unnecessary to review them "as they are only valuable as illustrations. The sufficiency of the title of each act must be determined from a consideration of its title and that body of the act under established rules of construction" (p. 304).

See also *Burton v. Commonwealth*, 122 Va. 847 (1918), and *Cochran v. Commonwealth*, 122 Va. 801, 810, 811 (1918).

From the above-quoted authorities, it is my opinion that the title to Senate bill No. 1 would be held by the courts to comply with the provisions of section 52 of the Constitution, for the reason that the various matters dealt with in the bill are clearly expressed in the title.

Coming to the question as to whether Senate bill No. 1 embraces more than one object, it is my judgment, from an examination of the provisions of the bill, that, while there is more than one subject dealt with in it, they are all congruous, have a natural connection with, or germane to, and are reasonably necessary for the accomplishment of the one object of the bill, which is to reorganize the administration of the State government.

In this connection, we call attention to *Bowman v. State Entomologist*, 128 Va. 351, 374, 375 (1920), where the court said, speaking of the title to the Cedar rust law:

"So far as we can perceive the statute embraces but one object and that is expressed in the title. There is more than one subject dealt with in the statute, but they are all congruous, have a natural connection with, or germane to, and are reasonably necessary for the accomplishment of the one object of the statute. This satisfies the constitutional requirement in question. *Hurley v. Hurley*, 110 Va. 31, 65 S. E. 472, 18 Ann. Cas. 968, and cases there cited, to which citation many more cases might be added."

In *Richmond v. Pace*, 127 Va. 274, 281, 282 (1920), in discussing a similar question the Court of Appeals, speaking through Saunders, J., after quoting section 52 of the Constitution, said:

"This particular section of the present Constitution is taken from the Constitution, which preceded it, and has been frequently construed by the court of last resort in this State. In its decisions our court has followed the rulings made by the courts of many other States, construing a like constitutional provision. Hence, the construction of this section of the present Constitution is well established, but its application at times is

difficult. These rulings have impressed the word 'object' with a very comprehensive meaning, which repeals the contention that the provisions of an act in aid of and related to the purpose expressed in its title are separate objects, and, therefore, unconstitutional. The body of most general acts contains many provisions in detail, intimately related to the main purpose of the act, but not expressed in the title. Indeed, to incorporate or mention them all in the title would make many titles of intolerable length. If each of such provisions are to be regarded as a separate and different 'object,' then all save one would be unconstitutional, even though mentioned in the title. According to such a rule of interpretation, it would follow that a general act, such as the act to create a 'State advisory board of taxation,' would be limited to establishing the board. The powers and duties of the board could not be defined and included in the main act. If such additional provisions may be fairly considered to be parts of the 'object' of an act, then they need not be expressed in the title, but if not parts of the 'object' then expression in the title would not validate, or render them constitutional. The fact that an act authorizes many things of a diverse nature will not affect the sufficiency of the title, the general subject of the enactment.

"It would be a violation of the spirit and letter of this constitutional safeguard, if such a construction should be put upon it as would forbid the incorporation into the law of everything needful to the proper operation of the one subject to which it is limited.' *Ex parte Upshaw*, 43 Ala. 234."

I believe that this bill, when tested by the rules laid down by the above-cited opinions of the Court of Appeals, does not violate section 52 of the Constitution. You are aware, of course, that the determination of this question ultimately rests with the Court of Appeals, and that that court has said that each case must be tested by the rules above stated. *Southern Ry. Co. v. Russell*, *supra*.

Respectfully yours,

JOHN R. SAUNDERS,

Attorney General.

STATE RIFLE RANGE—Condemnation proceedings.

RICHMOND, VA., December 29, 1926.

COL. WILLIAM H. SANDS,
National Bank of Commerce Building,
Norfolk, Va.

MY DEAR WILLIAM:

Acknowledgment is made of your letter of December 27, 1926, with reference to the institution of condemnation proceedings for the purpose of closing the streets and alleys in that part of the property owned by your clients, which it is proposed to convey to the Commonwealth.

After careful examination of chapter 311 of the Acts of 1926, we are satisfied that this act confers no power upon the Commonwealth, or its military board, to institute condemnation proceedings in connection with the State rifle range, or the acquisition of property therefor.

Section 4385 of the Code, which appears to be the only general statute on the subject of condemnation by the State, or its agencies, likewise confers no power upon the Commonwealth or military board in this respect. The authorities in this

State very clearly hold that the right of eminent domain must be exercised in this State only upon such terms, and in such manner, and for such public uses as the legislature has directed. *Blondell v. Gunter*, 118 Virginia 11; *School Board v. Alexandria*, 126 Va. 407, and other authorities cited in the Annotations in the Code of 1924 to section 4361.

It is, therefore, our opinion, that condemnation proceedings at this time would be useless, as no valid title could be acquired to the streets and alleys referred to.

Col. Crump has also investigated the matter and concurs in this opinion, and is present while this letter is being dictated. Personally, and I am sure you will agree with me in this statement, I regret exceedingly that these barriers are in the way, for certainly I have no reason in the world for objecting to a consummation of this agreement, especially since the Governor and the military board are anxious that it be consummated, and I am frank to say I regret that these obstacles exist.

Yours very truly,

JOHN R. SAUNDERS,

Attorney General.

STATE CROP PEST COMMISSION—Powers.

RICHMOND, VA., *December 10, 1926.*

HON. W. J. SCHOENE,
State Entomologist,
Blacksburg, Va.

MY DEAR SIR:

Acknowledgment is made of your letter of November 18, 1926, in which you request an opinion as to whether a regulation passed by the State Crop Pest Commission, providing for the destruction of a crop if planted in violation of regulation No. 1, is valid and constitutional.

Section 871 of the Code of Virginia, 1924, provides, so far as is applicable to the question here under consideration, as follows:

“* * * The Board of Crop Pest Commissioners shall, at the same time, provide rules and regulations under which the State Entomologist shall proceed to investigate, control, eradicate and prevent the dissemination of the said pests as far as may be possible, and these rules and regulations shall have the full force and effect of law so far as they conform to this chapter and the general laws of this State and of the United States; * * *.”

It would seem that the language of the act, “investigate, control, eradicate and prevent the dissemination of the said pests,” is broad enough to give the commission power to pass a regulation providing for the destruction of a crop, if planted in violation of regulation No. 1.

The intention of the General Assembly was to stop the spread of this evil, and to clothe the commission with power to accomplish this purpose. The word “destruction” is not used in the act conferring powers on the commission, but I think it is sufficiently germane and sufficiently clear that it was the intention of the General Assembly that such power be given the commission. Unless the commission was armed with such authority, the purpose of the act would not be completely effective.

Therefore, it is my opinion that the commission can pass a regulation which provides for the destruction of crops planted in violation of regulation No. 1.

Of course, by the provisions of the Federal Constitution, both the United States and the several States are prohibited from depriving any person of his life, liberty, or *property* without due process of law. The essentials of due process of law are as follows: appropriate and adequate procedure, impartial tribunal, adequate notice, and an opportunity to be heard. Black's Constitutional Law (3rd ed.), section 217, page 570, *et seq.*

If you embody in your regulation that the owner will be given notice and an opportunity to be heard, it is my opinion that the regulation would be valid and constitutional.

Black's Constitutional Law (3rd ed.), page 573, says: "A hearing or an opportunity to be heard is absolutely essential."

Trusting this gives you the desired information, I am

JOHN R. SAUNDERS,

Attorney General.

SLOT MACHINES—Gambling devices.

RICHMOND, VA., October 9, 1926.

HON. C. S. TOWLES,
Commonwealth's Attorney,
Reedville, Va.

MY DEAR MR. TOWLES:

Acknowledgment is made of your letter of recent date, in re slot machines.

The authorities on this question are *Ferguson v. State*, an Indiana case reported in 99 N. E. 806, 42 L. R. A., N. S., 720, and Annotated Cases 1915-c, 172. This case takes the position that a slot machine which delivers an article worth the coin deposited and sometimes tickets for additional chances in addition thereto, which indicates before each transaction what will be delivered, is nevertheless a gambling device where the machine does not give the same premium each time. Extensive notes appended to this case in both L. R. A. and Annotated Cases.

It is my understanding that the hustings court of the city of Richmond and the corporation court of the city of Norfolk and the corporation court of the city of Danville have held such machines to violate the Virginia statute. On the other hand, the corporation court of the city of Roanoke has held that the machines are not gambling devices, I have been informed, although I have no proof of this latter fact.

Another case on the subject is *Territory v. Jones*, 14 N. M. 579, 20 Annotated Cases, 128, with an extended note. Other notes on the subject will be found in 20 L. R. A., N. S., 239 and 34 L. R. A., N. S., 573.

The theory upon which such machines have been held illegal in New York is stated in a note in 42 L. R. A., N. S., 720-1, as follows:

"A machine operated by depositing a nickel in the slot, whereupon the depositor always gets a package of gum, and always knows the exact number of trade checks which he will receive for that nickel, but is given an option to obtain a package of gum and an uncertain number of trade checks by the dropping of a second nickel, is a gambling device, the use of which

is prohibited by statute, the uncertain opinion having in it such an element of chance as constitutes gambling. *People ex rel. Verchereau v. Jenkins*, 153 App. Div. 512, 138 N. Y. Supp. 449."

I will say for your information that it has been very hard for me to understand how the courts could conclude that the repetition of a lawful act was illegal simply because the act was repeated. I never heard of such a principle in the law until it was applied by the courts in the slot machine cases.

Yours very truly,

JOHN R. SAUNDERS,

Attorney General.

SLOT MACHINES—Illegality of.

RICHMOND, VA., October 28, 1926.

HON. JOHN W. STEPHENSON, JR.,

Warm Springs, Va.

MY DEAR MR. STEPHENSON:

I certainly beg your pardon for not replying to your letter earlier than this, but the fact is that we are in such a rush now, and I have had to be absent from the office several days, is the reason for my delay.

You state in your letter that recently Judge John M. Hart, of Roanoke, in rendering an opinion in deciding a case relative to the operation of a slot machine, referred to an opinion which was handed down by this office. You do not state in your letter to whom this opinion was rendered, but I presume that Judge Hart referred to an opinion which was given Mr. S. R. Price, Commonwealth's attorney, Roanoke, Virginia, on November 22, 1921. I am enclosing you a copy of this, as requested.

However, since this opinion was written, a number of the courts have decided that the operation of these machines is illegal. More than a year ago the chief of police of the city of Richmond ordered that they be taken out of all places of business, and a party was convicted in the hustings court for operating one, which was a test case. In a number of counties, and in several other cities, the courts have held them to be gambling devices, and I am of the opinion that they are. Were I Commonwealth's attorney, I should certainly forbid the use of them in my county. I would further add that we have written several letters since the opinion to Mr. Price was given, in which we held that the use of this character of machine is illegal.

Yours very truly,

JOHN R. SAUNDERS,

Attorney General.

STATUTES—Repeal of.

RICHMOND, VA., February 3, 1927.

HON. GEORGE A. COPP,

*Chairman of Board of Supervisors,
Strasburg, Va.*

MY DEAR SIR:

Acknowledgment is made of your letter of February 1, 1927, in which you say:

"I am writing to know if chapter 545 of the Acts of 1926, page 902, supersedes chapter 203 of the same acts, page 364? Our Commonwealth's attorney, Philip Williams, is ill with pneumonia and our board of supervisors would like to know at once and before our next meeting. Kindly let me hear from you at once."

Chapter 203 of the Acts of 1926 is a special act, which provides for the establishment of a budget system in Shenandoah county alone. Chapter 545 of the Acts of 1926 is an act applying to the counties of the State generally. If there has been any repeal of chapter 203 of the Acts of 1926 by chapter 545 of the Acts of 1926, it would be by implication. The latter act does not attempt to expressly repeal the former act.

The courts have held that repeals by implication are not favored. The courts have also held that where there are two statutes, the earlier special and the latter general, but containing terms broad enough to cover the subject matter of the special, the presumption is that the special is to be considered as remaining an exception to the general, and the general statute will not repeal the special statute unless its provisions are manifestly inconsistent with those of the special act. See *South & W. R. Co. v. Commonwealth*, 104 Va. 314 (1905); *Eureka Club v. Commonwealth*, 105 Va. 564, 569 (1906), and *Clemans v. Board of Education*, 68 W. Va. 298, 69 S. E. 808 (1910).

I am, therefore, inclined to the opinion that chapter 203 of the Acts of 1926 was not repealed by chapter 545 of the Acts of 1926.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

**SHENANDOAH NATIONAL PARK ASSOCIATION—Collection by
Bankers' Service Corporation.**

RICHMOND, VA., December 2, 1926.

COLONEL H. J. BENCHOFF, *President*,
Shenandoah National Park Association, Inc.,
Woodstock, Va.

MY DEAR COLONEL BENCHOFF:

I have had under consideration for some time your communication in regard to the question at issue between the Shenandoah National Park Association, Incorporated, and the Bankers' Service Corporation in the matter of the refund of the \$25,000.00 collected by the Bankers' Service Corporation, under authority of sections 5 and 6 of the contract between the Shenandoah National Park Association, Incorporated, and the Bankers' Service Corporation, with reference to the campaign for the purpose of obtaining donations of land and money with which to purchase land intended to be transferred to the United States government for the purpose of constituting the proposed Shenandoah National Park.

By section 4 of this contract the association agreed to pay the Bankers' Service Corporation for its services "a commission of 10 per cent on all donations of money and land made to the" association. For the purpose of computing the commissions on land donated, each acre was to be valued at \$5.00, and the commission was fixed at fifty cents per acre.

By section 5 of the contract the association agreed to pay the Bankers' Service Corporation a total sum of \$25,000.00, or so much thereof as should not have been received by the corporation by the method provided in section 6 of the contract, "to reimburse the employee for its expenses incurred and to be incurred in connection with the said campaign."

By the 6th and 7th sections of the contract it was provided as follows:

"(6) It is understood and agreed that during the period of ninety (90) days next following the signing of this contract, the employee shall be entitled, in addition to its commission of 10 per cent, a further sum equal to forty cents on each dollar of money actually paid in, which said sum shall be applied toward the payment of the \$25,000.00 hereinbefore provided for in paragraph '5' of this agreement until such time as the entire sum of \$25,000.00 shall have been paid to the employee in this way.

"(7) The employee agrees that when and if it shall receive the sum of \$125,000.00, which \$125,000.00 includes the 10 per cent commission and the additional sum of \$25,000.00 hereinbefore referred to, it will thereupon repay to the employer the said sum of \$25,000.00 without interest, or such part thereof as shall have been received by the employee from the employer, or collected from subscribers as provided in paragraph '6' hereof."

It appears that, at the time of the making of this contract, it was contemplated that the goal was to be \$2,500,000.00 with the nation as the field for the operations of the Bankers' Service Corporation. Due to the demands of the Secretary of the Interior, however, the parties verbally agreed to reduce the goal to \$1,250,000.00 and to restrict the solicitation of contributions to Virginia, Washington, D. C., and two counties of Maryland. The Bankers' Service Corporation, in writing, waived any commission as to the Richmond campaign, and received no compensation for the donation by the State. Including the donation by the State, the funds raised in Richmond and the funds raised by the Bankers' Service Corporation approximate \$1,200,000.00. The Bankers' Service Corporation raised approximately \$750,000.00 of this fund.

The question, which has been submitted to me on the above facts, is, what the Shenandoah National Park Association, Incorporated, owes to the Bankers' Service Corporation, and whether the \$25,000.00 collected by the Bankers' Service Corporation, pursuant to sections 5 and 6 of the contract, should be refunded by the Bankers' Service Corporation to the association, this latter fund having been collected as provided for by section 6 of the contract.

Sections 5 and 7 of the contract are so worded as to compel me to reach the conclusion that the Bankers' Service Corporation is not obligated by the contract to return to the association the \$25,000.00 collected by it under these sections. My reasons for this are as follows:

As above pointed out, section 5 of the contract provided that \$25,000.00 was to be paid to the Bankers' Service Corporation "to reimburse" it "for its expenses incurred and to be incurred in connection with the said campaign. The only obligation that rested on the Bankers' Service Corporation to return this expense fund is contained in section 7 of the contract above quoted. The condition of that section is that when, and then only, the Bankers' Service Corporation has received the sum of \$125,000.00, including the 10 per cent commission on donations and the \$25,000.00 advanced under sections 5 or 6 of the contract, "it will thereupon repay to the" Shenandoah National Park Association, Incorporated, "the said

sum of \$25,000.00 without interest, or such part thereof as shall have been received by the Bankers' Service Corporation as provided for in the contract.

