

**REPORT**

OF THE

**ATTORNEY GENERAL**

TO THE

**Governor of Virginia**

*From July 1, 1927, to June 30, 1928*

---

RICHMOND  
1929



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# LETTER OF TRANSMITTAL

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COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *July 1, 1928.*

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

MY DEAR GOVERNOR:

As required by law, I herewith submit the following report of the work of this office for the period from July 1, 1927, to June 30, 1928.

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,

JNO. R. SAUNDERS,  
*Attorney General.*

### Personnel of the Office

(Postoffice address Richmond).

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NAME	COUNTY	OFFICIAL TITLE
JOHN R. SAUNDERS.....	Middlesex.....	Attorney General
LEON M. BAZILE.....	Hanover.....	Assistant
EDWIN H. GIBSON.....	Culpeper.....	Assistant
NERHEA S. TOWNSEND.....	Charlotte.....	Secretary
EVA E. KIBLER.....	Augusta.....	Secretary
LOUISE W. POORE.....	Richmond City.....	Secretary

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### Attorneys General of Virginia

*From 1776 to 1926*

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EDMUND RANDOLPH.....	1776-1786
JAMES INNES.....	1786-1796
ROBERT BROOKE.....	1796-1799
PHILIP NORBORNE NICHOLAS.....	1799-1819
JAMES ROBERTSON.....	1819-1834
SIDNEY S. BAXTER.....	1834-1852
WILLIS P. BOCKOCK.....	1852-1857
JOHN RANDOLPH TUCKER.....	1857-1865
THOMAS RUSSELL BOWDEN.....	1865-1869
CHARLES WHITTLESEY (military appointee).....	1869-1870
JAMES C. TAYLOR.....	1870-1874
RALEIGH T. DANIEL.....	1874-1877
JAMES G. FIELD.....	1877-1882
FRANK S. BLAIR.....	1882-1886
RUFUS A. AYERS.....	1886-1890
R. TAYLOR SCOTT.....	1890-1897
R. CARTER SCOTT.....	1897-1898
A. J. MONTAGUE.....	1898-1902
WILLIAM A. ANDERSON.....	1902-1910
SAMUEL W. WILLIAMS.....	1910-1914
JOHN GARLAND POLLARD.....	1914-1918
*J. D. HANK, JR.....	1918
JOHN R. SAUNDERS.....	1918-1922
JOHN R. SAUNDERS.....	1922

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

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

1. *Barbee v. Murphy & Co.* From circuit court Prince William county. Ouster proceedings. Affirmed.
2. *Blow v. Commonwealth.* From circuit court Southampton county. Prohibition. Error confessed.
3. *Brooks v. Town of Potomac.* From circuit court of Arlington county. Writ of Prohibition. Writ denied.
4. *Commonwealth v. Beavers.* From circuit court of Page county. Habeas Corpus.
5. *Carleson, Tyler N. v. Commonwealth.* From the circuit court of Lancaster county. Prohibition.
6. *Collins v. Commonwealth.* From circuit court of Smyth county. Prohibition. Error confessed.
7. *Davis v. Commonwealth.* From circuit court of Mecklenburg county. Assault and Battery.
8. *French v. Commonwealth.* From circuit court of Bland county. Prohibition. Error confessed.
9. *Gray v. Commonwealth.* From hustings court city of Petersburg. Murder. Affirmed as to Burn Gray, reversed as to William Gray.
10. *Harris v. Commonwealth.* From circuit court of York county. Unlawful wounding.
11. *Knight v. Commonwealth.* From hustings court city of Petersburg. Prohibition. Error confessed.
12. *Locke v. Commonwealth.* From hustings court city of Richmond. Rape. Affirmed.
13. *Mercer v. Commonwealth.* From corporation court city of Norfolk. Murder. Reversed.
14. *Nickens v. Commonwealth.* From circuit court of Prince William county. Prohibition. Error confessed.
15. *Pauly v. Commonwealth.* From circuit court Tazewell county. Murder. Affirmed.
16. *Quivers v. Commonwealth.* From circuit court of York county. Prohibition. Affirmed.
17. *Rice v. Commonwealth.* From circuit court of Giles county. Prohibition. Error confessed.
18. *Stokes v. Commonwealth.* From circuit court of Tazewell county. Prohibition.
19. *Timmons v. Commonwealth.* From circuit court of Henrico county. Prohibition. Writ dismissed.
20. *Turner v. Commonwealth.* From circuit court of Northampton county. Prosecution under regulation of Crop Pest Commission. Reversed and remanded.
21. *Thompson v. Commonwealth.* From circuit court of Russell county. Error confessed.
22. *Union Tanning Co. v. Commonwealth.* From circuit court of Giles county. Taxation. Affirmed.
23. *Wood v. Commonwealth.* From circuit court of Grayson county. Assault and battery. Affirmed.
24. *Xippas v. Commonwealth.* From circuit court of Norfolk. Election fraud. Reversed.
25. *Yancey v. Commonwealth.* From circuit court of Halifax county. Prohibition. Error confessed.

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

1. *Western Gas Construction Company v. Commonwealth.* Appealed from the decision of the Supreme Court of Appeals of Virginia. Sustaining fine imposed by the Corporation Commission on the Western Gas Construction Company, a foreign corporation, for doing business in Virginia without a license and sustained by the Supreme Court of Appeals of Virginia. Affirmed.

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

1. *Brookman v. Commonwealth.* From circuit court of Albemarle county. Robbery.
2. *Oliver v. Commonwealth.* From circuit court of Green county. Murder second degree.
3. *Shifflett v. Commonwealth.* From circuit court of Green county. Murder.
4. *Shaver v. Commonwealth.* From circuit court of Augusta county. Seduction.
5. *Nelson v. Commonwealth.* From circuit court of Albemarle county. Robbery.

### Cases Pending before the Special Court of Appeals of Virginia

1. *Burr's Adm'x. v. Virginia Electric & Power Co.* From the Corporation Court of the City of Petersburg. Compensation. Suit brought to protect the Commonwealth.

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

1. *Daniel Kelleher v. G. T. French.* Appealed from the decision of the District Court of the United States for the Western District of Virginia.

### 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 Company.*
8. *Commonwealth v. Atlantic Coast Line Railroad Company.*
9. *Commonwealth v. Seaboard Air Line Railway Company.*
10. *Commonwealth v. Virginia Railway and Power Company.*
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, Commissioner of Revenue.*
15. *Commonwealth v. Jas. T. Trehly, Clerk.*
16. *Commonwealth v. Southeastern Iron Corporation.*
17. *Commonwealth v. Red Star Oil Company.*
18. *Commonwealth v. Taylor Korman Oil Company.*
19. *Commonwealth v. W. B. Fulton.*
20. *Commonwealth v. Julian T. Christian, Judgment satisfied.*

### 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, Commissioner of Insurance v. Surety Corporation of America.*
6. *Commonwealth v. B. B. Van de Grifdt & Son.*
7. *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

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COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., September 13, 1928.

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

DEAR SIR:

In accordance with section 3205 of the Code of Virginia, I hereby deliver you a report of the state and condition of the several causes in which the Commonwealth is a party pending July 1, 1928. I have added a number of opinions on questions of public importance, as well as a statement of the expenditures of this office for the year ending July 1, 1928.

The opinions here appended and statements of suits pending and disposed of, by no means represent all of the work of the office, the records of which show that the Attorney General has received a large and ever increasing number of inquiries concerning public business. Many of these inquiries require considerable time and research to answer, but it is not deemed necessary to preserve all such opinions in printed form.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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## ACCOUNTING SYSTEM—Installation of.

RICHMOND, VA., February 28, 1928.

HON. J. H. BRADFORD, *Director,  
Division of the Budget,  
Richmond, Virginia.*

DEAR MR. BRADFORD:

I am just in receipt of your letter of the 27th instant, in which you say:

“Under section 25 of the Reorganization Act of 1927, the Comptroller is authorized to make such expenditures out of the State treasury as may be necessary for putting into effect and operation on the first day of March, 1928, of all provisions of the Reorganization Act in relation to the Department of Finance.

“It now appears that the installation of the unified accounting system required by the Reorganization Act cannot be completed by March 1. The accountant who has been employed to make this installation must necessarily give a certain amount of time to the operation of this system after it actually becomes effective on March 1. For example, it is highly important that he should prepare and supervise the opening entries on the Comptroller's books and also assist in the preparation of the periodic financial statements that will be first issued under the new system at monthly intervals or oftener.

“It is necessary also for this accountant to coordinate the accounting records of the Division of Motor Vehicles with the accounts of the Comptroller. This will involve an examination of the books of the Director of the Division of Motor Vehicles and probably a revision of the records now in use in this office.

“Since the installation of the unified accounting system cannot be completed until after March 1, it will be necessary to make certain expenditures after that date in payment of expenses incurred in this installation.

## REPORT OF THE ATTORNEY GENERAL

"The only provision for such additional expenditures is the authority conferred on the Governor and the Comptroller by section 25 of the Reorganization Act.

"Will you kindly advise me for the Governor's information whether he is entitled under this section of the Reorganization Act to make such additional expenditures after March 1, 1928, as may be necessary to complete the installation of the unified accounting system."

Unquestionably, in my judgment, in order to carry out the purposes of the Reorganization Act as contained in section 25 of the same, the Governor is authorized to make all such additional expenditures after March 1, 1928, as may be necessary to complete the installation of the unified accounting system.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**ARRESTS—Fine in cases of driving while under the influence of liquor.**

RICHMOND, VA., *October 17, 1927.*

HON. F. J. HARRIS,  
*Civil and Police Justice,*  
*East Radford, Va.*

MY DEAR JUDGE HARRIS:

I beg to acknowledge receipt of your letter of recent date, in which you state that a young man was convicted on a plea of guilty in your court a few days ago for operating a car while under the influence of intoxicants, and that you imposed the minimum penalty as prescribed by law. You then state that the young man desires you to place him under bond, suspend the sentence and permit him to continue to operate his car, and you request me to advise you whether or not you have the authority to do this.

Section 25 of the prohibition law provides that the judgment of conviction in a case of this character shall operate to deprive the party convicted of his right to drive any such vehicle or conveyance for the period of one year from date of judgment. You have no right to restore to him the privilege of operating his automobile. Only the Governor can do this and he has consistently refused to do so in every case which has been presented to him. If you will read the last paragraph of section 33 of the prohibition law, you will see that a justice has no authority to suspend a jail sentence.

I take it for granted that you are trying this party under the State law and not under a town ordinance. You failed to state whether the Commonwealth's Attorney was present. The law requires that he shall be present and endorse his consent on the warrant of arrest.

Trusting I have given you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**AUTOMOBILES—Caretaker of farm Fairfax County must have license for.**

RICHMOND, VA., *September 28, 1927.*

HON. JAMES M. HAYES, JR., *Director,*  
*Division of Motor Vehicles,*  
*Richmond, Virginia.*

MY DEAR MR. HAYES:

Acknowledgment is made of your letter of recent date, in which you request me to



advise you as to whether I think automobile licenses should be paid by the hereinafter mentioned parties on the following statements of fact:

"Dr. E. B. Jones and Dr. Louise Jones, his wife. Dr. Louise Jones owns a farm in Fairfax county; employs a caretaker and maid; resides four or five months of the year on said farm, but claims they are not residents of Virginia, and do not understand, or rather agree, that they must take out Virginia license.