The Bankers' Service Corporation having collected only \$750,000.00, therefore, did not receive \$125,000.00, including the 10 per cent commission and the \$25,000.00 collected by it under sections 5 or 6 of the contract. Therefore, the contingency provided for by section 7 of the contract never arose.

The contract, in my opinion, however, does not guarantee to the Bankers' Service Corporation any other or additional compensation than the flat sum of 10 per cent on all donations of money and land made to the association, with the exception of the donations made by the Commonwealth and in the city of Richmond, as to which the Bankers' Service Corporation agreed to waive its commission. The contract did not guarantee to the Bankers' Service Corporation, as has been suggested, a minimum compensation of \$100,000.00, but merely guaranteed to it a commission of 10 per cent "on all donations of money and land made to the" Shenandoah National Park Association, Incorporated, as provided for by section 4 of the contract.

Trusting this gives you the desired information, I am

Very truly yours,

JOHN R. SAUNDERS,

Attorney General.

SCHOOLS—Trustee electoral board; term of office of.

RICHMOND, VA., July 13, 1926.

HON. E. A. PAINTER,
*Superintendent of Schools,
Fincastle, Va.*

MY DEAR MR. PAINTER:

Acknowledgment is made of your letter of July 9, 1926, in which you say:

"There seems to be in the minds of some citizens of this county a question with reference to the new trustee electoral board and its functions. The point of this letter is to ask whether the term of office of each member of the school board automatically expires September 1, 1926, or only one-third of the present membership of the board as under the old law providing for the election and office of school trustees."

I have examined section 629 of the Code of 1919, as amended by chapter 106 of the Acts of 1924, with care, and it is my opinion that this statute, as amended, provides for the appointment of an entirely new board after the first of July, 1926, the terms of the members of the board to commence on August 1, 1926, and to extend for a period of four years from that date. I do not think that any old members of the board will hold over.

Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,

Attorney General.

SCHOOLS—Trustee electoral board; whether school trustee electoral board or judge should appoint school trustee to fill vacancy.

RICHMOND, VA., *August 7, 1926.*

HON. W. M. SMITH,
Cumberland, Va.

MY DEAR MR. SMITH:

Acknowledgment is made of your letter of August 6th, in which you say:

"In a case where there is a vacancy occurring in the office of school trustee by expiration of his term, and the school trustee electoral board omitted and failed to appoint thirty days before the first of September, is it within the jurisdiction of the school trustee electoral board to appoint such school trustee, or should the judge appoint?"

Assuming that the vacancy has occurred, it would seem that the jurisdiction would be vested by section 2 of chapter 423 of the Acts of 1922 in the circuit court. However, I call your attention to the last sentence of section 33 of the Constitution, and to the cases cited in the annotation to that section.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

SCHOOL—Superintendent of, having authority to break a tie.

RICHMOND, VA., *July 7, 1926.*

MR. JAMES G. HENING, *Trustee,*
Box 444,
Richmond, Va.

MY DEAR SIR:

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

"The question arose a few days ago regarding superintendents of schools having authority to break a tie. Please advise if this law is still in effect and what page it can be found on in the Acts of the Assembly."

The law to which you refer is found in the last paragraph of section 5 of chapter 423 of the Acts of 1922, and reads as follows:

"* * * 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."

Trusting this gives you the desired information, I am

Very truly yours,

JOHN R. SAUNDERS,
Attorney General.

SCHOOL—County board, right to employ daughter of school trustee of one county to teach in another district.RICHMOND, VA., *July 10, 1926.*

HON. A. W. YOWELL,
Superintendent of Schools,
Madison, Va.

DEAR MR. YOWELL:

I am just in receipt of your letter of the 7th, in which you submit the following question for an opinion:

"Has the county school board of Madison county the right to employ the daughter of one of the school trustees in one district of said county to teach in the public schools in another district of said county?"

In reply, I will state that I am of the opinion that this would be a violation of the law. In fact, this office has rendered an opinion to this effect same time ago.

Yours very sincerely,

JOHN R. SAUNDERS,
Attorney General.

SCHOOLS, CHARLOTTE COUNTY—Whether notes satisfactory security.RICHMOND, VA., *January 13, 1927.*

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

MY DEAR MR. HAYES:

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

"The State-Planters Bank and Trust Company has written me requesting permission to withdraw a note of the Charlotte county school board for \$10,000 and deposit in place one for \$15,000 maturing January 15, 1928. The \$10,000 notes matures January 15, 1927.

"This deposit was made with the First National Bank to secure funds deposited by this department.

"What I desire to know is whether these Charlotte county school notes are satisfactory security."

In reply, I will state that a note of a county school board is not one of the class of securities which is mentioned in chapter 536 of the Acts of 1926, which amended section 2158 of the Code of Virginia in relation to State depositories.

You will observe that a portion of that section reads as follows:

"* * * Any such bank, however, may deposit with the Treasurer of the State, in lieu of such bond, registered or coupon bonds of the State of Virginia, registered or coupon bonds of any municipality, county or subdivision thereof, of the Commonwealth," etc.

It is, therefore, my opinion that you can only take the same class of securities which are mentioned in chapter 536 of the Acts of 1926.

You will further observe that this section also requires that the security, which the banks give, shall at all times be equal to the amount of money of the Commonwealth that is on deposit in any such designated State depository.

Very truly yours,

JOHN R. SAUNDERS,

Attorney General.

SCHOOL—County board trustees' vote.

RICHMOND, VA., February 5, 1927.

HON. M. D. HALL,

Division Superintendent of Schools,

Burke, Va.

MY DEAR MR. HALL:

Acknowledgment is made of your letter of recent date, in which you call attention to section 4 of chapter 423 of the Acts of 1922, which provides, so far as is applicable to the question here under consideration, that this act shall not affect the administration of the public school system in any city or town constituting a separate school division, and then reads as follows:

"The trustees of any town constituting a separate school district shall be members of the county school board; provided, however, that such town shall be entitled to only one (1) vote in said county board. * * *"

You then say:

"Now is it competent for the town school board of a town constituting a separate school district to designate one of its members to represent it in the county school board, and cast the one vote it is entitled to cast?"

"Two members of a town school board constitute a quorum (Code, sec. 651). Can less than a quorum present in a meeting of the county school board perform a valid official act?"

In my opinion the law contemplates that the trustees of a town shall be members of the county school board, but entitled to only one vote, and that, in order to exercise the powers conferred upon the members of the town board, at least a quorum thereof must be present at the meetings of the county school board.

I do not think that any authority in law exists for the members of a town board delegating to one of their number the discretionary powers conferred upon said board. The act you will observe does not say that one of the members shall have a vote, but that the board itself shall be entitled to one vote.

Trusting this gives you the desired information, I am

Very truly yours,

JOHN R. SAUNDERS,

Attorney General.

SCHOOL BOARD—Spending district levy.

RICHMOND, VA., February 21st, 1927.

MR. STUART MOORE, *Clerk,*
Rockbridge County School Board,
Lexington, Va.

MY DEAR SIR:

Acknowledgment is made of your letter of February 16th, in which you call attention to chapter 423 of the Acts of 1922, in which you say in part:

"In accordance with this act, we have submitted the school budget to the board of supervisors for this county based upon a county unit of school administration, a uniform school term and a uniform county school levy, with district levies only for the purpose of maintaining and retiring pre-existing debts of the several districts.

"A difference of opinion as to the requirements of this act has arisen and it has been subjected to various local interpretations. We are, therefore, asking that you give your advice and opinion as to the following points:

"1. Is or is not this act mandatory in requiring that the county be the unit of administration, and does or does not this imply a uniform school tax and a uniform school term?

"2. In the event that the board of supervisors, acting upon the last sentence of section 4 of this act, imposes separate and varying school levies in the several magisterial districts of the county, is or is not the county board required to treat the funds derived from such levies as a common fund to be administered without regard to the district of the source of the various funds; and, if this be not mandatory, is it permissible in the discretion of the school board? This inquiry does not refer to district levies for sinking fund purposes, but for administrative and operating expenses, etc."

In response to your several questions, I call your attention to the last sentence of section 4, chapter 423 of the Acts of 1922, which reads as follows:

"* * * 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 bonds issued for school purposes or other debts peculiar to that district."

I also call your attention to section 136 of the Constitution, which contemplates the levy of both a county and a district school tax. See also section 740-A of the Virginia Code of 1924.

While it is true that the affairs of the county schools are to be administered by the county board, in my opinion, the law does not contemplate the school board spending the district levy for one district in some other district, but each district levy is to be spent in the district in which the fund was raised.

Trusting that this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,

Attorney General.

SCHOOLS—Traveling expenses of superintendents and trustees.RICHMOND, VA., *February 25, 1927.*MR. C. W. STEELE,
Meadow View, Va.

DEAR MR. STEELE:

Acknowledgment is made of yours of the 20th, in which you say:

"As trustee of schools, I am writing to ask for information as to traveling expenses of superintendents and trustees of schools. It has been our custom to just issue warrants without the consent of trustees. It seems to me that the board of trustees should be furnished with itemized statements of all such expenses and pass upon the justice or injustice of such claims. In fact, I don't believe superintendents of schools should be paid traveling expenses, board, etc., unless there is a special fund set apart for such claims. I was quite familiar with the law twenty-five or thirty years ago when a member of the legislature, but can't keep up with the changes. The schools are almost crushed out of existence because of increased expenses in the way of operation."

If you will examine section 626 of the Code one of the provisions therein contained is as follows:

"The school board may out of the local school fund supplement the salary of the superintendent and provide for the traveling and office expenses of the superintendent, and so forth."

It seems to me that the county school board, in making up its budget for expenses for the year, should ascertain from the superintendent the amount which he needs for traveling expenses, office expenses, and so on, which should be approved by the county school board.

In my judgment, itemized statement of expenses of the superintendent should be furnished the school board when incurred and audited by the board, and when found correct and reasonable such expenses should be paid.

Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

SCHOOL, SALTVILLE—Passage of ordinance by town of Saltville.RICHMOND, VA., *March 16, 1927.*HON. W. B. PORTERFIELD, *Mayor,*
Saltville, Va.

DEAR MR. PORTERFIELD:

Acknowledgment is made of yours of the 7th, in which you say:

"The Saltville School and Civic League, of the town of Saltville, at a regular meeting some two weeks ago, passed a resolution asking the town council of the town of Saltville to pass an ordinance, if the same did not conflict with a State law, by which every child of school age and up to

fourteen years of age would be required to have a shot of toxin-antitoxin for the prevention of the spread of diphtheria. Please advise me if such an ordinance would be in conflict with any State law, and what the penalty should be if the child or parent should refuse?

"What is your experience or observation with the results of toxin-antitoxin? Would you advise the council to pass such an ordinance?"

In reply, I beg to say that I think the council of your town has a right to pass the ordinance you mention. The penalty for disobeying the ordinance would depend upon the punishment prescribed by its provision. I have had very little experience or observation as to the results of toxin-antitoxin, but I believe that the members of the medical profession are, to a large extent, in favor of it. However, I would hesitate to advise the council to pass such an ordinance until they had consulted the State and local health authorities.

Yours very truly,

JOHN R. SAUNDERS,

Attorney General.

SCHOOL TRUSTEE—Term of office.

RICHMOND, VA., March 4, 1927.

HON. C. G. AVERY, *Treasurer,*
Holdcraft, Va.

DEAR SIR:

Acknowledgment is made of yours of March 1, in which you ask me the following questions:

"For what length of time is a school trustee appointed? Could an appointee of the school trustee electoral board serve as such until his term expires if he actually leaves the county where such appointment or office is held, provided that he retains his legal residence by paying his poll taxes and voting in said county where office is held? Could a school trustee be removed before his term expires by an appointee to the electoral board filling a vacancy?"

In reply, I beg to say that, under section 636 of the Code of Virginia, a district school trustee is appointed for a term of three years. A trustee appointed to the school trustee electoral board by accepting this appointment vacates his position as a district school trustee, which thereupon becomes vacant. The question of whether or not a trustee vacates his office by moving to another jurisdiction is one of fact. If he changes his domicile with the intention of giving up his residence, he can no longer hold an office in the place at which he formerly resided. His paying poll taxes and voting merely constitute evidence of his intention. Replying to your last question, I would say that a trustee appointed to the electoral board and accepting the appointment vacates his position as trustee, and it is not necessary that any steps be taken to remove him.

Yours very truly,

JOHN R. SAUNDERS,

Attorney General.

SCHOOL BOARD—County and district levy.

RICHMOND, VA., *March 30, 1927.*

C. S. TOWLES, ESQ.,
Attorney at Law,
Reedville, Va.

MY DEAR SIR:

Acknowledgment is made of your letter of March 23, 1927, in which you wish an opinion on the three points in Mr. Smith's letter to us of March 14, 1927. The three questions are as follows:

"1. Whether or not said school board had the lawful right to apply 50 per cent of the funds in hand from district levies for school purposes, to the payment of deficit in State and county school funds: in other words, to apply the same to the payment of teachers' salaries, etc., throughout the county at large; and in this connection what are the things for which funds derived from district school levies can be used; and

"2. Assuming that said board did not have the right to so apply the said district funds—would an appeal from such action be in order to the school trustee electoral board; and

"3. Assuming that said school board did have the lawful right to so apply the said district funds, would an appeal from such action, as to the expediency and propriety of so doing, under the circumstances, lie to said appellate board."

In reply to question one, I would call your attention to section 136 of the Constitution, which contemplates both a county and a district school levy. 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. * * *

I would also call your attention to section 740-a of the Virginia Code of 1924.

In view of the foregoing, I would say that, while it is true that the affairs of the county schools are to be administered by the county school board, in my opinion the law does not contemplate the school board spending the district levy for one district in some other district, but each district levy is to be spent in the district in which the fund was raised. I will, therefore, say that said school board mentioned in your question cannot lawfully apply the 50 per cent of the funds in hand from district levies for school purposes to the payment of deficit in State and county school funds.

In answer to your second question, I would say that a right of appeal would lie from the action of the school board—section 666 of the Code of Virginia—so far as is applicable to this question is as follows:

"Any five interested heads of families, residents of the county, who may feel themselves aggrieved by the action of any county school board may within thirty days after such action state their complaint in writing to the division superintendent of schools, who, if he cannot within ten days after the receipt of the said complaint satisfactorily adjust same, shall grant an appeal to the school trustee electoral board, which shall

meet in the district or in one of the districts where such complaint originated, and shall summon witnesses and take such action in regard to the said complaint as it may deem proper. * * *

I might also state that an appeal lies from the school trustee electoral board to the circuit court of the county, or the judge thereof in vacation. Section 666 of the Code.

In answer to your third question, I would say that this should be answered like the preceding question, for the above section 666 of the Code gives the right to appeal when the complaint cannot satisfactorily be adjusted within ten days.

Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,

Attorney General.

SCHOOLS—Authority of, to refund indebtedness.

RICHMOND, VA., July 29, 1926.

MR. ROBERT M. NEWTON,
*Division Superintendent,
Elizabeth City County Schools,
Hampton, Va.*

MY DEAR MR. NEWTON:

Acknowledgment is made of your letter of July 27, 1926, in which you say in part:

"We have outstanding at the present time bank indebtedness in the form of notes amounting to around \$40,000. Under the act approved March 18, 1926, page 332, chapter 189, the school boards have the authority to refund indebtedness.

"I would like to have your written opinion as to whether or not the county of Elizabeth City would have the right to issue bonds under this act for temporary or bank loans made several years ago."

In my opinion, chapter 189 of the Acts of 1926 is not broad enough to permit you to do what you suggested you would do in your letter. However, chapter 46 of the Acts of 1926 is broad enough to permit the making of a new loan for the purpose of novating the old one, provided in so doing you comply with all of the terms and conditions of chapter 46 of the Acts of 1926.

Trusting this will give you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,

Attorney General.

SCHOOLS—Selecting site for erection of consolidated high school.

RICHMOND, VA., August 4, 1926.