"Thomas T. Taylor Company, Incorporated, in Washington, D. C. Machines are registered in the District of Columbia, as Thomas T. Taylor Company, Incorporated, District National Building. No residence address is given, which is contrary to District of Columbia laws. Thomas T. Taylor and son, Romine, two members of the firm, each of whom live in the same house, are residents of Fairfax county. The matter of residence is not in dispute. They travel morning and night from a point in this county into Washington, but claim that, as an incorporated firm under the laws of the District of Columbia, they do not have to take out Virginia license.

"H. C. Ayres, Tysons Corner, Virginia, owns a farm in this county and votes in this county. He has four or five trucks registered in the District of Columbia, where he operates an ice business. Daily he uses one of these trucks from Washington to Tysons Corner and returns, delivering ice at various points in the said county on a D. C. Tag. His defense is that he does not believe he has to take out license.

"Milton Walters and C. C. Grimes are legal residents of Fairfax county. They operate various machines daily in said county and spend the night with said machines here. They claim the machines are the property of a Washington corporation, which fact is undisputed, and they do not have to obtain Virginia license.

"H. D. Davidson resides in Virginia six months of the year, operates on D. C. tag, and claims that his lawyer says he does not have to have Virginia license.

"If any non-resident is required to do so, then why are the Corby Baking Company, the Havener Baking Company, the Fussell Ice Cream Company, S. Kann Sons Company, the Evening Star, the Washington Times, and many others who operate at least one hundred machines from Washington through Fairfax county and as far as Warrenton, Virginia, permitted to do so and no cognizance taken of the fact?"

The cases of Dr. Jones and wife, Thomas T. Taylor Company, Incorporated, H. C. Ayres and H. D. Davidson, in my opinion, are governed by sub-section (a) of section 7 of chapter 149 of the Acts of 1926. This paragraph of section 7 reads as follows:

"Every person or corporation and express, telegraph or telephone company owning a motor vehicle, trailer or semi-trailer intended to be operated upon any highway in this State shall before the same is so operated apply to the department for and obtain the registration thereof and a certificate of title therefor except as otherwise provided for in this section and except the owner of any vehicle which is exempted by section eight and excepting also when an owner is permitted to operate a vehicle under the registration provisions relating to manufacturers, dealers and non-residents contained in sections eighteen and twenty of this act."

Therefore, the owners or operators of the cars and trucks referred to should obtain Virginia licenses.

The cases of Milton Walters and C. C. Grimes, in my opinion, are governed by sub-section (c) of section 20 of chapter 149 of the Acts of 1926. This sub-section reads as follows:

"Every non-resident, including any foreign corporation carrying on business within this State and owning and regularly operating in such business any motor vehicle, trailer or semi-trailer within this State shall be required to register each such vehicle and pay the same fees therefor as is required with reference to like vehicles owned by residents of this State."

I am of the opinion that these machines cannot be operated in this State without obtaining a Virginia license.

With reference to the trucks operated by the baking companies, the ice cream company, the stores and newspapers, in my opinion sub-section (c) of section 20 of chapter 149 of the Acts of 1926, quoted above, is applicable, and these corporations should be required to register their vehicles and pay the fees required by law.

Trusting this gives you the desired information, I am

Very truly yours,

JNO. R. SAUNDERS,

*Attorney General.*

#### AGRICULTURE AND IMMIGRATION—Assessment of fertilizer.

RICHMOND, VA., *September 24, 1927.*

HON. GEORGE W. KOINER, *Commissioner,*  
*Department of Agriculture and Immigration,*  
*Richmond, Virginia.*

MY DEAR SIR:

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

"Section 1120, chapter 49, Code of Virginia, provides for the assessment of penalty for deficiency in fertilizers sold in this State, such assessments to be paid to the consumers of the deficient fertilizers, or to this Department in the event it is found to be impossible to locate the actual consumers.

"Under the provisions of this section we have found it necessary to assess penalties on several lots of fertilizer registered by and in the name of the Agricultural Supply Corporation, Richmond, Va., and shipped in sacks bearing their name and address. These fertilizers, however, were actually manufactured and shipped by the Smith Reduction Corporation, a Norfolk concern, the latter corporation's name not appearing in our registration records of the brands in question, nor on the sacks in which the goods were shipped.

"Upon receipt of penalty assessment notices, the Richmond concern forwarded the same to the Norfolk concern for payment, but instead of making payment of the amounts involved to the actual consumers, the Norfolk concern credited the account of the Agricultural Supply Corporation with the amount of the assessments, the latter concern, according to our understanding, having collected for the fertilizers shipped under this arrangement. Having received this credit, it was, of course, incumbent upon the Richmond concern to effect payment to the consumers of these fertilizers, but it would seem they have taken no steps in this direction, nor are we able to get any response to our letters to them on this subject.

"Under the circumstances, we would like to know if we could hold the Smith Reduction Corporation for the amount of these assessments, bearing in mind that they were fully aware of the fact that the amount involved belonged to the actual consumers of these fertilizers and not to the corporation whose account they credited with this amount."

I have read section 1120 of the Code with care and find that it is there provided that, where the analysis of fertilizers falls as much as five percentum and not more than ten percentum below the guarantee registered with the Commissioner of Agriculture and Immigration, or branded on the package by the manufacturer, dealer or agent, "it shall be the duty of the said commissioner to assess twice the value of such deficiency against the manufacturer, dealer or agent *who sold such fertilizer.*" If it falls over ten percentum, the commissioner is required to assess five times the value of such deficiency "against the manufacturer, dealer or agent *who sold such fertilizer,* \* \* and he shall require the manufacturer, dealer or agent to make good such assessments *to all persons who purchased such fertilizers.*" Italics supplied.

In my opinion, in view of the italicized portions of the above quotation from this section of the Code, it was the intention of the General Assembly to require the assess-

ment to be made against the manufacturer, dealer or agent who sold such fertilizers to the purchasers thereof. In this case, in my opinion, any assessment made for the benefit of the ultimate purchasers would have to be made against the manufacturer, dealer or agent who sold such fertilizers, namely, the Agricultural Supply Corporation of Richmond, Virginia, and not against the original manufacturer. If the assessment were made for the benefit of the Agricultural Supply Corporation against the Smith Reduction Corporation, it would appear from your letter that the latter corporation has already settled with the Agricultural Supply Corporation, its purchaser, for such deficiency.

Trusting this gives you the desired information, I am

Very truly yours,

JNO. R. SAUNDERS,

*Attorney General.*

#### ACTIONS AT LAW—Statute of limitations thereon.

RICHMOND, VA., *September 22, 1927.*

MORTON MYERS, *Esq.*,  
735 West 172nd Street,  
New York.

MY DEAR SIR:

In response to your letter of September 21, 1927, I here quote section 5810 of the Code of Virginia, 1919, which will give you the requested information:

“Every action to recover money which is founded upon an award, or on any contract, other than a judgment or recognizance, shall be brought within the following number of years next after the right to bring the same shall have first accrued, that is to say: If the case be upon any contract by writing under seal, whether made by a public officer, a fiduciary or private person within ten years; if it be upon an award or upon a contract in writing signed by the party to be charged thereby, or by his agent, but not under seal, within five years; and if it be upon any other contract express or implied within three years, unless it be an action by one partner against his co-partner for a settlement of the partnership account or upon accounts concerning the trade of merchandise between merchant and merchant, their factors, or servants, in either of which cases the action may be brought until the expiration of five years from the cessation of the dealings in which they are interested together, but not after; provided that the right of action against the estate of any person hereafter dying, or upon any such award or contract, which shall have accrued at the time of his death, or the right to prove any such claim against his estate in any suit or proceeding, shall not in any case continue longer than five years from the qualification of his personal representative, or if the right of action shall not have accrued at the time of the decedent's death, it shall not continue longer than five years after the same shall have so accrued; and provided further that the limitation to an action or other proceeding for money on deposit with a bank or any person or corporation doing a banking business shall not begin to run until a request in writing be made, therefor by check, order, or otherwise.”

I also call your attention to section 5812 of the Code, which provides that the bar of the statute of limitations may be removed or extended by a new promise in writing; to section 5821, which relates to a promise not to plead the statute of limitations; to section 5823, which extends the period in cases of persons under disability, and to section 5825 of the Code, which relates to those cases where the plaintiff is prevented from maintaining his suit by some act of the defendant.

Trusting this gives you the desired information, I am

Very truly yours,

JNO. R. SAUNDERS,

*Attorney General.*

**AUTOMOBILES—Operating under certificate "E."**

RICHMOND, VA., September 21, 1927.

HON. JAMES M. HAYES, JR., *Director,*  
*Division of Motor Vehicles,*  
*Richmond, Virginia.*

MY DEAR MR. HAYES:

Acknowledgment is made of your letter of September 19, 1927, in which you request me to advise you whether a person holding a certificate E is required to pay for the privilege of operating under such certificate \$50.00 for each vehicle or only one fee of \$50.00 regardless of the number of vehicles operated.

It is provided in paragraph No. (2) of section 5 of the Motor Vehicle Carriers Law, as amended, that:

"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."

It is further provided in the last paragraph of the same sub-section of section 5, as follows:

"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.

"The minimum fee charged for licenses A, B, C, X, Y, or Z shall in no case be less than twenty-five dollars each."

You will observe that the Commission is authorized to grant a certificate E for property carrying vehicles to an applicant. The first quoted section clearly authorizes the Commission to grant a license to a single applicant for the operation of more than one vehicle under a certificate E. The last paragraph of the Act, when read with this fact in mind, shows that the General Assembly intended to impose the privilege tax therein provided for not for the operation of each vehicle, but "for the privilege of operating under such certificate."

I am, therefore, of the opinion that only one privilege tax of \$50.00 is imposed for the operation of one or more vehicles under a certificate E.

Trusting that this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**AGRICULTURE AND IMMIGRATION—What constitutes Virginia hams, legally branded.**

RICHMOND, VA., July 25, 1927.

HON. F. C. BREAZEL, *Director,*  
*Dairy and Food Division,*  
*Department Agriculture and Immigration,*  
*Richmond, Va.*

DEAR MR. BREAZEL:

Acknowledgment is made of yours of recent date, enclosing Bulletin No. 51 of your department.

You ask whether a ham cut from the carcass of a western hog and cured by one of our big meat packers in Virginia can be legally branded "Virginia ham" or should it be branded "Virginia cured ham."

The first paragraph of section 1182 of the Code, to which you call my attention, is as follows:

"The term 'misbranded' as used in this chapter shall apply to all articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design or device regarding such article, or the ingredients or substance contained therein, which shall be false or misleading in any particular, and to any food product which is falsely branded as to the State, territory, or country in which it is manufactured or produced."

Regulation XIII (d) of Bulletin No. 51 of your department says:

"A distinctive name shall give no false indication of origin, character, or place of manufacture, nor lead the purchaser to suppose that it is any other food product."

Reading these together, it would seem that a ham labeled "Virginia ham" would be considered by the public to be a ham from a hog which has been raised, as well as cured, in Virginia and to that extent such a label would constitute a deception. Undoubtedly, such a ham should be branded "Virginia cured ham." That form of branding would accurately express the truth in regard to the ham, and I cannot see how any of the packers could reasonably object to it.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### AUTOMOBILES—Railroad to obtain licenses for trucks.

RICHMOND, VA., February 11, 1928.

HON. JAMES M. HAYES, JR., *Director,*  
*Division of Motor Vehicles,*  
*Richmond, Virginia.*

DEAR SIR:

I am in receipt of your letter of the 8th instant, in further reference to the matter of requiring railroad companies to obtain State motor licenses for automobiles and trucks.

It is doubtless true that the framers of the Constitution of 1902 did not have in mind automobiles or motor trucks when that Constitution was adopted. However, the language of section 176 is exceedingly inclusive in character, and you will notice that it provides that the State Corporation Commission shall assess—

"\* \* the value of the roadbed, and other real estate, rolling stock, and all other personal property whatsoever \* \* \* now or hereafter liable for taxation upon such property; \* \* "

Section 177 provides:

"\* \* for the privilege of exercising its franchises in this State, which, with the taxes provided for in section One Hundred and Seventy-six, 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: \* \* "

Under the broad provisions of these two sections, I am still of the opinion that automobiles and trucks owned by railroad companies are not subject to motor vehicle licenses.

However, the only way to test your construction of the law is to have one of your men arrest the driver of an unlicensed truck or automobile and have the courts pass upon the construction of sections 176 and 177. If there are only a few vehicles being used by railroad companies, it would not make a very great difference in revenue, but, if they undertake to use large numbers without securing licenses, the State would undoubtedly lose much revenue, and it might be well to test the question in the courts.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**AUTOMOBILES—Non-resident University of Virginia students required to obtain license.**

RICHMOND, VA., *January 25, 1928.*

HON. W. ALLAN PERKINS,  
*Attorney-at-Law,*  
*Court Square Building,*  
*Charlottesville, Va.*

DEAR SIR:

I am in receipt of your letter of the 23rd instant, having reference to the matter of requiring a Virginia State license of the students of the University of Virginia who are non-residents, but who operate motor cars at the University.

I did not give Mr. Hayes an opinion upon this particular subject. The ruling I gave him was with reference to the necessity of persons who are actual residents—personally present—of the State of Virginia, and I am of the opinion that such residents are required to obtain State licenses for the operation of their cars.

In a telephone conversation with Mr. Hayes, he informed me that no effort is made to require students who bring their cars to the University to obtain State licenses for the *current* year, but that his department has required students who continue the operation of cars while personally resident in Virginia to obtain State licenses after the expiration of their home State licenses.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**ATTORNEYS—Power of.**

RICHMOND, VA., *December 23, 1927.*

HON. J. W. ADAMS, *Clerk,*  
*Corporation Court,*  
*Fredericksburg, Virginia.*

MY DEAR MR. ADAMS:

Acknowledgement is made of your letter of December 22, 1927, in which you say:

“Section 4349 of Code referring to Powers of Attorney states ‘Such Powers of Attorney, unless the same be special and limited to one or definitely stated transaction shall be’ etc. Nothing is said as to disposition of Power of Attorney filed for the one special case. Should the Clerk record this? If not, what shall he do with it?”

The language of section 4349 of the Code is in part as follows \* \* \* \* \*

"Powers of Attorney, unless the same be special and limited to one, or definitely stated transactions, shall be duly acknowledged for recordation and recorded in the county or corporation, or counties and corporations, in which the powers delegated by them are to be exercised." This is the only reference contained in the statute with reference to such powers of attorney as are referred to in your letter. By implication, it would appear that recordation of such a power of attorney is not required, but all that is necessary for the clerk is to preserve same in the files of his office. However, I can see no objection to the clerk recording such a power; certainly, the statute does not prohibit it, and if the transaction is one of much consequence, I would think that the best course to pursue would be to record it. In any event, unless recorded, the power of attorney should be preserved by the clerk until such time as the obligation executed under his authority has been discharged.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### ARRESTS—Costs.

RICHMOND, VA., *April 12, 1928.*

MAJOR B. H. BAYLOR,  
*Assistant to the Adjutant General,  
Richmond, Virginia.*

DEAR MAJOR BAYLOR:

I am in receipt of your letter of the 2nd instant, in which you state that the officer of a summary court martial was required by a jailor at Danville, Virginia, to pay a jail fee upon the discharge of a person confined in his jail, in lieu of a fine imposed by a court martial.

You ask my opinion as to who should pay the jail fee. Under the law providing for the arrest of the person proceeded against, it is provided that a sheriff serving a summons or warrant of arrest shall be paid as in other cases, and further in the same Act, that the judgment of the court shall have the force and effect of the judgment of the justice of the peace.

While no special provision is made for the payment of other costs than those of arrests, I am of the opinion that, the proceeding against a delinquent member of the militia company being of a criminal nature and for the purpose of enforcing military discipline, the fees of all officers—excluding the pay of members of the court—should be presented to the proper court and certified to the Comptroller for payment, as fees are paid in any other criminal proceeding.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### ARCHITECTURE—License to practice.

RICHMOND, VA., *January 13, 1928.*

MR. RAYMOND V. LONG,  
*State Board of Education,  
Richmond, Virginia.*

DEAR MR. LONG:

I am in receipt of your letter of the 10th instant, in which you state that you had

been practicing architecture for a period of time less than six years prior to your employment with the State Board of Education; that since your connection with the State Board of Education you have had certain duties connected with the preparation of plans and the supervision of the erection of school buildings for that department.

You state that you made application to the State Board for the Examination and Certification of Professional Engineers, Architects and Land Surveyors for a certificate in architecture without an examination; that the State Board has felt that there is doubt about the work you have been doing for the State Board of Education constituting the *practice* of architecture as defined in chapter 328 of the Acts of 1920, as amended by chapter 231, of the Acts of 1924, and you refer me especially to clause F in section 8 of the 1924 Act.

This office took the liberty of calling up Honorable Harris Hart, Superintendent of Public Instruction, and asking him as to your duties in the matter of school plans and buildings. He stated that you and the employees of the office under you prepare plans for school buildings and that you personally supervise the construction of a number of school buildings.

I do not think there is any doubt of the fact that you have been practicing architecture during the time that you have been in charge of that part of the work of the Board of Education relating to the preparation of plans for and the supervision of the building of public schools in the State of Virginia.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**AUTOMOBILES—Operating wrecking trucks on dealer's license.**

RICHMOND, VA., *June 1, 1928.*

HON. RIVES B. HARDY, *Mayor,*  
*Blackstone, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of May 29, 1928, in which you say:

"I will thank you very much to give me your opinion as to whether or not automobile dealers have the right to operate their service cars and wrecking trucks under their dealers' license, or if the law requires that regular licenses shall be carried on such service cars and wrecking trucks used in and about their business."

While the law on the subject, section 18, chapter 149 of the Acts of 1926, is not very clear, it is my opinion that it was intended to authorize dealers to use dealers licenses only on cars which are used for demonstration purposes and no other automobiles, and I am advised by the Motor Vehicle Commissioner that he placed this construction on the Act at the time it was passed, and he requires dealers to obtain regular licenses for service and wrecking trucks and other cars not in the possession of such dealer for purposes of sale.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*



**AUTOMOBILES—Seized for transportation of ardent spirits; fee allowed attorney for the Commonwealth.**RICHMOND, VA., *November 26, 1927.*

HON. S. P. POWELL,  
*Commonwealth's Attorney,*  
*Spotsylvania, Va.*

DEAR MR. POWELL:

Somehow I do not find that your letter of August 5th to Colonel Saunders, in reference to fees allowed an attorney for the Commonwealth in proceedings for the forfeiture of an automobile seized while being used in the unlawful transportation of ardent spirits and which is not finally confiscated, has been answered.

The only practical construction of section 28, in reference to fees where there is no final judgment for the Commonwealth, is that it provides fees of \$10 each to the attorney for the Commonwealth, and the officer seizing the car, where the car is released to the claimant, though the car itself is *guilty*, and that the provision for the payment of \$12.50 to both the sheriff and the attorney for the Commonwealth is in those cases where the car itself is found not guilty. In other words, where proceedings are out against a car and for some reason the car is found not to have been engaged in the unlawful transportation of ardent spirits, the fee allowed the officers is \$12.50, to be taxes against the Commonwealth, while in those cases where the car is found to have been used in the illegal transportation of ardent spirits, but there appears to have been an innocent owner or lienee, and the car is forfeited for the transportation of ardent spirits, but relieved on account of the innocence of the claimant, a fee of \$10 to each officer is allowed, to be taxed against the car.

Yours very truly,

EDWIN H. GIBSON,  
*Assistant Attorney General.*

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**AUTOMOBILES—Disposition of proceeds of forfeiture.**RICHMOND, VA., *June 29, 1928.*

HON. ROBERT S. KIME,  
*Attorney for the Town of Salem,*  
*Salem, Virginia.*

MY DEAR MR. KIME:

I beg leave to acknowledge receipt of your favor of the 26th, in which you submit certain questions for an opinion.

Your first one is, whether or not the proceeds from the sale of an automobile seized by town officers while being used in the transportation of ardent spirits within the town limits can be paid into the town treasury.

I am of the opinion that this cannot be done. Section 28 of the Prohibition Law provides that where an automobile is seized in a county, it shall be turned over to the sheriff of the county, or sergeant of a city, if in a city, in which such seizure shall be made, and such vehicle and team, automobile, boat or other conveyance shall be forfeited to the Commonwealth. This provision of the law is in keeping with section 134 of the Constitution.

I would further add that this has been the ruling of the office for a number of years.

In answer to your second question as to whether or not an attorney for a town is entitled to the same fee for the prosecution of prohibition cases which are fixed for the Commonwealth's Attorney, where the Commonwealth's Attorney has been notified and does not appear to prosecute such cases, I would say that the law is not entirely clear, in my judgment, as to this.

You will note that the law only prescribes certain fees for the attorney for the Commonwealth, but it would seem to me to be fair for the court, when the Commonwealth's Attorney does not appear, to allow the attorney for the town who prosecutes the cases the same fees as are fixed by law for the Commonwealth's Attorney. This, in my judgment, is a matter which addresses itself to the sound discretion of the court, and a question which should be passed upon by the court. I am sorry I cannot be more definite in my opinion as to this question.

Sincerely yours,

JNO. R. SAUNDERS,  
*Attorney General.*

**AUTOMOBILE—Confiscation of, transporting ardent spirits.**

RICHMOND, VA., June 28, 1928.

HON. B. S. PEDIGO,  
*Commonwealth's Attorney,*  
*Floyd, Virginia.*

DEAR SIR:

I am in receipt of your letter of the 26th instant, in which you state as to the seizure of a car on account of its having been used in the illegal transportation of ardent spirits. After making the above statement, you then ask if the car is subject to confiscation.

In the case of *Edmonson v. Commonwealth*, 141 Va. 404, a car was seized on the 20th of April, 1924, by the sheriff of Charlotte county, on account of the fact that it had been used on the 19th day in the illegal transportation of ardent spirits, and the court was asked for final judgment of confiscation. The lower court gave judgment in favor of the Commonwealth. On appeal it was held that a car could not be confiscated for the illegal transportation of ardent spirits unless such spirits were found in the car at the time of the seizure or upon proof beyond a reasonable doubt that ardent spirits were in the vehicle immediately prior to the seizure.

In your case you say that ardent spirits were found in an automobile and they were taken off and the car moved to another place before the officers seized it. I very greatly doubt whether these facts come within the requirements of the *Edmonson Case* that the ardent spirits must have been removed from the car immediately preceding its seizure.

You then ask as to whether, where ardent spirits are found in an automobile by a person other than an officer, the vehicle can be confiscated. In my opinion, the provision of law authorizing the seizure by an officer is for the purpose of supplying power to an officer to make a search and seizure, and does not limit the forfeiture of a car to a case in which it has actually been seized by an officer, and gives authority to a court to order the confiscation of a car where ardent spirits have been found in the car by persons other than officers.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**BOARD OF SUPERVISORS—Authority to look after roads.**

RICHMOND, VA., February 7, 1928.

HON. JOEL W. FLOOD,  
*Commonwealth's Attorney,*  
*Appomattox, Virginia.*

MY DEAR MR. FLOOD:

I am just in receipt of your letter of the 4th instant, asking for certain information

concerning the proposed action of the board of supervisors of your county looking to the enactment of ordinances concerning the use of public roads within thirty-six hours after rain or snow.