MR. W. A. SCARBOROUGH, *Superintendent,
Dinwiddie, Va.*

MY DEAR MR. SCARBOROUGH:

Acknowledgment is made of your letter of August 3, 1926, in re: the appeal

from the action of the school board in consolidating two high schools and selecting a site for the erection of the consolidated high school.

In my opinion the appeal, when properly taken, suspends the action of the school board, and that board is unauthorized to proceed with its plans until the appeal has been finally determined.

If you will examine section 666 of the Code, as amended by the Acts of 1924, you will see that the section expressly provides that the appeal shall be decided by the court or by the judge in vacation.

Trusting this gives you the desired information, I am

Very truly yours,

JOHN R. SAUNDERS,

Attorney General.

SCHOOLS—Literary fund.

RICHMOND, VA., August 12, 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 August 11, 1926, in response to my letter of August 10, in which I ruled that under chapter 46 of the Acts of 1926 a school board could not borrow, any money from the Literary Fund unless and until section 3 of chapter 46 of the Acts of 1926 had been complied with.

I am familiar with the sections authorizing school boards to borrow from the Literary Fund, and these sections are general statutes which were in force the day before chapter 46 of the Acts of 1926 took effect.

The language of section 3 of chapter 46 of the Acts of 1926 is in part as follows:

"No school board of any county * * * shall hereafter borrow any money under any general statute in force the day before this act takes effect, or contract to expend, in any fiscal year, any sum of money in excess of the funds available for that fiscal year, unless in each case the board of supervisors of the county, * * * shall first approve the same by order, ordinance or resolution adopted after a public hearing of which thirty days' public notice shall have been previously given. * * *"

The language could not be clearer than that employed in this section, and in my opinion this section must be complied with before a loan can be made from the Literary Fund. That this is the proper construction of the act is emphasized by section 1 of the act, which prohibits the negotiation of loans "in any manner for any purpose without express authority of law."

Section 2 of the act expressly authorizes temporary loans in accordance with the terms of that section, while section 3 applies generally to the borrowing of money under any general law in force at the time chapter 46 of the Acts of 1926 took effect.

This shows, in my opinion, an intention on the part of the General Assembly to deal in this act with the whole subject of loans made by school boards, and to limit these boards to the making of such loans only as are approved by that body of the locality which levies the taxes from which such loans must be ultimately paid.

Trusting this gives you the desired information, I am

Very truly yours,

JOHN R. SAUNDERS,

Attorney General.

SCHOOLS—Duty of county treasurer.

RICHMOND, VA., August 17, 1926.

W. EARLE CRANK, ESQ.,

Commonwealth's Attorney,

Louisa, Va.

DEAR MR. CRANK:

Acknowledgment is made of your letter of the 11th, in which you say:

"Last spring when the school superintendent submitted his budget to the board of supervisors of Louisa county it later developed that there was considerable error in the amount of balance in the school fund left over from last session, and there has been a considerable stir in the county as to whose duty it is, under the law, to obtain the information submitted to the State Superintendent of Public Instruction from the Treasurer's office; and I am writing to ask that you will give me an opinion as to whether it is the duty of the county treasurer to furnish information to the county superintendent of schools as to the condition of the school funds upon which to base this budget, or is it the duty of the county superintendent of schools to obtain this information from the Treasurer's office himself. I have been requested by quite a number of citizens of this county to write to you and get your opinion in this connection, and I will, therefore, appreciate your advising me in connection with this at your convenience."

In reply, I beg to say that section 727 of the Code of Virginia (Virginia school laws, 1923, page 63, sec. 14-b), relating to the matter is as follows:

"The county treasurer shall, on the first day of December of each year, or within twenty days thereafter, make to the division superintendent of schools, on blanks to be furnished by the Superintendent of Public Instruction, a report showing the amount collected on account of the State, county and district school levies, respectively, prior to the first day of December of said year, on which no penalty is due, and also the balance of each of said levies collected, and upon which the penalty of five per centum is to be added, and showing the number and amounts of warrants on the State, county and district funds presented for payment from each district, respectively, the number and amount of such warrants paid by the treasurer, and the balance of State, county, and district funds on hand, and to what districts due. If any treasurer shall fail to comply with the provisions of this section, it shall be the duty of the county school board to impose a fine of not less than one dollar, nor more than five dollars a day for each day of such delinquency, the said fine to be deducted from any pay or percentage of such treasurer. The said report shall be verified by the affidavit of the treasurer.

"The treasurer of every town constituting a single school district shall perform like duties, be subject to like fines and penalties, and be entitled to the same rate of compensation as the treasurer of a county."

This provision appears to me too plain for construction or comment.

Yours very sincerely,

JOHN R. SAUNDERS,

Attorney General.

SCHOOLS—Issuance of bonds for districts.

RICHMOND, VA., *September 9, 1926.*

HON. W. J. EDMONDSON,
Superintendent of Schools,
Abingdon, Va.

MY DEAR MR. EDMONDSON:

Acknowledgment is made of your letters of recent date with reference to section 7 of chapter 400 of the Acts of 1926. After calling attention to this section, you state that two of the districts in your county are desirous of issuing bonds under section 7 of this act, and that the school board can obtain the consent of the board of supervisors to issue bonds for these districts. You then ask whether or not the school board has power to do so under this special act.

The language of section 7 of chapter 400 of the Acts of 1926, so far as is applicable to the question here under consideration, reads as follows:

"The county school board of Washington county, by and with the consent of the board of supervisors of the said county, be, and is hereby, authorized and directed to borrow not in excess of two hundred and fifty thousand dollars, and to issue and sell its notes therefor, payable at such time or times as shall be fixed by said board, said amount to be applied in paying off and discharging the valid outstanding public school indebtedness of the districts of the county, and to replace funds expended during the year for indebtedness incurred during the last preceding year or years. * * *"

It is further provided in this section that the proceeds must be applied to the indebtedness of the school districts other than money due to the Literary Fund.

It would seem from a reading of section 7 of chapter 400 of the Acts of 1926 that the school board of Washington county, with the consent of the board of supervisors, would have the right to borrow money and issue its notes for the purposes specified in said section 7 of the act, upon compliance with the requirements of that section of the act.

Trusting this gives you the desired information, I am

Very truly yours,

JOHN R. SAUNDERS,

Attorney General.

• **SCHOOL**—School buildings not erected with short term loans.

RICHMOND, VA., *September 11, 1926.*

MR. JAMES G. HENING, *Trustee,*
Box 444,
Richmond, Va.

MY DEAR SIR:

Acknowledgment is made of your letter of September 3, 1926, in which you request me to advise you whether chapter 46 of the Acts of 1926, page 59, would prevent a school board from making a short term loan for the purpose of erecting a school building, such loan to be carried until funds would be available by means of a loan from the Literary Fund.

I have examined chapter 46 of the Acts of 1926 with care, and in my opinion the legislature did not intend short term loans to be made for the purpose of erecting school buildings, for the reason that other provision is made by law for raising loans for buildings.

Trusting this gives you the desired information, I am

Very truly yours,

JOHN R. SAUNDERS,
Attorney General.

SCHOOLS—Transportation of school children.

RICHMOND, VA., *August 16, 1926.*

MR. BENJ. WATKINS LEIGH,
Attorney at Law,
Halifax, Va.

MY DEAR SIR:

I beg to acknowledge receipt of your letter of recent date, in which you ask for a construction of section 612 of the Code of Virginia, 1919.

This section deals with the regulations as to the multiplication of schools, transportation of children, etc. The section provides that pupils shall not be transported in vehicles on the public highways for a greater distance than five miles, except on macadamized roads, when the distance shall not exceed seven, unless the transportation be by motor vehicle, in which case it shall not exceed ten.

In this connection I call your attention to section 13 of chapter 423 of the Acts of 1922. One of the provisions of this section is that the school board shall provide for the consolidation of schools and transportation of pupils wherever such procedure will contribute to the efficiency of the school system.

I am advised that the majority of the school boards of the State are disregarding the provisions contained in section 612 of the Code, which limits the distance in transportation, and have been guided in their actions according to the provisions of that part of section 13 which I have just quoted.

Section 19 of chapter 423 provides that all acts or parts of acts inconsistent with this act are to that extent thereby repealed. Unquestionably, the provisions of section 612 are inconsistent with the provisions of section 13 just quoted.

The State Board of Education, therefore, takes the position, and I think

correctly that that part of section 612 which limits the transportation of children to certain distances is repealed by the provision contained in section 13.

Therefore, I think your board will be justified in arranging for the transportation of children for a greater distance than that contained in section 612.

Yours very truly,

JOHN R. SAUNDERS,

Attorney General.

SCHOOLS—Transportation of children.

RICHMOND, VA., *November 1, 1926.*

HON. A. WILLIS ROBERTSON,
Lexington, Va.

MY DEAR MAJOR ROBERTSON:

I beg leave to acknowledge receipt of your letter of October 29th. In this letter you state that the county school board of Rockbridge county is without sufficient funds for the operation of certain trucks used in the transportation of children to the high schools in the county. In order to meet this expense, the school board has imposed a charge of one dollar per month for transportation per pupil to and from the high schools in trucks.

You then call my attention to section 30, chapter 46 of the Acts of 1926. If you will examine section 703 of the Code of Virginia, which was amended by the legislature at its 1920 session (see Acts of 1920, pages 60-61) you will find that the last paragraph of this section reads as follows:

"The district school boards are authorized to charge, under regulations to be prescribed by the State Board of Education, tuition for pupils attending high schools, said tuition in no case to exceed the actual per capita cost for instruction and maintenance in the high school department."

The best solution of this problem is, in my judgment, for the school board of your county to charge a small tuition for pupils attending the high schools, and this amount could be used in the transportation of high school pupils. I talked with Mr. Harris Hart, Superintendent of Public Instruction, about your letter, and he agrees that this would be a wise solution of the matter. I hope the matter can be so arranged.

Yours very truly,

JOHN R. SAUNDERS,

Attorney General.

SCHOOLS—School trustee holding other office.

RICHMOND, VA., *June 13, 1927.*

HON. E. PEYTON TURNER,
Commonwealth's Attorney,
Emporia, Va.

MY DEAR MR. TURNER:

Acknowledgment is made of yours of the 11th, in which you ask the following questions:

(a) Is a district school trustee, a member of the county school board, eligible to appointment as a judge in primary elections?

(b) Is such trustee eligible to appointment as a judge in regular elections?

(c) Is the registrar of a precinct eligible in primary elections, or regular elections, either, or both?

Replying to your first and second questions, I will say that, in my judgment, a district school trustee is not eligible to appointment as a judge in either a primary or regular election. The concluding sentence of section 84 of the Code is 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."

Section 637 of the Code is 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 district school trustee; provided that the provisions herein contained shall not apply to fourth-class postmasters, county superintendents of the poor, commissioners in chancery, commissioners of accounts, and notaries public."

Reading these two sections together, it is evident that a district school trustee would vacate his office if he were appointed a judge of election. However, there is no legal barrier to the appointment of such a trustee as a judge of election, since he is not holding an elective office, but his position as trustee would be vacated.

Replying to your third question, I will say that a registrar is not eligible as a candidate in any regular or primary election. Section 97 of the Code is as follows:

"No person who acts as registrar shall be eligible to an office to be filled by election by the people at the election to be held next after he has so acted as registrar."

Yours very sincerely,

JOHN R. SAUNDERS.

Attorney General.

SCHOOLS—Disbursement of moneys.

RICHMOND, VA., November 24, 1926.

HON. CHAS. H. FUNK,
Commonwealth's Attorney,
Marion, Va.

MY DEAR MR. FUNK:

Please pardon my delay in replying to your letter of recent date, but, as you know, we have been very busy for the last thirty days in the preparation

of cases for the Supreme Court and in the arguing of cases, and it has been impossible for me to keep up with my correspondence.

You state in your letter that the town of Saltville gets through the treasurer's office a certain amount of school money each year; that heretofore the treasurer has been paying the warrants issued by the school board in payment of teachers' salaries. In other words, his office has acted as a distributing office for these funds, which you state necessitates a great deal of bookkeeping by him.

You then state that the school board of the town of Saltville desires, and that it is also the wish of the treasurer, that these funds be paid by the treasurer direct to the school board, and then the school board disburse it, and you desire to be advised whether or not this would be legal.

In reply to your inquiry, I do not think this would be proper, for the reason that the school board is not bonded, and the law contemplates that all school funds shall be handled by the treasurer, who is a bonded officer. Surely the treasurer cannot complain as to the amount of bookkeeping, as the law allows him a very reasonable percentage for the handling of the disbursement of these funds. I agree with you that the method proposed by you might be easier and less complicated, but I do not think it would be in contemplation of the law.

Yours very truly,

JOHN R. SAUNDERS,

Attorney General.

SCHOOLS—Deed of trust securing bond issue.

RICHMOND, VA., *January 7, 1927.*

MR. V. R. SHACKELFORD,
Attorney at Law,
Orange, Va.

MY DEAR MR. SHACKELFORD:

Acknowledgment is made of your letter of January 1, 1927, in re the recordation of the deed to Woodberry Forest school and a deed of trust from the school securing a bond issue.

It appears from your letter that the business corporation now owning the school has sold all its assets to a new nonstock, nonprofit-making corporation, the Walker family having surrendered their equity. The old corporation executed a deed to the Woodberry Forest estate, on which the school is located, to the new corporation, and the new corporation executed a deed of trust thereon to secure the unpaid purchase price. You request me to advise you whether either of these deeds can be admitted to record without the payment of the tax imposed by section 13 of the tax bill.

Section 2403 of the Code, so far as is applicable to the question here under consideration, provides:

"No deed * * * shall be admitted to record without the payment of the tax imposed thereon by law except a deed conveying land as a site for a school house or church, and except a deed conveying property to the State or to any county, city, town, district or other political subdivision of this State; * * *."

In my opinion the school referred to in this section is a public free school, and in this opinion the Auditor concurs. It would follow from this that both the deed and deed of trust are subject to the tax imposed by section 13 of the tax bill.

Yours very truly,

JOHN R. SAUNDERS,

Attorney General.

SCHOOLS—Renewal of loans.

RICHMOND, VA., November 20, 1926.

MR. JAMES R. ROWELL, JR., *Cashier,*
The Merchants and Farmers Bank,
Smithfield, Va.

MY DEAR SIR:

Acknowledgment is made of your letter of November 19, 1926, in which you say in part:

"Kindly advise us if law passed by the last General Assembly of Virginia requiring boards of supervisors of various counties to approve of loans made by county school boards, makes it necessary for boards of supervisors to approve of renewals of notes representing debts existing before the enactment of the law."

This matter is governed by chapter 46 of the Acts of 1926. Section I of that act provides that:

"No school board of any county, city or town of this State shall hereafter borrow any money in any manner for any purpose without express authority of law, heretofore or hereafter, or by this act conferred. Any loan negotiated in violation of this section shall be utterly void, except that this act shall not apply to any loan heretofore obtained, or any renewal thereof."

You will, therefore, see that the act expressly excepts renewals of loans obtained prior to the enactment of this statute.

Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,

Attorney General.

SCHOOLS—Authority to make loans.

RICHMOND, VA., November 26, 1926.

HON. FLETCHER KEMP,
Rosslyn, Va.

MY DEAR SIR:

Acknowledgment is made of your letter of recent date, in which you state that the county school board of Arlington county proposes to make a short term

loan under authority of chapter 46 of the Acts of 1926, and to issue its notes therefor. You state that the notes of the county are to be negotiated through a New York bank, and that this bank has inquired as to whether the school board has the authority to issue such obligations, and if it has that authority, whether the full faith and credit of the county of Arlington is pledged to the payment of same. You request my opinion on these points.

In response to your first inquiry, section 2 of chapter 46 of the Acts of 1926 provides as follows:

"Any school board of a county, or a city, or a town constituting a separate school district which may find it necessary to make temporary loans is hereby authorized to borrow a sum of money 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; such loans to bear interest at the rate of not exceeding six per centum per annum and to be repaid within five years from their date; provided, however, that no such loan shall be negotiated by a county school board without the permission and approval of the county board of supervisors, and no such loan shall be negotiated by a city school board or by a school board in a town constituting a separate school district, without the approval of the city or town council."