Let me refer you to the cases of *Polglaise v. Commonwealth*, 114 Va. 850 and *Standard Oil Company v. Commonwealth*, 131 Va. 830.

These cases sustain the constitutionality of regulations of the boards of supervisors of Spotsylvania and Rockbridge counties respectively in legislation of the character proposed by your board of supervisors. My caution to you is to see that the regulations adopted are *reasonable*.

Very sincerely yours,

JNO. R. SAUNDERS,  
*Attorney General.*

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**BOARD OF MOTION PICTURE CENSORS—Dempsey-Tunney fight.**

RICHMOND, VA., December 19, 1927.

HON. EVAN R. CHESTERMAN, *Director,*  
*Division Motion Picture Censorship,*  
*State Office Building,*  
*Richmond, Virginia.*

MY DEAR MR. CHESTERMAN:

In response to your request of December 14, 1927, that I briefly state to you my reasons for refusing to license the film version of the Dempsey-Tunney fight, I take pleasure in briefly stating them for the guidance of the Board in handling such matters in the future.

As you know, the Congress of the United States has enacted a law prohibiting the interstate transportation of films of prize fights. The Dempsey-Tunney fight occurred outside of Virginia and the films were taken in the State where the fight occurred. Therefore, these films got in Virginia only by means of a violation of the above mentioned act of Congress.

I do not think that an agency of the Commonwealth of Virginia should license the exhibition of a motion picture which got into the State in this way, regardless of whether the present owner thereof was the one who violated the law in bringing it here or not.

I do not mean by this to say that there might not be cases where my ruling would be different, if the facts showed that the Federal statute was an unwarranted infringement upon the rights of the Commonwealth of Virginia, as I believe that the rights of the State within its sphere are at all times superior to any control by the Federal Government, but, in this instance, our Code expressly prohibits and makes criminal the holding of a prize fight in this State, (Code sections 4426-27) and instead of being an encroachment upon any rights of Virginia, in my opinion, the Federal statute is in furtherance of the established policy of this State.

Hence my refusal to permit this film to be licensed for use in this State.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**BOARD OF SUPERVISORS—Consideration of budget and expenses.**RICHMOND, VA., *April 12, 1928.*

MR. KYLE T. COX,  
*Superintendent of Schools,  
Independence, Virginia.*

DEAR MR. COX:

I am in receipt of your letter of the 9th instant, in which you ask as to the method the board of supervisors should pursue upon the consideration of the budget the board is required to make up for the expenses of the next year. You ask if the board should approve items or strike from the budget items the board disapproves.

Either method will be a substantial compliance with the law and the practical result will be the same, whether you call it approving items or striking out items. The budget, after action by the board of supervisors, will consist of those items for which the board proposes to levy taxes.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**BOARD OF SUPERVISORS—Authority to levy tax.**RICHMOND, VA., *March 1, 1928.*

HON. J. SEYBERT HANSEL,  
*Commonwealth's Attorney,  
Monterey, Virginia.*

DEAR SIR:

I am in receipt of your letter of the 24th ultimo, in which you ask if your board of supervisors is authorized to levy a district tax in excess of \$1.25 for current school expenses and to create a sinking fund to pay off bonded indebtedness authorized by the special act of March 3, 1924, having to do with the issue of bonds for Monterey district in Highland county.

In my opinion, the \$1.25 limit is applicable to bonds issued under the general law, and that under the special act your board of supervisors is authorized to impose a levy sufficient to meet the current expenses and to pay off its bonds within a reasonable time.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**BOARD OF SUPERVISORS—Provisions for office of Commissioner of Revenue.**RICHMOND, VA., *February 14, 1928.*

MR. W. B. MERRIMAN,  
*Commissioner of the Revenue,  
Jonesville, Virginia.*

DEAR SIR:

I am in receipt of your letter of the 10th instant, telling me of the situation in your county as to the action of the board of supervisors in not providing you an office for use in the discharge of your duties as commissioner of the revenue of that county. You ask me to advise you fully as to your rights and as to what you should do in the premises.

The law is to be found on page 795 of the Acts of 1926 and, so far as you are concerned, is as follows:

“\* \* \* and the board of supervisors of each county, or the council of each city shall, if there be offices in the courthouses of the respective counties and cities, available for such purposes, provide offices for the treasurer, Commonwealth's attorney, sheriff, commissioner of the revenue, commission of accounts and division superintendent of schools for such county or city, and if such offices are not available in the courthouse, same may be provided by said board of supervisors or council, if they deem it proper, elsewhere than in the courthouse of said county or city \* \* \* .”

From your statement, it would seem that there is ample available room for your office in the county courthouse. If so, it is, in my judgment, the duty of the board of supervisors to provide you with such room. The duties of your office are onerous and exceedingly responsible, and it is not only just to you, but to the citizens and taxpayers of your county, that you should have furnished you by the board ample space for the discharge of the duties you owe the people of your county.

Should the board refuse to supply you with available room in the courthouse, you might call the attention of the judge of your circuit court to the situation, and I am sure that he will, if he is of the opinion that there is available room in the courthouse, require the board to supply you with such a room.

The provision allowing the board of supervisors to supply you with a room elsewhere than in the courthouse is optional with the board, and it cannot be required to go outside of the courthouse, although it would appear to me that it would be their pleasure to furnish you with quarters for use in the discharge of your official duties, even though they have to rent such quarters.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**BOARD OF SUPERVISORS—Duty to care for the poor.**

RICHMOND, VA., *February 10, 1928.*

HON. CHARLES H. FUNK,  
*Commonwealth's Attorney,*  
*Marion, Virginia.*

DEAR MR. FUNK:

I am in receipt of your letter of February 8, 1928, and I note that you desire my opinion upon the question as to the duties of the board of supervisors of your county to care for the poor of the incorporated towns of Marion, Chilhowie and Saltville.

You state that the tax rate on property in the towns is the same as on property in the county outside of the corporations, and that all of the taxes collected in the towns go into the general county funds, but that in the town of Saltville a reduction in the county taxes is made in consideration of the fact that by its charter the town takes care of its paupers.

There are several sections of law bearing upon the questions you ask. Section 2794 provides the duties of the superintendent of poor, and for a poorhouse for the county, with a further provision that the superintendent of poor shall receive at the county poorhouse such paupers as are sent to him by the overseers of the poor of the several districts of the county, and that he shall provide and care for paupers.

Section 2795 provides that the amount required for the support of the poor shall be chargeable on such county, and the board of supervisors shall include in the levy an amount sufficient for that purpose.

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Section 2730b provides that boards of supervisors of one or more of the counties, and the councils or governing bodies of one or more *cities* are authorized to contract with each other for the maintenance of the poor of such counties and cities. Section 3078b provides that councils or other governing bodies of *cities* are authorized to enter into contract with each other for the maintenance of the poor.

I think it undoubtedly true that where no duty about maintaining the poor is contained in the charter of a town and a county tax is levied upon the property of the town and county without discrimination, it is the duty of the county to maintain all paupers of the county, including towns.

While I know of no provision of law which allows the arrangements you speak of as having been made by the board of supervisors of your county with the town of Saltville, I am of the opinion that it is right and proper for the county to provide in some way for the reimbursement of that town on account of its expenditures for the care of its paupers.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**BOARD OF SUPERVISORS—Levying additional capitation tax.**

RICHMOND, VA., *April 5, 1928.*

HON. J. P. SNEAD,  
*Superintendent of Schools,  
Fork Union, Virginia.*

MY DEAR MR. SNEAD:

Acknowledgment is made of your letter of April 4, 1928, in which you call my attention to the recent bill passed by the General Assembly authorizing the board of supervisors of Fluvanna county to levy an additional capitation tax, in accordance with the provisions of section 173 of the Constitution, for the support of the schools, etc. You then say:

“I wish you would write me it, in your opinion, we could consider this additional dollar capitation tax put on by the county, as a prerequisite to voting. I am of the opinion that we cannot.

“I would like to know also if the clerk of the county could require this additional dollar to be paid along with the regular State capitation tax before issuing licenses, etc. I have been informed that this could be done. In case neither of the above could be done, could this dollar tax be collected as any other personal property tax, and if a person does not pay same, could it be returned delinquent against that person as any other unpaid personal property tax?”

Both of your first two questions should be answered in the negative. The only capitation tax which is required to be paid as a prerequisite to the right to vote, by sections 18, 19, 20 and 21 of the Constitution, is the State capitation tax. Therefore, the payment of a county capitation tax cannot be required as a prerequisite to the right to vote. The section of the Constitution under authority of which your law was enacted and the Act authorizing the tax to be imposed by the county give the county no authority to compel the prepayment of this tax as a right to obtain a license. The Downing law, requiring the prepayment of a State capitation tax as a prerequisite to the right to obtain a license, is limited to the State capitation tax. The county capitation tax, however, can be collected just as any other personal property tax is collected, by levy,

etc., and, of course, may be returned delinquent as any other unpaid personal property tax.

Trusting this gives you the desired information, I am

Yours very truly,

LEON M. BAZILE,  
*Assistant Attorney General.*

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**BOARD OF EDUCATION—Effect of proposed amendments to Constitution.**

RICHMOND, VA., May 11, 1928.

HON. HARRIS HART,  
*Superintendent of Public Instruction,  
State Board of Education,  
Richmond, Virginia.*

MY DEAR MR. HART:

Acknowledgment is made of your letter of recent date, in which you request me to advise you whether the members of the present State Board of Education will cease to function as such if section 130 of the Constitution is amended by the ratification of the proposed amendment to this section of the Constitution in the election to be held on June 19, 1928.

The proposed amendment to this section reads as follows:

“The general supervision of the school system shall be vested in a State board of education, to be appointed by the governor, subject to confirmation by the general assembly, and to consist of seven members. The first appointment under this section shall be one member for one year, two members for two years, two members for three years, and two members for four years, and thereafter all appointments shall be made for a term of four years, except appointments to fill vacancies, which shall be for the unexpired terms.”

Section 195-a, which will be added to the Constitution in the event that the proposed amendment to section 130 of the Constitution is ratified, reads as follows:

“All incumbents of offices shall serve the term for which they have been previously selected, subject to all the contingencies which affect officials of a similar class hereafter selected.”

The members of the present State Board of Education are incumbents of offices and as such, in my opinion, would serve the terms for which they have been previously selected, by virtue of the proposed section 195-a quoted above.

Yours very truly,

JNO R. SAUNDERS,  
*Attorney General.*

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**BOARD OF MEDICAL EXAMINERS—Authority to revoke license.**

RICHMOND, VA., November 29, 1927.

DR. J. W. PRESTON, *Secretary-Treasurer,  
State Board of Medical Examiners,  
Roanoke, Virginia.*

MY DEAR DR. PRESTON:

I am in receipt of your favor of November 28th, in which you enclose a certified copy of the Clerk of the Circuit Court of the city of Suffolk, showing that Dr. H. A.

Warren was convicted of a felony in that court. The order states that he plead guilty of a felony and he was sentenced to serve a term of two years in the State penitentiary, which sentence the court suspended.

You also enclose a letter from Hon. M. Anderson Maxey, who is the Commonwealth's Attorney of Suffolk, requesting that you revoke the certificate heretofore granted Warren to practice medicine. Upon the statement of these facts you desire me to advise you whether or not the Board of Medical Examiners, under section 1614-a, have the authority to revoke the certificate of Warren to practice medicine. This section among other things provides:

" \* \* \* The Board may refuse to admit persons to its examinations, or to issue the certificates provided for in this chapter, or may revoke any certificate or verification certificate granted by it or by any other medical examining board in this State in any of the following cases.

"A Practitioner of medicine or chiropody, who is guilty of any crime or misdemeanor or who is guilty of any fraud or deceit by which he was admitted to practice, or"

The fact that the court suspended this sentence in no manner effects the situation, and unquestionably your board has the authority to revoke the certificate of this party.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### BOARD OF SUPERVISORS—Authority to levy school tax.

RICHMOND, VA., March 15, 1928.

HON. JOHN H. CROWGEY, *Division Superintendent,*  
*Wythe County Public Schools,*  
*Wytheville, Virginia.*

MY DEAR MR. CROWGEY:

In reply to your letter of March 9th, the contents of which I have carefully noted, I beg leave to state that chapter 398 of the Acts of Assembly, 1920, with which you are familiar, provides:

"That each county, city, town, if the same be a separate school district, and school district, is authorized and required to raise sums by a tax on property of not less than fifty cents nor more than one dollar in the aggregate on the hundred dollars of the assessed value of property in any one year to be apportioned and expended by the local school authorities of said counties, cities, towns and districts in establishing and maintaining such schools as in their judgment the public welfare may require."

The second paragraph of this Act authorizes the boards of supervisors to levy an additional tax not exceeding twenty-five cents on the one hundred dollars of the assessed value of property. This levy is made in order to provide for the interest and sinking fund of any loans negotiated or bonds issued for such purposes. This Act has not been amended.

It is my opinion that the board of supervisors is limited to the tax of one dollar for school purposes, and the twenty-five cents, should the board see fit to levy it, can be done only for the purposes specified in the Act.

If your board of supervisors has levied the \$1.25 in accordance with the provisions of this Act, the board, of course, has a perfect right to continue this levy.



I would suggest that you consult with the Commonwealth's Attorney, who is the legal adviser of the board.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**BOARD OF SCHOOL TRUSTEES—Disposition of district school funds.**

RICHMOND, VA., *March 2, 1928.*

MR. T. BENTON GAYLE,  
*Division Superintendent,  
Stafford, Virginia.*

DEAR SIR:

I am in receipt of your letter of February 29, from which I quote at length:

"The school board of King George county, at the time of the annual settlement with the treasurer of the county for the fiscal year 1925-26, had balances in the three districts of the county, in the 'District School Funds,' amounting to \$1,000.00 in Potomac District, \$700.00 in Rappahannock District and \$1,300.00 in Shiloh District. This Board of School Trustees also had a note for \$3,000.00 in one of the local banks, which fell due immediately after this annual settlement.

"On motion of the trustee of one district and after due second and a unanimous vote of all members, and after receiving the recommendation of the division superintendent, these balances in the several districts were transferred to the 'County Fund,' or to the 'State Fund,' and a warrant for the full \$3,000.00 was then drawn and the note against the school board paid off in full.

"The Board of Supervisors of King George has made the repeated statement that this transfer of district funds to a general fund, even with full permission of the school board, was illegal. These members of the Board of Supervisors are threatening to reduce the present inadequate school levy on the ground that the school board does not make legal expenditures of the money already allowed them."

You then ask my opinion as to the legality of the action of the school board of your county in transferring district school funds to the county school fund, and the use of district money for county school purposes.

I am of the opinion that there is no provision of law authorizing such a transfer. While the law is not altogether clear as to just what disposition is made of the respective funds, the county and district funds should each be applied to such purposes as are allowed by law, and they should not be transferred from one fund to another at the arbitrary discretion of the school board.

I have communicated with Hon. Harris Hart, Superintendent of Public Instruction, and he concurs in this opinion.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**BOXING MATCHES—In violation of State law.**

RICHMOND, VA., *June 25, 1928.*

HON. W. R. BROADDUS, JR.,  
*Commonwealth's Attorney,  
Martinsville, Virginia.*

MY DEAR MR. BROADDUS:

I beg leave to acknowledge receipt of yours of the 21st in which you submit the following for an opinion:

"Mr. Tilden Lester, of Martinsville, owns a large swimming pool and dancing hall just outside of the corporate limits of the town. He charges a general charge of ten cents admission for all persons who enter; an additional charge is made for dancing and swimming. He desires to put on several boxing matches on the 4th of July and wishes to be advised as to the legality of same.

"He will not make any extra charge to see the boxing, but many people will go and pay the ten cents admission in order to see the boxing matches. Therefore, I am of the opinion that under Section 4426 of the Code of Virginia, it is not legal, for that section provides that no admission fee shall be charged, directly or indirectly."

In reply thereto, I am inclined to the opinion that this would be a violation of the provisions of section 4426 of the Code of Virginia, a part of which reads "to see which any admission fee is charged, either directly or indirectly."

From your letter it appears that Mr. Lester charges for the privilege of swimming and dancing, but a general admission fee of ten cents is charged to all persons who enter the dancing hall. It is proposed to have this boxing contest in the dancing hall, therefore, it would seem that the ten cents charge is an indirect charge for the privilege of seeing the boxing match or bout.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**BANKRUPT—Not discharged from debt due Sovereign State.**

RICHMOND, VA., June 20, 1928.

HON. HARRY E. MCCOY,  
*Commonwealth's Attorney,  
Norfolk, Virginia.*

MY DEAR MR. MCCOY:

On Monday I received a telephone call from Mr. Preston T. Taylor, an attorney of your city, with reference to a judgment rendered in favor of the Commonwealth against a certain bankrupt on a forfeited recognizance. From the facts given me by Mr. Taylor, the bankrupt was the surety on the recognizance. He requested me to wire you whether, in my opinion, you were authorized to release the judgment in favor of the Commonwealth on account of the fact that the surety had been discharged in bankruptcy subsequent to the rendition of the judgment.

I have examined section 15 of the bankrupt act and, while the matter is not entirely free from doubt, in my opinion it does not discharge one from obligations due to a sovereign State. See *State v. Shelton*, 47 Conn. 400, *Commonwealth v. Hutchinson*, 10 Pa. St. 466, and *Collier on Bankruptcy*, 1925 edition, pages 610-611. Indeed, it is my opinion that Article I, section 8, clause 4 of the Federal Constitution confers no power upon the Congress of the United States to provide for the discharge in bankruptcy of any person from an obligation which he owes to a sovereign State such as is the Commonwealth of Virginia. Even if the bankrupt act were open to the construction contended for by Mr. Taylor, in my opinion it would be unconstitutional and void, so far as it attempted to discharge an obligation due the Commonwealth of Virginia. If the matter is litigated in the courts, the rights of the Commonwealth should be protected to the fullest extent, and, if I can be of any further assistance to you, I assure you that I shall be glad to give you such help as I am able.

Very truly yours,

LEON M. BAZILE,  
*Assistant Attorney General.*

**BOARD OF SUPERVISORS—Apportionment of School Funds.**

RICHMOND VA., June 13, 1928.

HON. FRED C. PARKS,  
*Commonwealth's Attorney,*  
*Abingdon, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of June 12, 1928, in which you say:

"I quote the resolution of the Board of Supervisors of Washington County adopted at the May, 1928, meeting of the Board.

"On motion, the Commonwealth's Attorney is directed to ascertain from the Attorney General upon what basis school funds received from the State are apportionable among the different districts of this county, particular reference being made to the sum of \$5,880.00 recently received from State Treasurer, known as the Elementary Fund."

"I will appreciate it if you will give me this information."

If you will examine the second paragraph of section 653 of the Code, enacted into law by chapter 471 of the Acts of 1928, pages 1202-1203, commonly known as the School Code, you will see that the school districts have been abolished in the several counties for all purposes except for representation, the levying of a tax sufficient to pay the present school indebtedness, and for future capital expenditures. For all other purposes, the district has been abolished and the school system in the several counties will operate as a county unit.

Therefore, unless the apportionment of the fund referred to is made prior to June 17, 1928, which I take it will be almost impossible, it should be used for the payment of teachers' salaries in the several schools of the county without reference to magisterial districts. See section 701 of the Code, Acts of 1928, page 1221.

Trusting this gives you the desired information, I am

Very truly yours,

JNO. R. SAUNDERS,  
*Attorney General.*

**BOARD OF SUPERVISORS—Borrowing money on temporary loans.**

RICHMOND, VA., June 7, 1928.

HON. T. RUSSELL CATHER,  
*Commonwealth's Attorney,*  
*Winchester, Virginia.*

DEAR MR. CATHER:

I am in receipt of your letter of the 2nd instant, in which you say:

"I would appreciate your advising the extent to which boards of supervisors are permitted to borrow money on temporary loans to supplement revenues from taxes. In other words, please advise whether or not there is any limit beyond which boards of supervisors may not go in borrowing money temporarily for a county in anticipation of taxes to be received by the county."

There is no statute limiting or controlling the discretion of the boards of supervisors as to the amount of money they may borrow temporarily for legitimate county expenses.

Section 2727 allows them a free hand in the matter of levies for county charges and expenses.

I am of the opinion, however, that boards of supervisors should limit the annual expenses of a county, so far as its ordinary expenses are concerned, to its current annual levies.

You will recall that there are a number of instances in which express provision is made for the borrowing of money by boards of supervisors for such extraordinary accounts as could not be reasonably liquidated with its current revenues.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**BOARD OF EXAMINERS OF NURSES—Registration of nurses in State institutions.**

RICHMOND, VA., October 18, 1927.

MISS ETHEL M. SMITH, *Sec.-Treas.*,  
*Virginia State Board of Examiners of Nurses,*  
*Craigsville, Virginia.*

MY DEAR MISS SMITH:

Acknowledgment is made of your letter of October 14, 1927, received on yesterday, in which you say:

“Is there any way in which our law can be interpreted to excuse those graduate nurses who are employed in our State Institutions for the insane from registering? The patients are certainly sick people, as evidenced by the fact that they require nurses to take care of them. According to my own interpretation of the law, they should register, but I want expert advice on same, if you please.”

I have examined the statutes with reference to the registering and practicing of nurses and attendants, and find two sections of the Code, which in my opinion, are applicable to the question submitted by you.

Section 1709 of the Code provides that all persons who have been duly licensed by your board shall be known as registered nurses, and then provides in part:

“\* \* \* it shall be unlawful for any person to practice professional nursing of the sick as such for compensation without a license or certificate in this State, or to advertise as or assume the title of trained nurse or graduate nurse, or to use the abbreviation of ‘T. N.’ or ‘G. N.’, or any other words, letters, or figures to indicate that the person using the same is a trained, registered, or graduate nurse.”

Section 1711 of the Code, which is the only exception that I find to this provision if the statute, with reference to the licensing of attendants for the sick in certain cases, section 1714-A of the Virginia Code of 1924, be disregarded, provides as follows:

“This chapter shall not be construed to affect or apply to the gratuitous nursing of the sick by friends or members of the family, and also it shall not apply to any person nursing the sick for hire, but who does not in any way assume to be a registered or graduate nurse.”

It will be seen from an examination of these sections that, except those persons who engage in gratuitous nursing or those persons who nurse the sick for hire, but who do not in any way assume to be registered or graduate nurses, it is unlawful to practice professional nursing of the sick as such for compensation without a license or certificate.

Therefore, in my opinion, graduate nurses who have not been registered and licensed as provided by law cannot practice professional nursing, even in the State institutions

for the insane, without violating section 1709 of the Code, unless they do so in accordance with the provisions of section 1711 of the Code quoted above.

Trusting this gives you the desired information, I am

Yours very truly,

LEON M. BAZILE,  
*Assistant Attorney General.*

**BOARD OF SUPERVISORS—Application of candidates.**

RICHMOND, VA., October 31, 1927.