When this section has been complied with, it is my opinion that a loan negotiated under authority of this section is valid. In view of the fact that the title to all school property has been vested in the county school board by chapter 423 of the Acts of 1922, and by section 648 of the Code of 1919, as amended, and in view of the provisions of section 2, chapter 398 of the Acts of 1920, I am of the opinion that the obligations of the county school board for short term loans negotiated under section 2, chapter 46 of the Acts of 1926, are obligations which have the full faith and credit of the county behind them. See *Moss v. Tazewell*, 112 Va. 878, 1911.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

SCHOOL BOARD—Authority to borrow money.

RICHMOND, VA., December 10, 1926.

JOHN H. CROWGEY, ESQ.,
Division Superintendent of Schools,
Wytheville, Va.

MY DEAR MR. CROWGEY:

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

"From paragraph two of an act approved February 26, 1926, page 59 of the Acts of the Assembly, 1926, it would appear that a county school board, with the approval of the board of supervisors, could borrow an amount of money equal to one-half of the school revenues for that particular year. However, from paragraph three, it would appear that any loan that might be negotiated would be for an amount in excess of the

school revenues; hence, would require that a public hearing be had of which thirty days' notice had been given. In other words, a school board would not need to make a loan unless it had expended or contracted to expend an amount in excess of the school revenues for the year."

After a careful examination of chapter 46 of the Acts of 1926, I am of the opinion that in every case where the school board borrows money, or contracts to expend money in excess of the funds available for that fiscal year, it must not only obtain the permission of the board of supervisors to make such loan, or to contract such indebtedness, but thirty days' public notice must have been previously given as provided by section 3 of the act. In those cases where the board merely wishes to negotiate a temporary loan not in excess of one-half of the amount produced by the aggregate school levy for that year, and where that money is to be expended for such purposes as would not make the total expenditures of the board exceed the funds available for that fiscal year, I am of the opinion that the loan may be negotiated, with the consent of the board of supervisors, without the publication of the notice required by section 3 of the act. Of course, such cases would be extremely rare.

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

Sincerely yours,

JOHN R. SAUNDERS,

Attorney General.

SCHOOLS—Loan to Belmead school.

RICHMOND, VA., *November 4, 1926.*

JAS. G. HENING, ESQ.,

Box 444,

Richmond, Va.

MY DEAR MR. HENING:

Acknowledgment is made of your letter of November 2, 1926, in which you call attention to chapter 242 of the Acts of 1926, authorizing the county school board of Chesterfield county to borrow not exceeding \$25,000, and to issue its bonds therefor, for the purpose of making additions to the Belmead school in Manchester school district of said county, etc.

You state that no bonds have been issued under authority of the act to be used for purposes other than those specified in the act, the Belmead school having been completed without the necessity of the bond issue.

The purpose of the act is two-fold: First, for the making of an addition to the present Belmead school in Manchester school district; and, second, to provide additional high school facilities at such point in said district as may be selected by the county school board. I understand the addition to Belmead school was made and paid for out of funds already in the hands of the school board. Therefore while I am of the opinion that bonds could now be issued under this act, it is my opinion that they could be issued only for the difference between what the contemplated addition to Belmead school cost and the sum of \$25,000, as the legislature apparently did not intend more than the difference between \$25,000 and the cost of the addition to Belmead school to be expended in the additional

high school facilities provided for in the act. Of course, the proceeds of such bonds could be used for no purpose other than those specifically pointed out in the act itself. Although the act required an election by the people before such bonds could be issued, in view of the language of section 3, chapter 46 of the Acts of 1926, I am of the opinion that your board, as a precaution, should also obtain the approval of the board of supervisors of the county.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

SCHOOLS—Certificates of Indebtedness.

RICHMOND, VA., January 6, 1927.

HON. ROSEWELL PAGE,
*Second Auditor of Virginia,
Richmond, Va.*

MY DEAR MR. PAGE:

I beg leave to acknowledge receipt of your letter of recent date, which is as follows:

"As you know, the General Assembly of Virginia at its last session passed an act authorizing the governing boards of certain institutions of higher education to issue and sell through the Commissioners of the Sinking Fund certificates of indebtedness—Acts of 1926, page 829.

"The Literary Fund of Virginia, under this act, has purchased \$470,000.00 of these certificates and the first installment of interest becomes due January 1, 1927. I have mailed bills to several institutions for amount of interest due on that date. From a letter from Mr. A. B. Chandler, Jr., president of the State Teachers College at Fredericksburg, copy enclosed, you will observe that there is some question as to whether I have a right to collect the interest due January 1, 1927, at that time. Sections 8 and 9 of the act provides for the payment of interest and principal of the debt. The bonds themselves declare on the face that interest is payable January and July of each year.

"I will thank you to advise me whether I am required to collect interest on January 1, 1927, on certificates held by the Literary Fund, or if I have to wait until the buildings are completed and the institutions are deriving income from them."

In reply, I will state that I am of the opinion that you are required by virtue of the provisions of section 4 of the act referred to in your letter to collect interest on these certificates of indebtedness on January 1st and July 1st of each year and you do not have to wait until the buildings are completed and the institutions are deriving income from them by virtue of fees paid by students for occupancy.

I am frank to say that there seems to be a conflict in the provisions of section 4 and section 8 of this act, but the legislature, I am sure, will amend the act and take care of this situation at its next session.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

SCHOOLS—County board, appointment of new principal.

RICHMOND, VA., June 16, 1927.

HON. DABNEY S. LANCASTER,
Secretary State Board of Education,
Richmond, Va.

MY DEAR MR. LANCASTER:

I beg leave to acknowledge receipt of your letter of the 14th, which is as follows:

"I am writing you for an opinion in regard to section 666 of the Code of Virginia, which relates to appeals from local school boards to school electoral boards. This section indicates that an appeal may be made from any decision of a county school board upon the presentation to the division superintendent of schools of a petition signed by five interested heads of families, residents of the district—the superintendent to grant an appeal to the trustee electoral board if he cannot within ten days after the receipt of the complaint satisfactorily adjust the same. In the case of a school board that has failed to reappoint the principal of a high school, but who has appointed some one else in his place, does this section of the Code, in your opinion, grant the right to appeal to the electoral board *for the re-appointment of the former principal?* I shall be very glad to have an opinion from you in regard to this matter at the earliest possible date."
(Italics supplied.)

In my opinion an appeal does not lie in such a case for the reason that the statute provides that "any five interested heads of families, residents of the county, who may feel themselves aggrieved by the *action* of any county school board may" proceed to appeal as provided in this section.

The failure of the county school board, in my judgment, to reappoint a former principal of a school whose term of contract for teaching has expired and who, of course, has been paid for a session's work is not such an action by the board as is contemplated in the provisions of this section. The complaint in such a case is, in fact, directed, not to any action on the part of the school board, but to its failure to act.

Of course, if there is any reason why the new principal appointed is objectionable to the patrons then the appeal would lie from the action of the board in appointing him, but on such appeal the failure of the board to reappoint the former principal could not be considered by the electoral board.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

SCHOOL BOARD—Amount of loan.

RICHMOND, VA., February 5, 1927.

HON. M. D. HALL,
Division Superintendent of Schools,
Burke, Va.

MY DEAR MR. HALL:

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

"Under section 2 of chapter 46 of the Acts of 1926, if it be found necessary to secure the permission and approval of the county board of supervisors to negotiate a temporary loan for three of the six school districts of the county, will the amount of such loan be limited to one-half of the amount produced by the aggregate school levy in the county, or one-half of the amount produced by the aggregate school levy of the three districts seeking the loan?

"In other words: Is the basis for the limit of a loan to a school district one-half of the amount produced by the aggregate school levy in the county, or one-half of the amount produced by the aggregate school levy in the district?"

The language of section 2 of chapter 46 of the Acts of 1926 is as follows:

"Any school board of a county, * * * which may find it necessary to make temporary loans is hereby authorized to borrow a sum of money not to exceed one-half of the amount produced by *the aggregate school levy in such county*, * * * for the year in which the loan is negotiated; * * *"
(Italics supplied.)

The aggregate school levy, in my opinion, means the aggregate of the county and district school levies in such county.

Yours very truly,

JOHN R. SAUNDERS,

Attorney General.

TAXATION—Suit for payment of taxes.

RICHMOND, VA., July 6, 1926.

MESSRS. KIME AND KIME,
Attorneys at Law,
Salem, Va.

GENTLEMEN:

Acknowledgment is made of your letter of July 1, 1926, in which you call attention to chapter 341 of the Acts of 1924 and say in part:

"* * * The second paragraph of the act is so worded as, in our minds, to create a serious doubt as to whether or not property sold for delinquent taxes before the year 1902 and purchased by the Commonwealth (and not resold) can be filed on for delinquent taxes for years subsequent to the year 1902 without the treasurer again reselling such property. * * *

"Mr. C. D. Denit, the clerk of our court, does not know what to do in regard to accepting applications filed in his office for the purchase of property sold for delinquent taxes prior to the year 1902 and returned as heretofore sold for taxes subsequent to the year 1902.

"We would certainly like to have an opinion from you on this question in order that we may present the same to Mr. Denit, the clerk, or else you may write to him direct."

Section 1 of that act expressly provides that all liens upon real estate for taxes and levies due the Commonwealth, or any of its political subdivisions, prior to the 10th day of July, 1902, are released.

Section 2 of the act provides:

"The right, title and interest of the Commonwealth of Virginia in and to all real estate sold for taxes and levies assessed prior to the tenth day of July, nineteen hundred and two, which real estate has been purchased by the Commonwealth and not resold, is hereby unconditionally released unto and vested by operation of law in the person or persons who owned the real estate at the time the Commonwealth so acquired title, or persons claiming, or to claim, by, through, or under them."

It is my opinion that the liens of all taxes due the Commonwealth, prior to the 10th day of July, 1902, have been released, whether or not the property was sold by the treasurer. Therefore, it is my opinion that no application can be made, unless there has been a sale subsequent to the 10th day of July, 1902.

In the case of *Robins v. Waddill, Clerk*, the Court of Appeals issued a mandamus compelling the clerk to accept from the owner the taxes that had accrued since July 1, 1902, without the payment of those taxes which were due prior to July 1, 1902. I do not find any report of this case, but a copy of the order entered by the clerk could be obtained from H. Stewart Jones, Esquire, clerk of the Court of Appeals at Richmond.

Of course, the act does not relieve the owner from personal liability, and I know of nothing that would prevent a suit from being brought to enforce the payment of the taxes against the owner and his property in one of the methods provided for the collection of taxes.

Trusting this gives you the desired information, I am

Very truly yours,

JOHN R. SAUNDERS,

Attorney General.

TAXATION—Rate allowed clerks for copying and certifying list of persons paying poll tax.

RICHMOND, VA., July 26, 1926.

HON. V. W. NICHOLS, *Clerk*,
Bedford, Va.

DEAR MR. NICHOLS:

I am just in receipt of your letter of the 24th, to which I will reply at once:

In your letter you refer to section 112 of the Code of Virginia, which provides "for the clerk copying and certifying" list of persons who have paid their poll taxes. As stated by you, the law provides that for copying and certifying the same, the clerk shall be allowed two cents for each ten words, counting initials as words, etc.

You then illustrate your question by the following line:

"Agee, Henrietta A. 1923-1924-1925."

and ask if it would be a proper construction for the law to count this line as six words. I am of the opinion that this would be a proper construction of the law, and the line should be counted as six words. "1923-1924-1925" are unquestionably words designated by figures.

I am very glad to give you my opinion in this matter.

Yours very truly,

JOHN R. SAUNDERS,

Attorney General.

TAXATION—Spanish-American War soldier not exempt from paying poll tax.

RICHMOND, VA., July 21, 1926.

MR. W. L. CUTCHINS,
Franklin, Va.

DEAR MR. CUTCHINS:

I am just in receipt of your letter of July 20th. In reply, will state that soldiers who served in the Spanish-American War are not exempt from the payment of poll tax as a prerequisite to vote. I am under the impression that a resolution was introduced at the last legislature to amend the Constitution so as to embrace the soldiers who served in the Spanish-American War and the World War, and exempt them from payment of poll tax in order to vote. However, it will take two years for this amendment to be adopted. As the Constitution now reads, the only person exempt is the soldier who served in the War between the States.

Yours very truly,

JOHN R. SAUNDERS,
*Attorney General.***TAXATION—Inheritance tax.**

RICHMOND, VA., July 6, 1926.

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

DEAR SIR:

Acknowledgment is made of your letter of June 25, 1926, in which you say:

"The General Assembly by act approved March 20, 1924, chapter 305, pages 460-467, Acts of Assembly 1924, amended and re-enacted section 44 of the tax bill. Subsection 21 of section 21 of section 44 is as follows:

"The provisions of this act shall apply to the estate of every person who shall die on or after April first, nineteen hundred and twenty-four, and to all estates created by will which shall vest in interest on or after said date."

"With respect to estates of persons dying prior to April 1, 1924, the practice has been to determine the inheritance tax and collect the same in the manner provided by section 44 of the tax bill as amended by chapter 238, page 418, Acts 1918, and by chapter 3, page 9, Acts Extra Session 1919.

"Apparently such action by this office is not in accordance with decision of the Supreme Court of Appeals of Virginia, rendered January 22, 1920, 126 Va. Rep., page 493, as follows:

"The method of procedure in a proceeding for the ascertainment and determining of a transfer or inheritance tax is controlled by the statute which was in force on the subject at the time of the institution of the proceeding, although the tax itself and the rights of the parties are controlled by an earlier statute."

unless subsection 21 of section 44 of the tax bill, as amended and re-enacted by chapter 305, pages 461-467, Acts of Assembly 1924, changed the effect of the ruling of the Supreme Court of Appeals of Virginia in the *Heth Case*.

"I will be obliged if you will advise me under which law procedure should be had to determine and collect the inheritance tax on estate of a resident of Virginia who died prior to April 1, 1924."

I have examined the case of *Heth v. Commonwealth*, 126 Va. 493 (1920), and have also examined with care subsection 21 of section 44 of the tax bill as amended, which provides:

"The provisions of this act shall apply to the estate of every person who shall die on or after April 1, 1924, and to all estates created by will which shall vest in interest on or after said date."

While the rate of taxation is governed by the date of the death, it is my opinion that the procedure to be followed in the assessment and collection of inheritance taxes assessed on and after the taking effect of section 44 of the tax bill as amended is to be governed by the procedure outlined in that section and by the statutes with reference to the assessment of omitted taxes, etc. Code section 2332. The Court of Appeals laid this rule down in *Heth v. Commonwealth*, *supra*, and this rule is in accordance with the general rules with reference to the construction of statutes prescribed by chapter 2 of the Code, especially section 6 thereof.

Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

TAX—Tax on insurance agent.

RICHMOND, VA., May 26, 1927.

HON. JOSEPH BUTTON,
Commissioner of Insurance,
Richmond, Va.

MY DEAR COLONEL BUTTON:

Acknowledgment is made of your request of recent date that you be advised whether a town in this State has the authority to impose a license tax upon an insurance agent for conducting business within such town. You advise me that the contention is made that the case of *Tabb v. Richmond*, 116 Va. 227, is authority for the imposition of a license tax by a town on insurance agents.

Tabb v. Richmond, *supra*, was decided in 1914. Since that time, section 26 of the tax bill has been amended. This section of the tax bill, in the last paragraph thereof, provides as follows:

"The license tax on gross premiums as provided in section twenty-three and the tax on real estate and tangible personal property herein provided to be paid by every person, partnership, company or corporation doing such an insurance business in this State, shall be in lieu of all other

license fees, taxes or levies whatsoever for State, county, municipal or local purposes, which shall be construed to include their agents, except that the certificate fee of one dollar required to be paid by all such agents to the Bureau of Insurance shall be paid by them as heretofore."

In an opinion given by me on July 12, 1924, to Hon. Jno. A. Coke, Jr. (Report of the Attorney General, 1923-1925, page 377), I said, speaking of the right of a town to impose a license tax upon insurance agents soliciting business in that town:

"There can be no doubt in my mind but that this section prohibits the imposition of such a tax, either by the State, county or municipality. I would further call your attention to section 2206, found on page 247 of the Virginia tax laws. I have discussed this matter with the Auditor of Public Accounts, and he concurs in this opinion."