MR. J. S. DENUEFVILLE,  
*Yorktown, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of October 25, 1927, in which you state that you filed your application as a candidate for the Board of Supervisors in York County within the time required by law; that, having no opposition, you were declared the Democratic nominee for that party as provided in the primary law, and, therefore, your name did not appear on the primary ballot. You now state that the present incumbent, who was not a candidate in the Democratic primary, has announced his candidacy for the office in the general election for which you have been declared the Democratic nominee.

You then say:

"Now I would like to know whether all Democrats, who voted in the last primary, are under any obligations to me as the Democrat nominee, and, if so, to what extent.

"What help, if any, should I receive from the Democratic party of this county, particularly the members of the party from this district? This is a very important matter to me and to the Democrats of this district. May I not receive an answer from you at once as the election is close at hand?"

Section 246 of the Code provides that, when there is only one declaration of candidacy in a political party for the nomination for any office, the name of the person filing such declaration shall be declared the nominee of such party for the office for which he has announced his candidacy. Therefore, those candidates in the primary, who had no opposition, became the nominees of the primary without being voted for.

Every person, who participated in that primary, is morally bound to support every nominee of the party in whose primary he voted, whether such nominee was nominated by the votes cast in the primary or under authority of section 246 of the Code, and, of course, any person who participated in the Democratic primary, who does not vote for all the nominees of that party in the succeeding election will lose his standing as a member of the Democratic party, and be ineligible to vote in the succeeding primaries. See section 228 of the Code, as amended (Virginia Election Laws, pages 66-67).

I may further add that it is the duty of the Democratic party authorities in your county to render you every assistance in seeing that you, as one of the nominees of the primary, are elected to the office for which you have been nominated.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**BOARD OF SUPERVISORS—Authorizing extension of hunting season.**

RICHMOND, VA., November 2, 1927.

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

DEAR SIR:

Acknowledgment is made of your letter of the 31st ultimo, in which you say:

"In several counties the Boards of Supervisors are passing ordinances re-lengthening closed seasons not in conformity with the provision found in section 3356, Code of Virginia, which reads as follows:

"Provided further that the *current closed* season fixed in section second (subsections (a) and (b)) may be lengthened only by fixing a date for same to take effect as otherwise provided earlier than prescribed in this Act."

"We would like to have your opinion as to whether any ordinance passed by the Boards of Supervisors would be effective longer than the current closed season in which enacted. We would also like to have your opinion as to whether our game wardens should enforce an ordinance passed by boards of supervisors where same did not fully comply with the provisions of the law. The trouble seems to be that these Boards do not seem to understand that they can only *shorten an open season by lengthening the closed season.*"

There are several other provisions of law bearing directly upon the lengthening of the closed season or the shortening of the open season. Paragraph 7 of section 3356 of the Code of 1924 provides:

"The board of supervisors of any county (on written petition of one hundred licensed resident hunters or landowners thereof) shall have the power to shorten the open season in their said county, \* \* \*."

and section 2743 of the Code, as re-enacted twice by the General Assembly of 1926, pages 665 and 871, the quotation from this section in all three places being identical, is only quoted once, and is as follows:

"To prevent the destruction of game, fish, wild fowl, birds, and fur-bearing animals, and to limit still further than is provided by general law the time, manner and means by which they may be taken or killed; the number that may be taken or removed from the county in a given time, and the manner and condition of such removal;"

Under paragraph 2 of section 3356, the open season can only be shortened at the close thereof and not at the beginning thereof. However, there is no such restriction either in paragraph 7 of section 3356 or in the quotation from section 2743 and, under the existing uncertainty as to the authority of boards of supervisors in the matter of lengthening the closed season or shortening the open season, either of which brings about the same result, except in the matter of the part of the season thereby closed, my advice is that your department co-operate to the fullest possible extent with county boards of supervisors and local enforcement authorities, and that you instruct your game wardens to be governed by local regulations as to hunting and, if the results are not satisfactory to your department, that you take into consideration the advisability of amendments so as to clarify the law and to obviate conflicts therein as to future hunting seasons.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**BOARD OF SUPERVISORS—Authorizing extension of hunting season on deer.**

RICHMOND, VA., November 2, 1927.

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

DEAR SIR:

Acknowledgment is made of your letter of October 31, in which you say:

"Herewith is attached copy of an ordinance passed by the Board of Supervisors of Chesterfield County. You will note it has extended the open hunting season on deer provided for in chapter 390, Acts 1926, p. 674.

"We would like to be advised if this Board of Supervisors has not exceeded its authority in extending the open season for hunting deer in said county during the month of December and if so, will it be the duty of our game wardens to arrest and prosecute any person found hunting deer in Chesterfield County during the month of December, 1927?"

With this you enclose a copy of a resolution passed by the Board of Supervisors of Chesterfield County September 19, 1927, changing the open season for hunting deer in that county from the season provided for by the act of the General Assembly of Virginia, passed at its 1926 session.

In my opinion the act referred to governs hunting of deer in Chesterfield County and the Board of Supervisors were without authority to change the season provided for in the said act. Their authority is confined to a change of the general law and does not apply in case of a special act.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**BOARD OF PUBLIC WELFARE—Turn-key fee Richmond City Home.**

RICHMOND, VA., October 3, 1927.

HON. FRANK BANE,  
*Commissioner of Public Welfare,*  
*Richmond, Virginia.*

MY DEAR MR. BANE:

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

"Further in reference to our conversation concerning the right of the Richmond City Home to the 50¢ turn-key fee on all commitments:

"As stated to you, we have agreed with this institution that said fee is not payable where wards of this Department are sent to the City Home for care and treatment, since it is not a commitment but a boarding arrangement, and since this Department retains custody of the children.

"The City Home is, however, of the opinion that they are entitled to the 50¢ turn-key fee with reference to all cases that are committed directly to this institution by either the juvenile and domestic relations court or the police court of the City of Richmond. Section 3510 of the statute provides that said fee shall be paid to sheriffs, sergeants or jailors upon every new commitment to the jail. Insofar as our dealing with the juvenile court is concerned, we have not interpreted this act to mean that detention homes are entitled to the aforesaid fee. More specifically, Mr. Morton, superintendent of the Richmond City Home, wishes to know whether his institution is entitled to a turn-key fee for persons who are committed directly to his institution for care and treatment by the courts of the City of Richmond."

Section 3510 of the Code of 1919 provides a committal fee of 50¢ for a jailor. This term has a well defined meaning in this State as disclosed by our legislation, and is confined in its meaning to the officer in charge of a jail. See chapter 115 of the Code and the numerous sections therein with reference to jailors.

A poorhouse is not, in my opinion, a jail, even though it be used for the purpose of detaining and treating certain diseased persons. In this connection I call your attention to section 1914 of the Code of 1919, as amended, in the last paragraph of which it is provided:

“The same fees or allowance shall be paid by the State for children boarded out or held in a detention home as are now paid for prisoners confined in jail.”

This statute, in my opinion, is not broad enough to authorize the payment of a commitment fee for receiving a person in such detention home. Obviously a person cannot be confined in jail until he has been received therein.

I further call your attention to sections 1519 and 1543 of the Code of 1919 relating to the quarantine of persons suffering from venereal diseases. Both of these statutes expressly provide that, except in the case of convicts in the penitentiary, no part of the expense shall be borne by the State.

It is, therefore, my opinion that the superintendent of the City Home is not entitled to a fee of 50c. for receiving a person in such home, even though when committed there by a court for the purpose of receiving treatment for an infectious disease.

Yours very truly,

LEON M. BAZILE,  
*Assistant Attorney General.*

#### BOARD OF EXAMINERS FOR NURSES—Certificate to practice.

RICHMOND, VA., July 6, 1927.

MISS ETHEL M. SMITH, *Secretary-Treasurer,*  
*State Board of Examiners for Nurses,*  
*Craigsville, Virginia.*

MY DEAR MISS SMITH:

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

“A certain Miss Griffith was registered in 1904, as a non-graduate, under the waiver. She then entered training at the Memorial Hospital, was granted one year for some previous training she had had, and graduated from the Memorial in 1906. Had Miss Griffith applied for certificate of registration as a graduate in 1906, when she did graduate, she would have been entitled to registration without examination, but as she already held a Virginia State Certificate of Registration, she decided it was unnecessary to secure any other certificate.

“She is now in an institutional position in Honolulu, and writes us that they insist that she produce a certificate of registration as a graduate nurse, and she wishes us to issue same. You understand she never made application for this until in September, 1926, twenty years after she was entitled to it, and the granting of same now, without examination, presents a good many difficulties. The Board of Examiners feels it has no more right to issue her a certificate of registration, without examination, than it would to any of those who failed to apply for this during the period of waiver.

“I wrote Miss Griffith, telling her that my records showed she was registered in 1904, as a non-graduate, and that I also verified the fact that she did graduate from the Memorial Hospital in 1906, and would, therefore, have been entitled to registration, as a graduate, without examination and suggested that she present my letter to the Secretary in Honolulu, but evidently she is averse to taking their examination, and they are not willing to grant her registration without same.”



When Miss Griffith registered as a nurse in 1904, she registered under authority of section 6 of chapter 191 of the Acts of 1902-3-4, approved May 1, 1903, which reads as follows:

"Any person who shall show to the satisfaction of the board that she or he graduated from a training school of a general hospital of good standing prior to the first day of January, nineteen hundred and four, or that she *or he was engaged in the practice of professional nursing of the sick on the date of the passage, of this act shall be entitled to a license without passing an examination:* provided such application shall be made within twelve months after the passage of this act." (Italics supplied.)

Section 7 of that act provided as follows:

"All persons who have duly received licenses or certificates in accordance with the provisions of this act shall be known and styled a registered nurse, and it shall be unlawful after one year from the passage of this act for any person to practice professional nursing of the sick as such for compensation without a license or certificate in this State, or to advertise as or assume the title of trained nurse or graduate nurse, or to use the abbreviation 'T. N.' or 'G. N.,' or any other words, letters, or figures to indicate that the person using the same is a trained, registered, or graduate nurse."

In granting a license to a nurse without examination the board was not authorized to make any distinction between a graduate nurse and one who was engaged in the practice of professional nursing of the sick on the date of the passage of this act, namely, May 1, 1903. The license, when granted, in my opinion placed each holder thereof upon exactly the same professional standing, so far as the law is concerned.

When the board granted Miss Griffith a license as a professional nurse in 1904, she became licensed as a professional nurse in this State for all purposes, and in my opinion, in view of the provisions of section 7 of the act above quoted, was entitled to practice professional nursing of the sick for compensation and to advertise as or assume the title of trained nurse, or registered nurse, because, under the Virginia law, as soon as she received her certificate she became a registered nurse.

When Miss Griffith subsequently graduated from the training school of the Memorial Hospital, which is a recognized school in this State, she immediately became entitled to place after her name graduate nurse, or "G. N.," if she so desired.

This being so, it is my opinion that the records of your board, if they do not accord with this opinion, should be corrected so as to accord with the law. As I have said, however, Miss Griffith is unquestionably entitled, in view of the provisions of the above quoted act, to use the title registered nurse, as she was in fact a registered nurse within the meaning of the Virginia law as it existed in 1904, as soon as her registration was completed and a license issued to her by law.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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#### BANKS AND BANKING—Construction of statute pertaining thereto.

RICHMOND, VA., June 13, 1928.

HON. WALLER HOLLADAY,  
*American National Bank,  
Richmond, Virginia.*

MY DEAR SENATOR:

Acknowledgment is made of your letter of June 11, 1928, in which you call attention to section 73 of chapter 507 of the Acts of 1928, which section authorizes the personal

representative of a decedent to continue his decedent's endorsements for the period of one year without personal liability to such personal representative. You then say:

"The validity of the Act is questioned by several attorneys with whom we have conferred, because of the title to the Bill. The provision in question is of interest at the moment, and, if I am not exceeding the bounds of propriety, I will be very much obliged if you will give me your interpretation of the validity of the Act in this respect."