I am still of the same opinion.

Trusting this gives you the desired information, I am

Very truly yours,

JOHN R. SAUNDERS,
Attorney General.

TAXATION—Merchant's license.

RICHMOND, VA., July 9, 1926.

HON. HUGH D. SHEPHERD,
Chatham, Va.

MY DEAR MR. SHEPHERD:

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

"I am a merchant and I have to pay the following taxes: a State license tax, a county tax on stock of merchandise and accounts, a town license on stock based on amount of State license, and a town tax on stock of merchandise and accounts based on the county tax.

"I understand that this is not done in any other town in the State except Gretna. I would like to know if you think this legal and proper."

The State tax is authorized by section 2366 of the Code, and the county tax is also authorized by law.

With reference to the town taxes, I call your attention to sections 3072 and 3073 of the Code and to the case of *Virginia Wholesale Company v. Appalachia*, 131 Va. 357.

It seems outrageous that the General Assembly should ever have given a city or town the power to impose both a license tax and an *ad valorem* tax on the capital of merchants, but it seems that this has been done by the above-quoted Code sections. See section 2205 of the Code, as amended by chapter 576 of the Acts of 1926.

Sincerely your friend,

JOHN R. SAUNDERS,
Attorney General.

TAXATION—Druggist tax.

RICHMOND, VA., July 22, 1926.

HON. M. J. PUTNAM,
Commonwealth Attorney,
Clifton Forge, Va.

MY DEAR MR. PUTNAM:

Acknowledgment is made of your letter of July 19, 1926, in which you say:

"Please let me have your construction of sections 121 and 122 of the Virginia tax laws as applicable to the following state of facts: A local druggist receives exposed films to be developed and the local druggist sends them to a photographer at Staunton, Virginia, by whom they are developed or printed and returned to the local dealer, who in turn delivers them to the persons from whom they are received, and, as I understand it, the photographer allows the local dealer fifty per cent on all business thus forwarded, and contends that he should not have to pay license either as daguerrean or photograph artist, or as agent of either as provided under section 121 of Virginia tax laws. As I see it, the local dealer comes clearly within the provisions of section 121, and should pay the tax provided under section 122."

I have examined sections 121 and 122 of the tax bill with care, and it is my opinion that while the question is somewhat close, that the druggist is subject to tax under these sections.

Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,

Attorney General.

TAXATION—Exemption of income tax.

RICHMOND, VA., August 17, 1926.

MR. W. R. HARRISON, *Cashier,*
The American National Bank,
Danville, Va.

MY DEAR MR. HARRISON:

I beg to acknowledge receipt of your letter of the 14th, in which you desire an opinion.

You state in your letter that one of your friends, a lady who is entirely dependent upon her salary, is divorced from her husband who now lives in New York State; that he pays nothing either towards her support or the support of her boy about 11 years of age. You then desire to be advised whether or not she is entitled to an exemption of \$2,400 or \$1,400 on her income tax return.

The law provides that a husband and wife living together, or a widow or widower with dependent minor child or children, is entitled to an exemption of \$2,000 and \$400 for each additional person entirely dependent upon the taxpayer for support. It further provides that an individual unmarried and without dependent minor child or children is entitled to an exemption of \$1,000 and \$400 for each additional person dependent upon and entirely supported by the taxpayer.

Evidently, the commissioner of the revenue takes the position that the lady in question is unmarried and is, therefore, only entitled to \$1,400 exemption. This perhaps is a technical construction of the law. However, I have always believed that the law should be construed with common sense, and I am of the opinion that, inasmuch as the lady in question has been divorced from her husband and he does not contribute anything towards her support or the support of the child, she virtually stands in the position of a widow and should, therefore, be allowed an exemption of \$2,400.

I might add that I have discussed this matter with Mr. Moore and Mr. Morrisett, both of whom are members of the State Tax Commission, and they agree with me that this is a just and equitable construction to be placed upon the statute in this case.

Yours very truly,

JOHN R. SAUNDERS,

Attorney General.

TAXATION—Inheritance tax: whether securities given children are taxable.

RICHMOND, VA., *December 1, 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 reference to Mrs. Sarah V. D. Stirling, daughter of Edward L. Daingerfield, deceased.

It appears from the files submitted to me that Mr. Daingerfield on March 29, 1917, gave to his three children, Mrs. Stirling, Miss Mary E. Daingerfield, and Francis L. Daingerfield, certain bonds and securities. On that date a safe deposit box was rented from the Safe Deposit and Trust Company, 13 South street, Baltimore, Maryland, in the name of Mrs. Stirling, Miss Daingerfield, and Francis L. Daingerfield. The card contained the endorsement that access to the box was to be given to any two of the survivors or to the deputy appointed by the lessees jointly.

It appears that Mr. Daingerfield's children appointed him their deputy. This box was leased until September 21, 1925, when the bonds were removed from Baltimore to Washington by Francis L. Daingerfield and his father.

Mr. Daingerfield died on October 14, 1925. After Mr. Daingerfield's death, the bonds were obtained from the Washington bank by his children. From 1917 until shortly prior to his death, Edward L. Daingerfield, as deputy for his three children, clipped the coupons from the bonds and collected the income therefrom, which he remitted to his children monthly, together with other items which he was in the habit of giving his children during his life time.

You have requested me to advise you whether the securities thus delivered to his children in 1917 are taxable as a part of Mr. Daingerfield's estate.

In my opinion, this was not a gift made in anticipation of death by Mr. Daingerfield, and if a valid and complete gift as of 1917, would not be subject to tax as a part of his estate. In 28 C. J. 641-2, it is said:

"It is not necessary that the donee should retain the property in his possession after delivery to him. The subsequent possession by the donor, while it may in some cases tend to throw suspicion upon the transaction as being in fraud of creditors, and calls for an explanation, is not necessarily incompatible with the donee's dominion over the property, and will not necessarily operate to make the gift ineffectual. Where, however, the donor's retention of possession is inconsistent with the idea of an executed gift, the gift fails."

"The donor may constitute himself a trustee for the donee, and in such case no further delivery is necessary. But the law will not imply such trust; it must be expressed. In regard to personal property, the declaration of trust may be made either in writing or by parol. In either case, the language used must be clear, unequivocal, and irrevocable."

There is nothing connected with this transaction which would indicate that Edward L. Daingerfield retained possession of the property inconsistent with the idea of an executed gift. The bonds were delivered to the donees and placed in a safe deposit box accessible only to two or all of the donees, or to their deputy appointed jointly by the donees. Every circumstance connected with the transaction convinces me that the transaction was a complete gift as of March 29, 1917, and, therefore, that the securities thus given to his children by Mr. Daingerfield are not subject to the inheritance tax.

Yours very truly,

JOHN R. SAUNDERS,

Attorney General.

TAXATION—Transfer tax on estate.

RICHMOND, VA., *December 14, 1926.*

AMERICAN SAFETY RAZOR CORPORATION,
*Jay and Johnson Streets,
Brooklyn, New York.*

GENTLEMEN:

Acknowledgment is made of your letter of December 10, 1926, in re the transfer tax imposed by this State on shares of corporation stock and sections 5348-5349 of the Code of 1919.

On November 27, 1926, the Auditor of Public Accounts, who is charged with the enforcement of the transfer tax law, wrote an opinion to Hon. J. Vaughan Gary, of Richmond, Virginia, with reference to this matter, in which he said:

"In determining this tax, and, after its payment, issuing authority to transfer, regard is not had to provisions of section 5349 of the Code, as amended by chapter 540, page 897, Acts 1926, as proof of publication of notice required by that section is considered a matter between the transfer agent of the corporation and the personal representative of the estate."

This office fully concurs in the opinion expressed by the Auditor. I may further add that, in my opinion, the provisions of 5348 of the Code of Virginia, 1919, are not mandatory, but purely for the benefit of the corporation which may waive the advertisement authorized by this section if it feels so disposed.

Yours very truly,

JOHN R. SAUNDERS,

Attorney General.

TAXATION—Church property.

RICHMOND, VA., *February 4, 1927.*

MAJOR CHARLES O. SAVILLE, *Clerk,*
Chancery Court of the City of Richmond,
Richmond, Va.

MY DEAR MAJOR SAVILLE:

Acknowledgment is made of your letter of February 1, 1927, in which you say:

"I most respectfully submit copies of two paper writings, which together were duly admitted to probate in this court today as the last will and testament of D. J. O'Connell, deceased, late of this city.

"The paper bearing date on the 26th day of February, 1923, is intended, as shown from its face, to transfer the title of the church properties from Bishop O'Connell to his successor in office. The paper bearing date on the 27th of February, 1923, disposes of the individual estate of D. J. O'Connell. This estate is valued at one hundred and fifty thousand dollars, and I have assessed the probate tax in accordance with the law.

"I should like to be advised as to whether or not there is a transfer or probate tax on the church property held and transferred by Bishop D. J. O'Connell to his successor in office by the papers above referred to of February 26, 1923.

"I understood from the statements made in court that all the church property of the Catholic Church is conveyed to and held by the presiding bishop of the diocese for the church, and is not held by trustees as other church properties in Virginia are."

As stated in your letter, the tax was imposed upon the will which disposed of the estate belonging to Bishop O'Connell personally, and the only question submitted to me for my decision is whether the will by which he devised the property held by him as trustee for the Roman Catholic Church of this diocese to his successor in office is subject to the tax imposed by section 12 of the tax bill.

Bishop O'Connell held this property, as is pointed out in your letter, merely as a trustee for the congregations in his diocese, and had no personal interest in it whatever. The property itself is exempt from taxation by section 183 of the Constitution of Virginia.

The church property mentioned in the will of Bishop O'Connell is held in perpetuity by the church, and the bishop of the church is merely the administrator of the property. Had it not been mentioned in the will of Bishop O'Connell, under the law of the church his successor in office would have become the administrator of the property. In fact, although the property is mentioned in the will, it did not pass by the will to his successor in office otherwise than as administrator for the church, the property continuing always as the property of the church.

I am, therefore, of the opinion that the probate of this will is not subject to tax.

I submitted your letter to Hon. C. Lee Moore, Auditor of Public Accounts, and he concurs in this opinion.

Very truly yours,

JOHN R. SAUNDERS,

Attorney General.

TAXATION—Inheritance tax, exemption from.RICHMOND, VA., *April 13, 1927.*

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

MY DEAR MR. AUDITOR:

Acknowledgment is made of your communication of recent date, in which you request me to advise you whether a grandnephew or grandniece of a decedent is entitled to the exemption provided in the inheritance tax law for nieces and nephews.

After examining the law, I have reached the conclusion that a grandnephew or grandniece is not entitled to the exemption provided by section 44 of the tax bill, as amended.

In 37 Cyc. pp. 1570-71, it is said:

“* * * an exemption of this kind is construed with some strictness and is limited to the very persons intended by the statute to be relieved from the payment of the tax; and the exemption of a certain class of relations by specific designation, as ‘brothers,’ ‘nephews,’ or the like, will not exempt their descendants. * * *”

See also *In Re Bird's Estate*, 11 N. Y. S. 897 (1890), and *In Re Moore's Estate*, 35 N. Y. S. 782 (1895).

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

TAXATION—Tax on deeds.RICHMOND, VA., *November 19, 1926.*

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

MY DEAR MR. AUDITOR:

Acknowledgment is made of your communication of October 19, 1926, in which you state that some time ago a deed from John S. Weskett and J. S. Lawrence, receivers of the Fisheries Products Corporation of Virginia, to Armour Fertilizer Works, was recorded in the circuit court of Norfolk county and the tax paid thereon; that subsequent to the recordation of this deed the court held that the receivers had executed the deed without authority so to do and declared the deed void, directing a copy of the order to be recorded in the circuit court of Norfolk county; that subsequent to this time new proceedings were had and a deed from the same receivers to the same grantee was authorized by the court.

This deed has now been tendered to the clerk for recordation, and you request me to advise you whether the tax thereon must be paid before this deed can be admitted to record, or whether the tax paid on the void deed could be applied to the new deed.

I have examined section 13 of the tax bill, as amended, with care, and it is

my opinion that the second deed cannot be admitted to record without the payment of the tax required by law. It is a very hard case, and I think that the party paying the tax ought to be entitled to a refund of the tax paid for the recording of the void deed, but from the examination of section 2385 of the Code, as amended, I am of the opinion that this section is not broad enough to offer relief in the case of a privilege tax, such as is involved here. It will, therefore, seem that Mr. Levy's only recourse is to the General Assembly.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

TAX—On mortgage from G. Sturm to United Security Life Ins. of Pa.

RICHMOND, VA., June 15, 1927.

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

MY DEAR MR. AUDITOR:

Acknowledgment is made of your communication of recent date, with reference to the tax to be imposed on a mortgage from Gertrude DeSales Sturm to the United Security Life Insurance and Trusts Company of Pennsylvania.

It appears from an examination of the mortgage that it is given to secure a bond in the penalty of \$5,000 conditioned for the payment of \$2,500, certain interests and certain insurance premiums, the amount and number of which are mentioned in an agreement referred to in the mortgage, but not made a part thereof. In my opinion, the tax in this case should be based upon the amount of the bond secured by the deed of trust, namely \$5,000.

I have read Mr. Marable's letter to you of May 21, 1927, and am of the opinion that the party presenting the mortgage for record is mistaken in thinking that the only sum secured by the same is a loan of \$2,500. As pointed out above, the mortgage not only secures the \$25.00 loan and the interest, but secures certain life insurance premiums due under the policy referred to in the mortgage, the amount of which is not disclosed, but for which, together with the loan and the interest, a bond in the penalty of \$5,000 is taken and secured by the mortgage.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

TAXATION—Unpaid tax on real estate, etc.

RICHMOND, VA., July 29, 1926.

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

MY DEAR MR. MOORE:

I have Mr. W. B. McFarland's letter addressed to you under date of July 26, 1926, which was referred to this office for an opinion. In his letter he says in part:

"A citizen of Augusta county owning both real and personal property gives a deed of trust on certain personal property, which has since been sold, and the proceeds of that sale are in my hands. This citizen has since sold his real estate on which there are back unpaid taxes. What I am anxious to know is this:

"Must I wait and collect this back unpaid tax on the real estate from the real estate, or can I take it from the proceeds of personalty now in my hands?"

In answering the question propounded by the treasurer of Augusta county, I would state that he must wait and collect the back unpaid tax on the real estate from the real estate, for to take it from the personalty would be depriving the creditors secured under the deed of trust, since that fund is not sufficient to pay all this tax. To take the proceeds from the personalty, which were obtained from the sale, would be most unfair and unjust to the creditors as the real estate is amply good for the delinquent taxes due on it. Furthermore, the taxes on the real estate have accrued since the personalty deed of trust was given.

Very truly yours,

JOHN R. SAUNDERS,

Attorney General.

TAX—Fishing in Potomac River.

RICHMOND, VA., June 11, 1927.

HON. M. D. HART, *Executive Secretary,*
Commission of Game and Inland Fisheries,
Richmond, Va.

DEAR SIR:

Acknowledgement is made of yours of the 6th, in which you enclose letter of J. R. H. Alexander, Commonwealth's attorney of Loudoun county, written to you under date of June 3, and your letter to him of June 6, in which you say:

"We are referring yours of June 3 to the Attorney General for his attention and instruction as to how this department should proceed in the matter referred to in same.

"There is a question, as we see it, as to whether the State of Maryland has the right to require citizens of Virginia to pay a license to fish in the Potomac river, as the compact between the States is silent relative to this. The right to tax *her own citizens* for this privilege is not questioned, but those of Virginia is a different proposition, unless affected through joint and concurrent legislation."

You ask my advice as to what action your department should take in this matter. In this connection, I call your attention to section 3299 et seq. of chapter 129 of the Code of Virginia. The first subdivision of the said section contains these words:

"It shall be lawful for any citizen of the State of Maryland or of the State of Virginia to take fish, oysters or crabs from the Potomac river after complying with the requirements of the laws of the State of which he is a citizen for the taking of fish, oysters or crabs from the waters of such State; and any citizen of either State who takes fish, oysters or crabs from the Potomac river without having complied with the requirements of

the law of his State as to the taking of fish, oysters or crabs in its own waters, shall be considered guilty of violating the laws of the State of which he is a citizen, and shall be prosecuted according to such laws. * * *

This section clearly indicates that any citizen of Virginia may catch fish in the Potomac river so long as he complies with the laws of the State of Virginia, and need not take out a license from the State of Maryland for so doing.

I think it would not be inadvisable for you to call the attention of the Fish Commission of Maryland to chapter 129 of the Code and request a statement that citizens of Virginia are not required to take out Maryland fishing licenses, and then make it public through the newspapers of the counties and cities situated near the Potomac river.

Yours very truly,

JOHN R. SAUNDERS,

Attorney General.

TAXATION—Inheritance tax; right of survivor.

RICHMOND, VA., *October 1, 1926.*

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

MY DEAR MR. AUDITOR:

Acknowledgment is made of your letter of September 29, 1926, in which you say in part:

"Hon. Robert T. Barton, Jr., has requested me to advise him whether a bank account deposited in Virginia under the following conditions, is liable for the payment of inheritance tax imposed by the laws of this State upon the decease of either of the depositors:

"The sums deposited on this book belong to the undersigned jointly, it being understood each may withdraw on his or her individual order during their joint lives and that any balance upon the death of either shall belong to the survivor. Revocable only by the consent of both parties, in writing, and on presentation of the pass book."

With this letter you send me copy of an opinion written by you to Hunter McQuiston, of Bronxville, N. Y., in re inheritance tax on real property held by joint tenants with provision of survivorship. In this opinion, you reach the conclusion that where the instruments creating the joint tenancy provide for survivorship, no inheritance tax would be assessable upon such property upon the death of one of the parties because the other would succeed to the share of the decedent "by virtue of the instrument conveying the property not under the will or laws of descents and distributions."

It is my opinion that the conclusion reached by you in your letter to Mr. McQuiston is sound and correct, and I am further of the opinion that your conclusion in the matter is applicable to and governs the matter submitted by Major Barton for the same reasons given in your letter to Mr. McQuiston.

Yours very truly,

JOHN R. SAUNDERS,

Attorney General.

TAXATION—Whether inheritance tax or gift.RICHMOND, VA., *September 29, 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 send me file in re: estate of Flora Mease Thorpe.

It appears from the facts in connection with this matter that on August 3, 1922, Mrs. Thorpe executed an instrument by which she gave all of an estate which she inherited from her brother, who died in Illinois, to her children. This gift was an absolute gift which took effect as of August 3, 1922. Mrs. Thorpe died a resident of Williamsburg, Virginia, on April 2, 1923.

Section 44 of the Virginia tax bill, imposing a tax on inheritance as it existed at that time, imposed no inheritance tax on gifts except those gifts intended to take effect in possession or enjoyment after the death of the grantor, which is not the case here. In 1924, section 44 of the tax bill was amended so as to impose a tax on gifts made in contemplation of death, and further creating a presumption that all gifts made within one year of the death of the donor should be deemed *prime facie* to have been made in contemplation of death.

It is my opinion that the 1924 amendment is not retroactive and that, at the time the gift in this case was made and at the time Mrs. Thorpe died, the law did not impose an inheritance tax on gifts such as are involved in this case. *Heath v. Commonwealth*, 126 Va. 493, and *Commonwealth v. Herbert*, 127 Va. 291.

I am of the opinion, however, that if Mrs. Thorpe's children were residents of Virginia at the time the gift was made by Mrs. Thorpe, they are subject to the income tax prescribed by the laws on such gifts, subject of course to the authorized exemptions and deductions.

Very truly yours,

JOHN R. SAUNDERS,
Attorney General.

TAXATION—Recordation of deed of trust.RICHMOND, VA., *October 29, 1926.*

HON. JOHN C. JAMISON,
*First National Bank Building,
Roanoke, Va.*

MY DEAR SIR:

I am just in receipt of your letter of October 28.

In this letter you state that from time to time you have occasion to arrange for an extension of the time of payment of loans secured by deeds of trust on real estate, which extension is evidenced by an extension agreement which is recorded. You further state that on the original deed of trust you pay a State tax of twelve cents per hundred dollars for the amount secured, and that the

clerk of the court charges you the same tax for recording the extension agreement.

If the extension agreement states the amount secured, unquestionably he is correct in charging you the State tax of twelve cents per hundred dollars.

Yours very truly,

JOHN R. SAUNDERS,

Attorney General.

TAXATION—Inheritance taxes, assessment and collection of.

RICHMOND, VA., November 15, 1926.

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

MY DEAR SIR:

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

"In connection with the assessment and collection of inheritance taxes, will you kindly give me your opinion covering the following questions:

"It is provided in Code section 2332, as amended by chapter 115, page 95, Acts 1920 (page 363 Virginia Tax Laws 1926) that if certain taxes, including inheritance taxes, have not been assessed for any of the three years next preceding that in which an ascertainment of such taxes is made, that such taxes may be collected by the Commonwealth, et cetera.

"Under the provisions of the Inheritance Tax Law one year is allowed after the date of the decedent's death in which to pay the tax. It would therefore appear that the Commonwealth would have the right to assess inheritance taxes upon estates of decedents dying four years prior to such assessment. Is this correct?

"In your opinion would the Auditor of Public Accounts be authorized to assess and collect inheritance taxes on estates, liable for such taxes, where the death of the decedent occurred more than four years prior to the assessment?"

Section 2332 of the Code of 1919, as amended, provides, so far as applicable to the question here under consideration, as follows:

"If the * * * assessing officer, * * * designated by law to assess * * * property (real, personal and mixed), taxes, levies, et cetera, as certain that any person, * * * or inheritance tax *has not been assessed, for any year of the three years next preceding that in which such ascertainment is made,* * * * it shall be the duty of the * * * assessing officer, to list the same and assess persons, property (real, personal and mixed), with taxes and levies at the rate prescribed for that year, * * *." (Italics supplied).

In my opinion the construction suggested in your letter is not authorized by the language of the statute, for the reason that the assessment of an inheritance tax upon the estate of a person dying four years prior to the assessment would not be "for any year of the three years next preceding that in which such ascertainment is made." In other words, where the assessment is made in 1926, it is my opinion that you could not go back of the year 1923 to assess an omitted inheritance tax.

Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,

Attorney General.

TAXATION—Effect of tax bill passed by General Assembly.RICHMOND, VA., *November 12, 1926.*HON. S. A. THOMPSON, *Mayor,*
Stuart, Va.

DEAR SIR:

Acknowledgment is made of yours of the 8th, in which you say:

"As mayor of the town of Stuart, I was asked by the town council to inquire of you as to the effect of section 1 of the Tax Bill passed by the General Assembly. You will note that it makes a change of the fiscal year, both for general taxes and for license taxes, beginning with the year 1927, so as to coincide with the calendar year.

"The question that the council desires to know about is as to whether or not that law is binding on license taxes for cities and towns also. The town of Stuart has heretofore been running its license taxes from May to May, just like the State did, and under the town law we have no such thing as a rebate on license. All licenses are straight for the year.

"Now, should the town issue license beginning January 1 for the year 1927? People who are doing business in the town requiring license have license up to the first of May. It would seem that they could not be prosecuted for doing business without license in case they refuse to take license the first of January, should the town issue license January 1 for the year 1927, the same, however, to take effect as of May 1."

In reply, I beg to say that it appears that section 1 of chapter 160, page 288, of the Acts of 1926, applies only to the State license and not to town licenses.

Yours very truly,

JOHN R. SAUNDERS,

*Attorney General.***TAXATION—Assessment and payment of, on railway and canal corporations.**RICHMOND, VA., *October 29, 1926.*HON. C. LEE MOORE,
Auditor of Public Accounts,
Richmond, Va.

MY DEAR MR. AUDITOR:

Acknowledgement is made of your letter of October 28, 1926, in which you call my attention to section 27 of the tax bill, as amended by chapter 358 of the Acts of 1926, with reference to the assessment and payment of taxes on railway and canal corporations.

After calling my attention to the fourth paragraph of the eleventh subsection of this section, which requires the Corporation Commission, when the assessment is made, to immediately forward a copy of the same not later than the 15th day of October to the Auditor of Public Accounts and to the corporation assessed, this section then provides that the corporation shall pay into the treasury of the State on or before the first day of November following, the tax upon its property and the franchise tax imposed upon the gross transportation receipts, as shown by the copy of the assessments.

It is further provided that in the event such tax is not paid at the time required by law, a penalty of five percentum shall be added thereto.

You have called my attention to the fact that the Corporation Commission has certified a number of assessments to you and the carriers involved after the 15th day of October, but prior to the first of November, and request me to advise you whether such carriers must pay their taxes by the first of November, 1926, in order to escape the penalty, and whether they are to be allowed sixteen days from the date the assessment is certified in which to pay the tax without the penalty.

It has been suggested to me that the carriers should be allowed sixteen days from the date the assessment is certified in order to examine the assessment so that they may appeal if not satisfied with the action of the Corporation Commission. This appeal is provided for by section 28 of the tax bill, as amended. The appeal must be made to the circuit court of the city of Richmond, and as that court does not meet prior to the first day of November of each year, it would be impossible to have the matter determined by the court within sixteen days of the assessment, especially in view of the fact that the law also provides for an appeal from the judgment of the circuit court of the city to the Court of Appeals. I am, therefore, of the opinion that this is not a sufficient reason to justify a delay of sixteen days in the payment of the tax where the assessment is certified after the 15th day of October, as in the event of appeal the tax would have to be paid prior to the termination of the appeal in order to escape the penalty. There is, of course, nothing in the law to prevent the carriers so situated from paying the tax under protest and investigating their rights to appeal after the tax has been paid.

It is, therefore, my opinion that where the assessment has been certified to the Auditor and the corporation a sufficient length of time before the first day of November in which to enable the carriers in the due course of mail to get its check into the treasury by the first day of November, that the tax must be paid on that day in order to escape the penalty.

I am, therefore, of the opinion that where the assessment has been certified too late for the tax to be paid through the due course of mail by the first day of November, that the carriers should have such time after the assessment was made in which to pay the tax as would be a reasonable time for the check to be transmitted from the carriers' place of business to the Treasury through the due course of the mail, and I am of the opinion that this latter rule would apply in those cases where the assessment was not made until after the first day of November, for the reason that no penalty could be exacted for the nonpayment of a tax which had not been assessed on the day the law required it to be paid.

Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,

Attorney General.

TAXATION—Writ tax due for docketing cases.

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

RICHMOND, VA., July 29, 1926.

MY DEAR MR. MOORE:

After reading Mr. Watson's correspondence addressed to you of June 24 and

July 17, 1926, respectively, which was referred to this office for an opinion in regard to the payment of the writ tax due for docketing cases, I would suggest that you write to Mr. Watson and call his attention to section 15 of the tax bill, which makes it a prerequisite of the clerk to receive the tax before he "shall issue any writ, or docket any removed or appealed warrant, or any notice mentioned in the fourteenth section."

Inasmuch as he apparently failed to comply with this section, he is responsible himself for the writ tax.

Mr. Watson unquestionably would have a right of action against the defendants (appellants) to recover the tax, based on the amount of damages claimed by them.

Section 14 of the tax bill says in part:

"Upon every appeal, writ of error, or supersedeas in a circuit court, except as otherwise provided, there shall be a tax of three dollars; and on every appeal, writ of error, or supersedeas in the Supreme Court of Appeals, there shall be a tax of six dollars; which, if not paid within thirty days from the granting of such appeal, the said appeal shall be dismissed."

Trusting this gives you the desired information, I am

Very truly yours,

JOHN R. SAUNDERS,

Attorney General.

TRANSFER AGENT—Duties of.

RICHMOND, VA., *January 27, 1927.*

MATTHEW T. MURRAY, JR., ESQ.,

Resident Attorney,

Guaranty Trust Co. of New York,

140 Broadway,

New York City.

DEAR SIR:

Acknowledgment is made of yours of the 22nd, in which you say:

"As transfer agents for a number of corporations organized under the laws of Virginia, may we ask that you inform us of the duties, if any, devolving upon us by virtue of section 5349 of chapter 340 of the Acts of 1926?

"We would appreciate having a ruling with authorization to act thereunder on whether or not we are entitled to transfer shares of stock of Virginia corporations standing in the name of decedents who were not residents of Virginia, from a waiver issued by the tax authorities, or whether in addition to such waiver we are required before effecting transfer to ascertain if the estate has complied with the statute. In other words is there, or is there not, a duty upon us to ascertain that the requirements of the above section have been met before effecting transfer, and in the event that we are under such duty, is a waiver issued by the taxing authorities a waiver so far as we are concerned of the requirements of this section?

"In this connection we have been shown a copy of your letter of December 14, 1926, addressed to the American Safety Razor Corporation quoting and concurring in an opinion of Hon. C. Lee Moore, Auditor of Public Accounts, stating that the section is considered a matter between

the transfer agent of the corporation and the personal representative of the estate. We understand from this letter that the provisions of the section referred to are not mandatory, but purely permissive and may be waived by the corporation or its transfer agent, in its own discretion without liability irrespective of knowledge or lack of knowledge of a personal representative of the decedent qualified as such within Virginia.

"If we are incorrectly informed as to our right to waive the requirements of the section, will you kindly also state if the statute applies to estates of decedents who died prior to June 16, 1926, the transfer being requested after such date."

In reply I beg to say that your understanding of the ruling of this office of December 14, concurring in the opinion of Honorable C. Lee Moore, Auditor of Public Accounts, to Honorable J. Vaughan Gary, then counsel for the State Tax Board, dated November 27, 1926, construing sections 5348-9 of the Code of Virginia, is correct. In other words, the provisions of section 5349 of the Code are not mandatory, but are for the benefit of a corporation which may wish to waive the advertisement authorized by this section.

Therefore, it is not incumbent upon you to ascertain whether the requirements of that section have been complied with or not. In my judgment, that section applies to estates of decedents who died prior to June 16, 1926.

Yours very truly,

JOHN R. SAUNDERS,

Attorney General.

TOWN COUNCIL—Authority of.

HON. W. H. KEYSER,

Mineral, Va.

MY DEAR SIR:

Acknowledgment is made of your letter of December 14, 1926, in re the situation in your town with reference to the failure of the mayor to qualify and the resignation of the acting mayor.

I note you say that your charter is contained in the Acts of 1902 and I assume that it has not been amended. If this be the case, I respectfully call your attention to section 3 of your charter, being chapter 477 of the Acts of 1901-2, which provides for the election of six councilmen and a mayor; and to section 19 thereof, which, so far as is applicable to the question here under consideration, provides as follows:

"Should any of the officers elected or appointed refuse or fail to accept and qualify within thirty days after such election or appointment, or who were ineligible to the position, then it shall be the duty of the majority of such town council as may accept and qualify to fill any vacancy by election."

From the facts stated in your letter, this would give the town council the authority to elect the mayor. I am not sure that this section is broad enough to permit the council to fill a vacancy caused by resignation. If the council has not the power, under section 19 of the charter, to fill such a vacancy, it would be

filled by appointment by the judge of the circuit court, under section 136 of the Code, where the party resigning was a member of the council and not the mayor.

Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,

Attorney General.

TREASURERS—Compensation for collection of taxes.

RICHMOND, VA., December 22, 1926.

HON. JOHN B. BOATWRIGHT,
Acting Commonwealth's Attorney,
Buckingham, Va.

MY DEAR MR. BOATWRIGHT:

Acknowledgement is made of your letter of December 20, 1926, in which you state that our friend, James L. Anderson, the former treasurer of your county, died during the month of November, and that the judge appointed as his successor Dr. G. L. Morriss.

You call attention to section 2431 of the Code of 1919, as amended, which provides that in certain cases the incoming treasurer shall receive as compensation for the collection of tax tickets turned over to him, etc., three and one-half per centum, and ask me how this would apply in the Buckingham case where the county pays the treasurer five per centum on taxes collected by him.

It seems to me in this case that the question would not arise for the reason that the taxes were not due this year until December 15. That being so, Mr. Anderson died before the taxes became due and, therefore, no tickets for taxes then due could have been turned over to Dr. Morriss by Mr. Anderson's estate, the taxes for 1926 not being then due and the taxes for 1925 having been returned delinquent.