The title to this Act, Acts of 1928, page 1304, is as follows:

"An ACT to revise, collate and codify into one act the general statute of the Commonwealth relating to banks and banking, which act shall constitute and be designated and cited as the Virginia banking act, and to repeal all Code sections and all acts and parts of acts inconsistent therewith and to provide penalties for the violations thereof."

Section 73 is not limited in its provisions to banks and trust companies who are personal representatives of decedents, but is generally applicable to all personal representatives of decedents.

Our Court of Appeals has been extremely liberal in construing section 52 of the Constitution, which requires the object of a law to be expressed in its title. *Dickens v. Radford, etc., R. Co.*, 121 Va. 352; *Bosang v. Iron Belt Bldg., etc., Ass'n*, 96 Va. 119; *District Road Board v. Spillman*, 117, Va. 201, 204; *Bunkley v. Com.*, 130 Va. 55; *Cochran v. Com.*, 122 Va. 801.

In the case of *Bowman v. State Entomologist*, 128 Va. 351, the court held that although there is more than one subject dealt with in a statute, if the subjects are all congruous, have a natural connection with, are germane to, and are reasonably necessary for the accomplishment of the one object of the statute, the Constitutional provision that no law shall embrace more than one object, which shall be expressed in its title, is satisfied.

In *Richmond v. Pace*, 127 Va. 274, the court held that the title of an act of the General Assembly is sufficient if it gives notice of the general subject of the act, and of the interests likely to be affected thereby.

Of course, it is impossible for me to say definitely what the courts will hold when this matter is finally presented to them for a decision. It seems to me, however, the provision referred to is germane to the object expressed in the title, and has a legitimate and natural association therewith, and for this reason would probably be upheld by the courts.

Sincerely yours,

JNO. R. SAUNDERS,  
*Attorney General.*

#### COMMONWEALTH ATTORNEY—Fees in prohibition cases.

RICHMOND, VA., February 23, 1928.

HON. CLAUDE R. WOOD,  
*Commonwealth's Attorney,*  
*Dillwyn, Virginia.*

DEAR MR. WOOD:

I am in receipt of your letter of the 20th instant, in which you inquire as to the amount of fees to which an attorney for the Commonwealth is entitled under section 46 of the Layman Act, and I note what you say as to the fees provided under section 3505 of the Code.

In my opinion, the fee is \$10 when payable out of the State treasury, the fee of \$20 being limited to those cases in which the punishment prescribed may be death.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**COMMONWEALTH ATTORNEYS—Fees in prohibition cases.**

RICHMOND, VA., May 18, 1928.

HON. S. L. WALTON,  
*Commonwealth's Attorney,  
Luray, Virginia.*

DEAR MR. WALTON:

I am in receipt of your letter of the 15th inst., and I note what you have to say in reference to fees allowed attorneys for the Commonwealth, and especially provisions of section 46 of the Layman Law as amended by chapter 231 of the Acts of 1926.

In your letter you quote from section 46 as follows:

"And in every case where a conviction is had on the final hearing the attorney for the Commonwealth shall be allowed a fee of twenty-five dollars, to be taxed with the costs and paid for by the defendant, inclusive of the fee allowed at the preliminary hearing. Where there is no conviction, or the defendant is insolvent, then the fee to be paid the attorney for the Commonwealth shall be as in felony cases."

You then ask:

"Does this section, or clause rather, only apply to cases which are tried in the circuit court, as no preliminary trials are had in mayor's or special justice's court—as they dispose of the cases before them, or is it broad enough to cover cases of misdemeanor prohibition on a plea of guilty before a magistrate or justice of the peace?"

In my opinion the provision applies to trials in the circuit court, so far as the provision you have quoted controls. However, I am further of the opinion that in all trials before a mayor or a special justice, the provisions of section 33 apply as to fees of attorneys for the Commonwealth as well as all other officers. The last sentence of section 33 provides:

"In entering such judgments the trial justice shall tax in the cost against the defendant the same fees and awards in favor of those charged with the enforcement of this act as is elsewhere herein provided for prosecutions in courts of record."

The change as to the fees when an accused pleads guilty before a magistrate reducing the fee for the attorney for the Commonwealth from twenty-five dollars to ten dollars was made by the Legislature of 1926 in response to a feeling in the Legislature that an attorney for the Commonwealth should not be paid more than that amount where pleas of guilty are entered.

I am not advised as to whether the subject of fees in mayor's or special justice's court was considered, but as you say there is no preliminary trial before mayors unless they are acting as justices of the peace, and then only mayors of towns in which there is no prohibition ordinance. This being so, the Legislature made no change in the allowance in cases tried before mayors under town ordinances, and cases tried before special justices.

Should appeals be taken from judgments of conviction by mayors and trial justices, and trials had in circuit courts, there is only one fee of twenty-five dollars to be taxed against the accused upon his conviction.

That portion of section 46 providing for a fee of ten dollars to the attorney for the

Commonwealth in preliminary hearings does not really amount to anything so far as the fee to be taxed against a person convicted is concerned, as that amount is specifically included in the fee of the attorney for the Commonwealth upon final conviction.

In those cases in which the accused is discharged by a magistrate, or acquitted by a jury, fees of the attorney for the Commonwealth are controlled by section 3505 of the Code, fees for a magistrate being five dollars, and for a trial in a court ten dollars. These allowances are, of course, paid by the Commonwealth, as other criminal charges.

Where the prosecution is before a mayor, or other officers, for violation of the town ordinances, section 37 provides for the payment of all costs by the towns or cities, and I should say that the attorney for the Commonwealth would be entitled to the same fees as to which he would be entitled in trials in circuit and corporation courts.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### CONSTITUTION—Amendments to.

RICHMOND, VA., *February 6, 1928.*

HON. JOHN W. McCAULEY,  
*House of Delegates,*  
*Richmond, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of February 1, 1928, in which you say:

"The joint resolution, which has for its purpose the submitting to the people the question of the amendment of section 170 of the Constitution so as to allow the assessment of abutting property for the improvement of streets, etc., is now before the Courts of Justice Committee of the House of Delegates. On yesterday, it was referred to a sub-committee, composed of Messrs. Hammack and Bader and myself, who are to report back on the question of whether or not the resolution is in proper shape.

"I presume that you have heard of the point that has been raised. The question arises on account of the amendment by the vote of the people of the same section in the fall of 1927, after the same resolution had passed the session of 1927. The point is that some doubt the legality of the submission, since at the time that this resolution was passed by the last General Assembly the section in question was one thing and now, when it comes again before the General Assembly, it is another thing. Personally, and as Chairman of the sub-committee, I would like to have the opinion of the Attorney General on the question raised."

It appears that the General Assembly of 1924 (Acts of 1924, pages 772-773) proposed an amendment to section 170 of the Constitution. The General Assembly of 1926 (Acts of 1926, pages 474-475) agreed to the proposed amendment, which was submitted by the Extra Session of 1927 (Acts of 1927, pages 8-11) to the voters of the State as required by section 196 of the Constitution to be voted on at the election held on the Tuesday after the first Monday in November, 1927. At this election the proposed change in section 170 of the Constitution was approved and ratified by the electors of the State, and thereby became a part of the Constitution.

It also appears that at the Extra Session of 1927 (Acts of 1927, pages 45-46) the General Assembly proposed a new amendment to section 170 of the Constitution, which is entirely different from the amendment proposed by the General Assembly of 1924, approved by the General Assembly of 1926. The question presented for my opinion, therefore, involves the determination of the validity of the proposal that the General Assembly of 1928 approve the proposed amendment to section 170 of the Constitution as submitted to it by the General Assembly of 1926 at its Extra Session in 1927 (Acts of 1927, pages 45-46).

Section 196 of the Constitution reads as follows:

"Any amendment or amendments to the Constitution may be proposed in the Senate or House of Delegates, and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, with the ayes and noes taken thereon, and referred to the General Assembly at its first regular session held after the next general election of members of the House of Delegates, and shall be published for three months previous to the time of such election. If, at such regular session the proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the General Assembly to submit such proposed amendment or amendments to the people, in such manner and at such times as it shall prescribe; and if the people shall approve and ratify such amendment or amendments by a majority of the electors, qualified to vote for members of the General Assembly, voting thereon, such amendment or amendments shall become part of the Constitution."

Although the most important step in changing the Constitution is a favorable vote by the electors, as was pointed out by Marshall, J., in *State ex rel. Postel v. Marcus*, 160 Wis. 354, 359-360 (1915), "that does not warrant the sovereign will being overruled as to any other step."

It is my opinion that the provisions of section 196 of the Constitution of Virginia are mandatory and not directory merely and, of course, any action of the General Assembly, and even of the people of the State, except in conformity with the provisions of the Constitution, would be void. So far as I have been able to ascertain, the precise question involved here has been considered and definitely passed upon by only two courts: first, by the Appellate Division of the Supreme Court of New York in *Browne v. City of New York*, 213 App. Div. 206, 215-216 (1925), and, second, by the Court of Appeals of that State in the same case, 241 N. Y. 96 (1925). The Appellate Division decided, on facts almost identical with those involved in the case here and under a constitutional provision very similar to section 196 of our Constitution, that the proceedings proposed here would be invalid when carried out. The New York Court of Appeals in the last cited case reversed the Appellate Division and held that, after the amendment had been submitted and ratified by the voters of the State, the proceedings were valid.

I have read the opinions of both courts with much care and, after careful deliberation, it is my judgment that the opinion of the Appellate Division, although reversed, is much better reasoned than the opinion of the Court of Appeals reversing the same. The language of the Court of Appeals, it seems to me, ignores the basic and fundamental rule that constitutional provisions are mandatory and are to be strictly observed and followed.

In the opinion of the Appellate Division, in declaring such a proceeding invalid, the court said (213 App. Div. 215-216):

"It is just as essential that the proposed amendment shall be referred to the Legislature to be chosen at the general election of Senators next succeeding the proposal of the amendment and that it shall be published for three months previous to the time of the holding of such general election of Senators, as it is that the people shall vote upon such proposed amendment after the choice of Senators at the general election succeeding the publication of the proposed amendment. The theory of this provision clearly is, that the electorate who are to choose the Senators, and, necessarily, the Assemblymen, shall be informed of the exact nature of the amendment proposed, and shall, in the light of such information, cast their ballots for such members of the Senate and of the Assembly as shall reflect the views of a majority of the electorate as to the desirability of submitting such proposed amendment to a vote.

"It is, therefore, manifest that if the people, at a general election at which Senators are to be chosen and prior to which a proposed amendment to one of the articles of the Constitution has been published, shall adopt an amendment to

that very article, which not only changes its terms, but amounts to a redeclaration of the fundamental principle contained in the article as therefore existing, and which becomes a part of the Constitution on the first of January following, such proposed amendment, as a result of the action of the electorate, no longer relates to the same article of the Constitution to which it referred at the time when it was agreed to be submitted to the Legislature to be chosen at the next general election of Senators. A new article has taken the place of and has superseded that to which the amendment was proposed. The notice embodied in the publication of the proposed amendment relates to a constitutional provision which had been changed prior to the time when the Legislature chosen at the election was organized. If, as in the present case, the proposed amendment referred to the Legislature in 1922 could be voted upon at the general election in 1923, it would, in 1922, have related to a provision of the Constitution different from that to which it would relate in 1923. The people who were informed in 1922 by the publication of the amendment as then proposed, would have in their minds a proposal different from that upon which they would vote in 1923. That would nullify the manifest purpose of section 1 of article 14 of the Constitution."