Of course, the matter is one which relates to county revenue and not to State revenue and, therefore, is not one which falls under the jurisdiction of this office, but it does seem to me that the statute contemplated those cases where the outgoing treasurer had begun the collection of taxes, which collections were not completed prior to the expiration of his office, or death, etc., and not the cases where before the beginning of the tax collection period the treasurer died and his successor was appointed.

Yours very sincerely,

JOHN R. SAUNDERS,

Attorney General.

TREASURER OF PORTSMOUTH—In re Hudgins.

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

RICHMOND, VA., November 10, 1926.

MY DEAR MR. AUDITOR:

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

"Sometime ago I placed in your hands for suit accounts against Henry L. Hudgins, Treasurer of the city of Portsmouth. I am informed that the bonding company, which is surety upon his official bond, will make settlement without it being necessary for the Commonwealth to take judgment. Would I be authorized to accept interest on the amount due the Commonwealth at the rate of six per centum under chapter 15, page 19, Acts extra session 1923, and not charge interest at the rate of fifteen per centum provided for by section 2435 of the Code?

"To my mind it is very clear from the act of 1923 that if the Commonwealth recovered judgment against Mr. Hudgins and his sureties I would be authorized to accept interest at the rate of six per centum, and it seems to me, this being the fact, as the surety is anxious to make settlement without requiring the Commonwealth to obtain judgment it would be within the provisions of the act of 1923 for me to accept interest at the rate of six per centum, but as you are my legal adviser I deem it important to have your opinion."

While it is true that section 2435 of the Code provides that a treasurer, who fails to pay the revenue into the treasury at the time prescribed by law, shall be charged with interest thereon at the rate of fifteen per centum per annum from the time the same was so payable, it is my opinion that chapter 15 of the acts of 1923, which is a later statute, is so inconsistent with section 2435 that it must control any settlements made between the Commonwealth and treasurers indebted to it.

While it is true the language of the act is apparently limited to judgments, I am of the opinion that it would apply to settlements made prior to the recovery of a judgment. It would be absurd to say that the Auditor had the authority to accept interest at six per centum on a judgment against the treasurer, but that he must demand fifteen per centum if the claim is settled prior to judgment. I think that the Legislature intended, when it enacted chapter 15 of the Acts of 1923, to authorize you to settle any such claim, when, in your judgment, you deemed it just and proper, on a basis of six per centum instead of fifteen per centum which you are authorized to charge under section 2435 of the Code.

In settling this judgment, however, I call your attention to the fact that the costs in the suit now pending in the circuit court will have to be paid. These costs will amount to the sum of \$13.00, provided the suit is dismissed within the next two weeks. Of course, if the suit is not settled within that time, additional costs will accrue.

Yours very truly,

JOHN R. SAUNDERS,

Attorney General.

TREASURER OF BUCHANAN—Default in payment.

RICHMOND, VA., May 26, 1927.

HIS EXCELLENCY, HARRY F. BYRD,
Governor of Virginia,
Richmond, Virginia.

MY DEAR GOVERNOR:

Acknowledgement is made of your letter of recent date, in which you state

that your attention has been called to the fact that the county of Buchanan has defaulted in the payment of interest on its bonds. With this letter you send me a copy of a letter written by the State Accountant to Hon. Floyd H. Roberts, dated April 18, 1927, in which he states that there is a deficit existing in the accounts of the treasurer of Buchanan county to the amount of \$89,596.40. I am advised by the Auditor that this deficit does not include any State funds, as the treasurer of Buchanan county has settled with the State for all money due by him to the Commonwealth.

In your letter you say in part:

"* * * I wish you would advise me of the authority the State has to require that the deficit be made good, and that the back interest on the bonds be paid."

I have examined the index to the Code with care, and the only statutes which appear to bear upon the question here involved are sections 2201 and 2791 of the Code.

Subsection 5 of section 2201 of the Code provides as follows:

"The treasurers of the several counties of this State shall settle with the board of supervisors and school boards by the first day of October of each year, and shall, on said first of October, exhibit to said judge and Commonwealth's attorney the cash to balance their accounts, if any is due, with the county levy and the county school fund. If any treasurer fail to produce said cash to balance his said account, then said court shall, after service of rule as prescribed by paragraph three of this section, suspend said treasurer, and appoint some competent person to discharge his duties, as provided in said paragraph."

Section 2791 of the Code is as follows:

"The Governor shall have power to suspend the treasurer of any county or city of this Commonwealth or other officer charged with the collection of the public revenues of the State from collecting the revenues of the State for such county or city for failure to execute and perform the duties required of such officer under the laws of the Commonwealth with reference to the collection of the State revenues; and said officer shall not collect any further the State revenues unless the General Assembly by joint resolution restore him to office. The collection of the State revenue in such city or county shall then be made by the person appointed by the Governor for that purpose, and such appointee, after having qualified and given bond according to law, shall discharge all the duties of the office to which he is appointed during the time of the suspension of his predecessor, and shall be amenable to all the rules, regulations, requirements, and responsibilities declared by the laws of this State pertaining to the collection of the State revenue."

It seems to me, from an examination of subsection 5 of section 2201 of the Code, that a clear duty rests upon the judge of the circuit court of Buchanan county, and the Commonwealth's attorney of that county to proceed in this matter. The law is plain and unmistakable in its terms.

While section 2791 of the Code is not so clearly applicable to this situation, you would probably be within your authority, in view of the shortage existing in the treasurer's accounts, in suspending him from collecting the revenue of the State. This suspension, however, would not affect his right to continue to col-

lect the revenue of the county of Buchanan and its districts, unless some action was taken by the judge of the circuit court and Commonwealth's attorney of that county as is contemplated by section 2201 of the Code.

I further call your attention to section 2737 of the Code, which provides that, if any county treasurer "fail to pay, upon presentation *any legal warrant*, having in his hands at the time funds out of which the same ought to be paid, * * * the holder thereof may, on motion in his own name, in the circuit court of the treasurer's county, recover from him and his sureties the amount of such warrant, together with damages, at the rate of ten per centum per month on the said amount from the time such treasurer should have paid the same, and the costs of such motion, including an attorney's fee of five dollars." (Italics supplied.)

In addition to this, I call your attention to section 2686 of the Code, which authorizes suits against counties upon contracts made with them, subject to the limitations therein provided. I also call your attention to section 2705 of the Code, commonly known as the Custer law, which also applies to this case.

Trusting this gives you the desired information, I am

Very truly yours,

JOHN R. SAUNDERS,

Attorney General.

TRIAL—Return of fine and costs by justice.

RICHMOND, VA., June 14, 1927.

MR. J. E. COBB,

Box 22,

King William C. H., Va.

MY DEAR SIR:

Some time ago you wrote me with reference to a fine imposed by the trial justice court of Henrico county on a colored boy living near you for the operation of an automobile without a license plate thereon. Due to the great pressure of work in the office, I have been unable to answer your letter before.

It appears from your letter that the boy was fined \$10 and required to pay the fine and costs amounting to \$15.75, which he has paid. You request me to advise you whether the boy could get the fine and costs back, in view of your belief that he was improperly fined.

Under the law, when a court having jurisdiction of a matter imposes a fine, if the fine and costs are paid, the matter is ended and there is no method known to me by which the same could be returned after they have once been paid.

Trusting this gives you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,

Attorney General.

USURY—Usurious transactions forbidden.

RICHMOND, VA., July 2, 1926.

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

MY DEAR GOVERNOR:

Acknowledgment is made of your communication of July 1, 1926, referring to me a letter addressed to you by Mr. Y. Melvin Hodges, of South Hill, Virginia, in which he states that the Farmers Union Fertilizer Company, Incorporated, of South Hill, Virginia, sold to Mr. Otto Paetz, a client of his, certain fertilizers and remitted to him a bill for \$288.30 if paid in cash, but for \$345.53 if not paid in cash. He requests you to investigate the matter and advise him whether such a transaction constitutes usury.

In response thereto, I call your attention to the case of *Graeme v. Adams*, 23 Gratt. (64 Va.) 225, 14 Am. Rep. 13, where the Court of Appeals said:

"* * * It is well settled that on a contract to secure the price or value of work and labor done or to be done, or of property sold, the contracting parties may agree upon one price if cash be paid, and upon as large an addition to the cash price as may suit themselves, if credit be given; and it is wholly immaterial whether the enhanced price be ascertained by the simple addition of a lumping sum to the cash price, or by a percentage thereon. In neither case is the transaction usurious. It is neither a loan or the forbearance of a debt, but simply the contract price of work and labor done or property sold; * * *."

See *Evans v. Rice*, 96 Va. 50, and *Kraker v. Shields*, 20 Gratt. (61 Va.) 377, 398.

Trusting this gives you the desired information, I am

Very truly yours,

JOHN R. SAUNDERS,
Attorney General.

UNIVERSITIES AND SCHOOLS—Advertising for bids.

RICHMOND, VA., April 12, 1927.

DR. R. BENNETT BEAN,
Chairman Faculty Building Committee,
University, Va.

DEAR SIR:

Replying to yours of the 5th, I will say that I do not know of any law which requires the University of Virginia or any building committee to advertise for bids before entering into contracts for the construction of buildings at the university. As already explained, if the university itself is to do the building and not have the building done through contractors, it would be necessary to advertise for bids under the law relating to the purchasing commission.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

UNIVERSITY OF VIRGINIA—Appropriation bill.

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

RICHMOND, VA., March 9, 1927.

MY DEAR GOVERNOR:

Acknowledgment is made of your communication of recent date, with which you enclose a letter from Dr. Alderman and certain exhibits relating to chapter 482 of the Acts of 1926.

It appears from Dr. Alderman's letter that the university has secured subscriptions totaling \$1,402,250.00 for the medical building fund. Of this amount, the university has collected \$146,000.00, and, in addition, the alumni board of trustees has appropriated to this fund \$125,000.00, making a total of \$271,000.00. Dr. Alderman states that, when the amount of \$62,500.00, appropriated by chapter 482 of the Acts of 1926 is paid, the General Education Board, pursuant to its offer to the University of Virginia, dated June 23, 1926, accepted by the University of Virginia on July 6, 1926, will thereupon pay into the said medical building fund the sum of \$444,667.00. Therefore, Dr. Alderman requests you to authorize the payment of the \$62,500.00 appropriated by chapter 482 of the Acts of 1926 for the appropriation year ending February 28, 1927.

After making the above-mentioned appropriation, the language of the act is, in part, as follows:

"Provided, however, that this appropriation of sixty-two thousand and five hundred dollars shall *not be available* unless and until satisfactory evidence has been furnished to the Governor of Virginia that the sum of five hundred and seventy-five thousand dollars in addition *has been made available* for the erection of said buildings by the alumni, friends and officials of the university." (Italics supplied.)

From Dr. Alderman's statement, I do not think that the sum of \$575,000.00, in addition to the \$62,500.00 appropriated by this act, has as yet been made available for the erection of said buildings, as the sum of \$575,000.00 is not as yet at the disposal of the university.

I would suggest, however, that, in view of the statement made by Dr. Alderman, you authorize the payment of the sum of \$62,500.00 in accordance with the provisions of chapter 482 of the Acts of 1926, and direct the drawing of a warrant, conditioned that it be delivered as soon as the bursar of the university certifies to the Auditor that he has in his hands the sum of \$575,000.00. This, I think, would permit the university authorities to certify that the payment of the \$62,500.00 had been authorized by the State in such a way as to treat it as a cash collection at the instant the \$444,667.00 is paid by the General Education Board.

I regret that the language of the above-quoted provision of chapter 482 of the Acts of 1926 is such as to require this cumbersome proceeding, but, as I understand the meaning of the word "available," the sum of \$575,000.00, in addition to the State appropriation, has not as yet "been made available for the erection of said buildings by the alumni, friends and officials of the university."

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

UNIVERSITY OF VIRGINIA—Appropriation bill.RICHMOND, VA., *April 1, 1927.*

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

MY DEAR GOVERNOR:

Acknowledgment is made of your letter of March 30, 1927, with which you enclose Dr. Alderman's letter to you of March 29, 1927, with the certificate of the president and bursar of the University of Virginia, dated March 29th, attached thereto.

I have examined the same, and it is my opinion that the provision of the appropriation bill referred to has been complied with by the university, and that you should now authorize the payment of the sum of \$62,500 as requested by Dr. Alderman.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

VIRGINIA MILITARY INSTITUTE—Appointment of State cadets.RICHMOND, VA., *November 1, 1926.*

GEN. W. H. COCKE,
Supt. Virginia Military Institute,
Lexington, Va.

MY DEAR GENERAL COCKE:

I beg leave to acknowledge receipt of your letter of October 29th, in which you quote section 845 of the Code of Virginia, which provides for the appointment of State cadets to Virginia Military Institute.

You state in your letter that the question has arisen as to whether under this provision of the law the board may appoint State cadets who are not legal residents of the State of Virginia, but are simply residing temporarily in the State.

You further state that it is your opinion that it was the intention of the legislature that these appointments should be limited to boys whose parents are *bona-fide* residents of Virginia, and in the event there are no parents, then the boy should be a resident.

In reply, will state, you are entirely correct in your construction of this statute. That part of the section which provides the manner in which these boys are to be selected; namely, from the students and eleven from the State at large, clearly shows that it was the purpose of the legislature to limit these appointments to boys who are *bona-fide* residents of the State of Virginia.

It was entirely proper that you should ask for this information, and I assure you it is a pleasure for me to give it.

Yours very sincerely,

JOHN R. SAUNDERS,
Attorney General.

VIRGINIA-CAROLINA POWER CO.—Registration fee.RICHMOND, VA., *April 29, 1927.*

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

MY DEAR MR. MOORE:

I beg leave to acknowledge receipt of your letter of this date in which you state that the State Corporation Commission, for the years of 1924, 1925 and 1926, assessed an annual registration fee of \$25.00 against the Virginia-Carolina Power Company. The registration fees for 1924 and 1925 were not paid, but the registration fee for 1926 with 5 per cent penalty was paid on April 15, 1926, and in the absence of specific direction given when you received the check it was applied to the payment of the registration fee for 1926, and 5 per cent penalty thereon.

You further state that Hon. Marvin Smithey, president of this company, while in your office today advised you that he was under the impression that the registration fees for the years 1924 and 1925 had been paid, and had it been brought to his attention by Mr. William Gray, the secretary of the company, that this had not been done he would have seen that these assessments were promptly paid.

You desire to be advised now whether or not you can apply the check which was sent you in 1926 to the registration fee and penalty for 1924, thereby placing the corporation in a position to ask the State Corporation Commission to vacate its order revoking the corporation's charter.

I am of the opinion that under all of the circumstances connected with this matter that you now have the authority to apply the check sent you in 1926 to the registration fee assessed for the year 1924, which, of course, will prevent the forfeiture of the charter of this company, provided, of course, that the registration fees for the years 1925 and 1926 with penalties are immediately paid.

Yours very truly,

JOHN R. SAUNDERS,
Attorney General.

VIRGINIA AND MARYLAND—Boundary line.RICHMOND, VA., *March 26, 1927.*

JUDGE WILLIAM S. SNOW, *Commissioner,*
Alexandria, Va.

MY DEAR JUDGE:

I have yours of the 24th, in which you ask me whether Virginia or Maryland laws control in the territory marked off in the two maps by the red and blue pencil marks.

A line runs from Cock Pit Point to Freestone Point and another from Sycamore Point to Hallowing Point on the north side of the Potomac in the counties

Section 14 of the Code, dealing with the boundary line between Virginia and of Prince William and Fairfax, respectively, and, in my opinion, Virginia laws control in the waters north and west of these lines.

Maryland, provides that Virginia shall have jurisdiction to low-water mark on the Virginia side and low-water mark is defined in the latter part of that section as follows:

"Third, the low-water mark on the Potomac, to which Virginia has a right in the soil, is to be measured by the same rule; that is to say, from low-water mark at one headland to low-water mark at another, without following indentations, bays, creeks, inlets or affluent rivers; * * *."

I apprehend that the same rule applies to all of the territory of Virginia bordering on the Potomac.

I am returning herewith letter of H. R. Dulany, Jr., and the maps which you sent me.

Yours very tru'y,

JOHN R. SAUNDERS,

Attorney General.

VEHICLES—Weight on public highways.

RICHMOND, VA., February 8, 1927.

HON. LESTER HOOKER, *Commissioner,*
State Corporation Commission,
Richmond, Va.

MY DEAR MR. HOOKER:

Acknowledgment is made of your letter of February 2, 1927, in which you say:

"Please give us your opinion of sections 39 and 40 of chapter 474 of the Acts of 1926, at page 779, in regard to the weight of vehicles permitted to operate over the public highways.

"Can a vehicle weighing more than ten thousand pounds, though the combined weight of vehicle and load carried thereon does not exceed twenty thousand pounds, be operated over the public highways?

"This is an administrative matter which has to be passed on by two other departments, consequently we desire your opinion."

Section 39 of chapter 474 of the Acts of 1926 reads as follows:

"No load hauled in any vehicle, however drawn or propelled in, over or upon any of the public highways within this State, shall exceed five tons or ten thousand pounds in weight, nor shall the weight of the vehicle itself exceed the same limits."

In my opinion this means that the truck and the load combined shall not exceed ten tons in weight. It, therefore, follows that it would be lawful to operate on the public highways of this State a truck exceeding five tons in weight, so long as the load placed therein does not bring the weight of the truck and the load in excess of ten tons.

Yours very truly,

JOHN R. SAUNDERS,

Attorney General.

STATE HOSPITAL (WESTERN)—Nonresidents formerly residents.

RICHMOND, VA., November 29, 1926.

DR. J. S. DEJARNETTE,
*Western State Hospital,
Staunton, Va.*

DEAR DR. DEJARNETTE:

Acknowledgment is made of your letter of November the 24th in which you ask seven questions:

1. If a person leaves Virginia with the intention of making another State his home, does he immediately lose his residence in Virginia?

Before answering this question, I might preface my remarks by giving a few fundamental principles which are pertinent here. To constitute domicile two things must concur—first, residence; secondly, the intention to remain there. *Pilson, trustee, v. Bushong*, 29 Gratt. 229. Domicile, therefore means more than residence. A man may be a resident of a particular locality without having his domicile there. Minor on Conflict of Laws, at page 114 (section 59) says: "It must be observed that neither presence alone will suffice to create a domicile of choice. Both must concur and at the very moment they do concur the domicile is created. As it is sometimes expressed, the factum (presence) and the animus (intention) must unite.

I might also add that the test to determine who is entitled to the benefits of State institutions is whether the person has his legal residence in this State.

In answer to your first question, I would say that if the person leaves Virginia with the intention of making another his permanent home he immediately loses his residence in Virginia. It is a general principle of conflict of laws that a domicile once acquired is retained until a new domicile is gained. It is to be observed, therefore, that the abandonment of a domicile does not of itself destroy it, even when coupled with an intent to acquire a new one, but it continues until another is, in fact, gained. Minor on Conflict of Laws at page 71 (section 29).

Your second (2) question is as follows:

- If a person comes from another State to Virginia with the intention of making Virginia his home, does he immediately become a resident of Virginia and entitled to the benefits of the State institutions?

In answer to this question, I would say that it involves the converse of the first question, and the same principles of law apply. I would, therefore, say that if this person comes to Virginia from another State with the intention of making Virginia his legal residence he is entitled to the benefits of the State institutions. I am using legal residence here as meaning domicile and not merely residence.

Your third (3rd) question is as follows:

- If a person leaves Virginia for over two years and becomes insane and returns to Virginia, is he entitled to the benefits of Virginia's public institutions?

This question, as you can plainly see, depends upon the intention of the parties. If the person left Virginia only temporarily, not intending to acquire a new domicile, but all the time holding Virginia as his legal residence, I would say that under these circumstances he is domiciled in Virginia, and when he becomes insane he is entitled, of course, to the benefits of the public institutions. On the other hand, if he left Virginia with the intention of acquiring a new domicile the question would be different. Here he is not considered domiciled in Virginia and when he returns to Virginia insane (having been adjudged insane by a commission of lunacy) he is considered *non compos mentis*, and, therefore, not capable of choosing a domicile. He cannot choose Virginia as his new domicile for he is incapable because of his insanity, but must be still considered as keeping his legal residence in his former place. I would, therefore, say, under this latter case, that he is not entitled to the benefits of the public institutions in this State.

Your fourth (4th) question is as follows:

If a person leaves Virginia for over two years and comes back and stays six weeks in Virginia and becomes insane, habitual drunkard or doper, is he entitled to the benefits of the State institutions, if not, how long should he live in Virginia before he is entitled to it?

Some of the same principles apply to this question as to other ones, and the question of intention is very important here. If it was the intention of the person leaving Virginia to keep Virginia as his permanent home, although he physically resides in another State, Virginia is still his place of domicile. Leaving the State for two years does not of itself show that he left Virginia permanently. Here, then, if the person becomes insane, habitual drunkard or doper, he is, of course, entitled to the benefits of the State institutions, for his legal residence is in Virginia. His insanity, etc., takes place in Virginia, his domicile. On the other hand, if he left Virginia with the intention of relinquishing it as his domicile and acquiring a new domicile elsewhere (even though he comes back for six weeks), he is not entitled to the benefits of the State institutions because he is domiciled elsewhere. His physical presence in Virginia for six weeks does not of itself show that Virginia is his legal residence. Furthermore, if he left Virginia with the intention of acquiring a new domicile and does acquire one and after two years comes back to Virginia with the intention of making Virginia his legal residence and gives up his former domicile, he is entitled to the benefits of the State institutions if he becomes insane, habitual drunkard or doper.

In regard to the important question of intention, I might say that the fact that one openly proclaims a place to be his permanent home does not make it so unless, in fact, the intention to reside there permanently exists. Frequently, there are no declarations, or they are ambiguous or untrustworthy as evidence. Amongst the acts and circumstances which have been considered by the courts in the determination of domicile are the exercise of the voting franchise; the payment of taxes on personalty; the ownership of a place of residence or of business; continued residence in a country; attendance upon a church and active participation in its affairs; and various other circumstances of themselves trivial, but sufficient to turn the scale in a close case. Minor on Conflict of Laws at page 123 (section 64).

Your fifth (5th) question is as follows:

If a man's wife has lived in Virginia two years and the man has lived out of Virginia for ten years, does the residence of the wife follow the husband or is her residence where she has lived? I have understood the wife's residence follows her husband.

It is established beyond dispute that a woman upon marriage, immediately acquires the domicile of her husband, and that her domicile ordinarily changes with every alteration of his, regardless of the actual locality of her residence after the marriage. Minor on Conflict of Laws at page 94 (section 46). A wife may acquire a separate domicile for the purpose of getting a divorce. Apart from the divorce feature of it, I should think that her domicile would follow that of her husband.

Your sixth (6th) question is as follows:

If a man comes to Virginia with the intention of making Virginia his home and has a son of the minor age in an insane hospital of another State, is that son entitled to the benefits of the Virginia institutions?

In answer to this question, I would say that the domicile of the infant is determined by the domicile of his parents. Minor on Conflict of Laws at page 79 (section 35), says: "Infants, not having arrived at years of discretion, are incapable in law of exercising that voluntary and discreet choice in regard to their permanent abode, which is essential to the acquisition of a domicile of choice." Furthermore, if an infant should become insane during his minority and remain in that State continuously, the incapacity of minority never having been followed by adult capacity to select a home of his own, his domicile must be determined by the same rules that control the domicile of an idiot or infant. Minor on Conflict of Laws at page 106 (section 55). This being true I would say that the insane son is entitled to the benefits of the Virginia institutions.

Your seventh (7th) question is as follows:

If a nonresident of Virginia is committed by a regular board of lunacy and it is stated in the commitment that he is a nonresident of Virginia, should he be received at one of the State hospitals for the insane and sent to the State of his residence or should he be sent direct from the county from which he was committed?

In answer to this last question, I would say that it is generally true that the nonresident insane person is sent direct from the county from which he was committed to the State of his residence. Virginia Code section 1036 provides as follows:

"No nonresident insane, epileptic, feeble-minded or inebriate person shall be admitted or detained in any hospital under any contract with the board except when there is a vacancy therein not applied for on behalf of any person residing in the State. When so admitted the board may at any time discharge him and require his friends to take charge of him or send him back to his home, and shall do so whenever it may be necessary in order to make room for a person residing in the State."

You will see from the above section that in some cases, to-wit: where there is a vacancy not applied for by a resident of Virginia, the nonresident insane

person is admitted to State institutions. In this case, after being committed to the State hospital, he is later sent back to his home, when it is necessary to make room for a resident person.

Trusting this will give you the desired information, I am

Yours very truly,

JOHN R. SAUNDERS,

Attorney General.

WESTERN STATE HOSPITAL—Separation inebriates from insane patients.

RICHMOND, VA., *October 13, 1926.*

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

MY DEAR GOVERNOR:

I have yours of the 5th instant, enclosing copy of letter of Dr. J. S. DeJarnette, Superintendent of the Western State Hospital, dated September 16th, in which he calls your attention to chapter 82, page 84, Acts of 1926, requiring all inebriates and drug addicts sent to the State hospital to be kept in wards separate from the insane. He also says that he has been able to accomplish this separation in the male department, but not in the female department, and that he has now eight female drug addicts which he cannot keep separate from the insane patients, as he has over a hundred female patients beyond the capacity of the hospital.

He asks you what to do with these inebriates and drug addicts when they apply. He says: "Must we take them and put them in a ward with the insane, or should we stop taking them until a building has been provided for their special use?"

In my judgment, as I wrote Dr. DeJarnette on August 23rd, the language of chapter 82 of the Acts of 1926 is peremptory, and I think Dr. DeJarnette should stop taking them until a building has been provided for their special use. There is no liability incurred by refusing to receive patients who cannot be accommodated as the law requires. On the other hand, I think there would be liability if these inebriates and drug addicts were commingled with the insane patients in violation of the act mentioned.

Yours very sincerely,

JOHN R. SAUNDERS,

Attorney General.

WESTERN STATE HOSPITAL—Separation inebriates from insane patients.

RICHMOND, VA., *August 23, 1926.*

DR. J. S. DEJARNETTE, *Supt.,*
Western State Hospital,
Staunton, Va.

MY DEAR DR. DEJARNETTE:

Acknowledgment is made of yours of the 20th, in which you say:

"I am writing you in regard to the Acts of Assembly 1926, page 84, chapter 82, in regard to the inebriates and drug addicts. This law states, every inebriate so committed and received at such institution shall be assigned and kept in wards separate and apart from the insane patients. It also states the hospital board is authorized to designate one or more of the State hospitals for the care of inebriates and when so designated all commitments shall be made accordingly."

"Please write me if we are violating the law by placing drug addicts and alcoholics on the wards with the insane before the board has determined which hospital they want this class of patients confined. Also, will it be legal for us to keep the drug addicts and alcoholics confined on the wards with the insane until an appropriation has been made to put up a suitable building and suitable wards for this class of patients?"

"There will not be enough drug addicts to fill a ward of any size at any one time and this will make it extremely expensive. The different classes of alcoholics, those with delirium tremens, the noisy, profane, violent, ill and filthy would all have to be put on the same ward."

"As these people are not insane they are very liable to make a conspiracy to get out; therefore, will require more attendants to care for them, and if they are scattered out among the insane it will not require any extra attendants."

"If we take them and continue to put them on the wards with the insane are we liable to suit for damages for so doing?"

"At present we continue to put them on the wards with the insane as there was no appropriation at the last General Assembly to put up buildings for them and the hospital board has not designated any special institution for their care."

In reply, I beg to say that the statute to which you refer (approved March 1, 1926) contains this sentence: "But every inebriate so committed and received at such institutions shall be assigned and kept in wards separate and apart from the insane patients."

This language was not in this section prior to this amendment. However, it is unambiguous and mandatory, and I could see no course for you to pursue except to be guided by it, even at some additional expense.

It will be observed that the hospital board is "authorized to designate one or more of the State hospitals for the care of inebriates, but it is not required to do so."

It is my judgment that in the absence of such designation all of the State hospitals are required to receive such addicts and inebriates under the same conditions as heretofore.

To be more specific, I do not think it would be legal for you to put the drug addicts and alcoholics in the same wards with the insane, and I believe, in view of the statute already quoted, there will be a cause of action for damages for confining them in that manner.

I do not doubt that it would be very inconvenient to rearrange your wards so as to have one especially for the drug addicts and alcoholics, but I cannot see any other way in which you can comply with the plain letter of the law.

Very sincerely yours,

JOHN R. SAUNDERS.

Attorney General.

WORKMEN'S COMPENSATION LAW—Fund tax.RICHMOND, VA., *April 20, 1927.*

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

MY DEAR MR. HUNDLEY:

Acknowledgment is made of your letter of April 13, 1927, in which you call attention to subsection (j) of section 75 of the workmen's compensation law as amended by the Acts of 1926; which requires every employer carrying his own risk under the provisions of section 68 to report to the Industrial Commission his payroll, and requires the commission to assess against such payroll a maintenance fund tax. You state that Pittsylvania county carries its own risk, and that you do not think that this subsection of section 75 of the act applies to a county for the reason that a county is not an industry or business but a governmental body.

There would be some force in your suggestion if it were not for section 2 of the act, paragraph (a), which provides as follows:

“‘Employers’ shall include the State and any municipal corporation within the State or *any political division thereof, * * **” (Italics supplied.)

This definition of employers embraces counties within its meaning, and, therefore, it is my opinion that subsection (j) of section 75 of the act applies to the county of Pittsylvania.

Sincerely yours,

JOHN R. SAUNDERS,
Attorney General.

WORKMEN'S COMPENSATION LAW—Applicable to county policemen.RICHMOND, VA., *January 8, 1926.*

HON. E. J. SUTHERLAND,
Commonwealth's Attorney,
Clinchwood, Va.

MY DEAR MR. SUTHERLAND:

Acknowledgment is made of your letter of January 6, 1927, in which you say:

“On October 10, 1926, Josh C. Smith, a county policeman of Dickenson county, while in the discharge of his duties as such officer, received a gunshot wound which totally disabled him from that date until November 29, 1926.

“I would appreciate it very much for you to give me your opinion as to whether Mr. Smith under the circumstances is entitled to claim compensation from the county for such injury.”

If you will examine section 2 (a) and (b) of chapter 400 of the Acts of 1918, as amended, Pollard's 1926 Code Biennial, pages 491-2, you will see that the workmen's compensation act applies to county policemen. In the annotations to

this section you will find the case of *Troy v. County of Princess Anne*, 5 O. I. C. 568, referred to.

I would suggest that you communicate with Hon. Bolling Handy, chairman of the Industrial Commission.

Very sincerely yours,

JOHN R. SAUNDERS,

Attorney General.

STATEMENT

*Showing the Current Expense of the Office of the Attorney General from
June 30, 1926, to July 1, 1927*

General repairs	\$ 13 50
Telegrams	28 80
Telephone service and tolls	282 54
Subscriptions to and purchase of law books.....	200 25
Postage	165 00
Towels, drinking water, furniture, office supplies, repairs.....	248 32
Printing	105 12
Additional stenographic service	60 00
Insurance premiums	10 00
	<hr/>
	\$1,113 53

1926

STATEMENT

*Showing Amounts Expended from the Appropriation for Traveling Expenses from
June 30, 1926, to July 1, 1927*

July 6.	Leon M. Bazile, expenses to Washington, lease of Virginian Railway by N. & W. Railway.....	\$ 27 30
July 9.	John R. Saunders, expenses to Washington, lease of Virginian Railway by N. & W. Railway.....	16 55
Aug. 31.	Leon M. Bazile, expenses to Washington, hearing before I. C. C., leasing Virginian by N. & W.....	23 90
Sept. 13.	Leon M. Bazile, expenses to Wytheville, investigation of lynching Raymond Bird.....	34 40
Sept. 15.	John R. Saunders, expenses Staunton, attending Court of Appeals	18 39
Oct. 25.	John R. Saunders, expenses to Norfolk, request of Governor	13 12
Oct. 25.	Leon M. Bazile, expenses to Staunton, attending Court of Appeals	19 96
1927		
Feb. 4.	John R. Saunders, expenses to Norfolk, representing Governor at United States Shipping Board.....	7 62
May 18.	John R. Saunders, expenses to Cape Henry, request of Governor	9 87
June 10.	Leon M. Bazile, expenses to Wytheville, attending Court of Appeals	30 30
	Total	<hr/>
		\$ 201 41

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