Our court has never considered the specific question here involved, but from what was said by it in *Scott v. James*, 114 Va. 297, 303 (1912), I am inclined to think that, if the issue did come before the Court of Appeals, it would adopt the reasoning of the Appellate Division in *Browne v. City of New York*, *supra*, rather than the reasoning and opinion of the Court of Appeals of that State.

In *Scott v. James*, *supra*, our court said, quoting from the opinion of the trial court adopted as the opinion of the Court of Appeals (p. 303):

"\* \* \* In acting under section 196 the legislature is not engaged in the exercise of ordinary legislative functions; that is, it is not passing a general statutory law for the government of the people. In another sense, however, the legislature is engaged in performing legislative or law-making work, because the making or amending of a Constitution is the establishing of the highest law for the people; but while engaged in bringing about the establishment of such a higher law the legislature is not acting alone and has no power to act alone, but under section 196 of the Constitution the legislature and the people of the State must act conjointly, \* \* \*."

As you know, the opinion of the New York Court of Appeals would not be binding upon the Court of Appeals of Virginia when it came to consider this question, and, inasmuch as by a slight delay all question of doubt could be eliminated, I would suggest that the safest course to pursue would be for the General Assembly of 1923, instead of agreeing to the amendment proposed by the Extra Session of 1927, to start the process of amending section 170 of the Constitution over again. The matter is a serious one and should not be complicated by grave questions as to the validity of the process by which the amendment is sought to be effected, when they can be so easily avoided by delay of two years.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### COMMISSIONER OF FISHERIES—Validity of oyster leases.

RICHMOND, VA., February 28, 1928.

HON. A. L. JORDAN,  
*House of Delegates,*  
*Richmond, Virginia.*

MY DEAR MR. JORDAN:

Acknowledgment is made of your letter of February 24, 1928, in which you say in part:

"Pursuant to the attached resolution, the Committee to Investigate the Oyster Industry respectfully requests that you furnish it an opinion on the validity of the leases in question.

"You were present at the first hearing before the committee and are familiar with the facts, as per copy of transcript of the record attached."

The resolution referred to in your letter provides for the appointment of a legislative committee to investigate the oyster situation, "including the present administration of the Commissioner of Fisheries; and make inquiry as to the validity of the leases in question," (Mobjack Bay), as to which a controversy has arisen between the tongers and certain lessees, among them Mr. F. W. Darling and associates.

It is my understanding from the transcript of the evidence furnished here, and from statements made at the various conferences, that Mr. Darling and certain other parties applied for and obtained leases to certain tracts of oyster planting ground in Mobjack Bay under authority of section 3225 of the Code; that these tracts were turned over to Mr. Darling for operation and the rent paid by him; that any profits arising from the operation of these oyster planting grounds are divided between Mr. Darling and the other lessees from the Commonwealth, and that all losses are borne by Mr. Darling.

I understand that the validity of these leases has been, and is now, the subject of litigation. The validity of each lease presents a question of both law and fact, and I do not find that there is sufficient evidence in the transcript furnished me with your communication upon which to base an opinion as to the validity of each of the leases.

In this connection I call the attention of the committee to a statement made by Mr. C. S. Smith, counsel for the tongers, which is found on page 49 of the transcript, in which he says:

"I think that it will be necessary for you gentlemen to receive evidence as to what the real facts about the Mobjack Bay controversy are, and about the way the Commission of Fisheries conducts its affairs, which I understand to be the scope of your investigation, and with just a statement from me and a statement from Mr. Darling of our views of this situation, I don't think the committee will be able to make a report to the General Assembly of any value."

The transcript furnished me only contains statements relative to this matter made by Mr. C. S. Smith and Mr. F. W. Darling. It contains no evidence. However, I presume it is the desire of your committee that I give you my views as to the construction of section 3225 of the Code of Virginia, which said section deals with the question of the assignment of oyster planting grounds.

Your committee, of course, is aware of the fact that the construction of this section has been recently involved in a suit in the circuit court of Gloucester before Hon. Claggett B. Jones, Judge of that circuit. I understand that the court withheld its opinion, due to the fact that the matter in controversy was compromised and it became unnecessary for the court to render its opinion. I do not know whether or not the suit has been dismissed, or whether it is still pending, and naturally I have some hesitation in expressing an official opinion. However, since requested by your committee I feel it my duty to give you my views in connection with this statute.

It will be seen from a reading of section 3225 as to leases of oyster planting ground, other than in the Chesapeake Bay, the language of this section is as follows:

"\* \* \* no such assignment shall exceed two hundred and fifty acres."

With reference to leases in the Chesapeake Bay found in the next sentence, the language is "\* \* \* the number of acres, if such an assignment be made, shall not exceed five thousand to any one applicant \* \* \*." The difference between the two provisions will be readily observed.

The provision of the law is very definite and clear as to the number of acres a planter can acquire and hold in the Chesapeake Bay, namely, not exceeding five thousand acres. When it comes to an assignment elsewhere, the law is definite that no one assignment must exceed two hundred and fifty acres. But, the intention of the Legislature as expressed in the language of the statute is not so clear that a planter cannot obtain a subsequent assignment so long as this assignment does not exceed two hundred and fifty acres. It is my understanding that the several commissions of fisheries in construing this statute have, in a number of instances, construed the two hundred and fifty acre limitation to apply to one assignment, and has permitted further assignment to the same applicant.

Our Supreme Court has given great weight to the construction of statutes placed thereon by the heads of departments, whose duty it is to administer the law relating thereto. In this connection I would refer your committee to the following cases:

*Smith v. Bryan*, 100 Va. 199;  
*Virginia, etc., Co., v. Kidd*, 120 Va. 426;  
*Richmond v. Drewry Hughes Co.*, 122 Va. 178;  
*Superior Steel Corporation v. Commonwealth*, 147 Va. 202.

I also call your attention to section 3228 of the Code, which allows any person having leased oyster grounds to sub-rent or assign his rights to any resident of this State, or to a corporation authorized by law to occupy and hold oyster planting ground. This section provides in part:

"The sub-renter, or assignee, shall have all the rights and privileges of the original renter, for the unexpired term of the original lease, \* \* \*."

This statute, you will see, does not prohibit a sub-lease or assignment of oyster planting ground to a planter holding another oyster ground.

In my opinion, it was evidently the purpose of the Legislature to limit the holding of one person, firm or corporation to five thousand acres in Chesapeake Bay, and two hundred and fifty acres in other oyster waters of the State. However, the issue is involved in great uncertainty by reason of the doubtful language contained in section 3225 of the Code, and nothing short of a judicial decision, or the amendment of the statute by the General Assembly, can definitely determine and settle the question presented to me, for an opinion, by your committee.

In view of the large business interests involved, I suggest that section 3225 of the Code be amended so as to clearly express the intention of the Legislature as to the number of acres any one person, firm or corporation may hold or operate, either by original assignment, or by reason of lease or transfer from the party to whom the original assignment was given.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### CAPITATION TAXES—Widows and wives of Confederate veterans exempt.

RICHMOND, VA., March 21, 1928.

MR. R. L. BURKE,  
*County Treasurer,*  
*Appomattox, Virginia.*

MY DEAR MR. BURKE:

In reply to your letter of March 19th in which you desire to be advised whether wives or widows of Confederate Soldiers are required to pay capitation taxes for the years



1925 and 1926 as a prerequisite to voting, I beg leave to state the following: the amendment to the Constitution which was ratified at the last November election is found on page 9 of the Acts of the special session of the Legislature, 1927, and is in the following language:

"No person, nor the wife or widow of such person, who, during the late war between the States, served in the army or navy of the United States, or of the Confederate States, or any State of the United States, or of the Confederate States, shall at any time be required to pay a poll tax as a prerequisite to the right to register or vote. The collection of the State poll tax assessed against any one shall not be enforced by legal process until the same has become three years past due."

Unquestionably, the wives or widows of persons who served during the late war between the States in the army or navy of the United States, or of the Confederate States, or any State of the United States, or of the Confederate States, are not required to pay poll taxes for any year as a prerequisite to voting. Of course, you understand that this does not relieve these parties from paying capitation taxes except as a prerequisite to vote. There can be no doubt about this in my mind.

It, therefore, follows that these wives or widows can register and vote without paying capitation taxes either for the years 1925, 1926 and 1927.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**CLERKS—Fees in prohibition cases.**

RICHMOND, VA., *February 10, 1928.*

MR. R. GRAY BEVERLEY, *Clerk,*  
*Corporation Court,*  
*Winchester, Virginia.*

DEAR SIR:

Your letter of yesterday has been received, in which you state that Winchester has adopted the prohibition law and ask to be advised as to what fees you would be entitled to from fines, confiscation and sales of automobiles which you pay to the City Treasurer.

While there is no express provision entitling you to a commission on fines collected for prohibition cases appealed to and tried in your court, I should say that you would be entitled to five per cent commission allowed on fines collected and turned into the State Treasury.

Your city is entitled to all fines in prohibition cases and must pay all the expenses. There is no provision by which a town or city is authorized to institute forfeiture proceedings against vehicles used in the illegal transportation of ardent spirits. Such proceeding should be by the Attorney for the Commonwealth of the county or city, but in the name of the Commonwealth, and the money should be accounted for to the State Treasurer after all of the officers have received the commissions provided for by the general law.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**CLERKS—Fees of.**RICHMOND, VA., *January 16, 1928.*MR. S. R. HURLEY, *Clerk,*  
*Grundy, Virginia.*

DEAR SIR:

I beg to acknowledge receipt of your letter of January 14, in which you ask for certain information in reference to clerks' fees. The fees are as follows:

For recording delinquent lands for the non-payment of taxes, under section 2428 of the Code, you are entitled to 10 cents.

For certifying the list to the treasurer, under section 2460 of the Code of Virginia, you are entitled to 10 cents.

For recording list, taxes and levies other than on real estate where the treasurer is unable to collect, in the insolvent personal property book, I do not find that you are entitled to any fee.

For services under section 2471 and 2489 of the Code, you will note such fees are covered in the above mentioned sections 2428 and 2460.

All of these fees are payable out of the delinquent land fund.

Hoping this will furnish you the desired information, I beg to remain

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**CHAUFFEURS—Required to obtain license.**RICHMOND, VA., *January 27, 1928.*MR. K. C. MOORE,  
*Attorney at Law,*  
*Harrisonburg, Va.*

DEAR SIR:

I am in receipt of your letter of the 23rd instant, in which you ask whether or not an owner of a truck operating under an E certificate is required to secure a chauffeur's license, and whether or not a taxi driver is required to have a like license.

I am of the opinion that both are required to obtain chauffeurs' licenses.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**COUNTY SCHOOL BOARD—Authority to borrow money from literary fund.**RICHMOND, VA., *January 30, 1928.*HON. HARRIS HART,  
*Superintendent of Public Instruction,*  
*Richmond, Va.*

DEAR MR. HART:

I am in receipt of your letter of the 25th instant, in which you inform me that a question has arisen in Lancaster county as to the authority of the county school board of that county to borrow money from the Literary Fund, I presume, for the purpose of erecting a school building and to levy a county tax for the repayment of the loan.

The law is in great confusion as to whether or not money loaned by the Literary Fund is county or district indebtedness. Under chapter 34 of the Code, money can be loaned by the Literary Fund to school districts for the purpose of erecting buildings, and the board of supervisors is authorized to levy a district tax for its repayment.

Chapter 423 of the Acts of 1922, page 737, may or may not have intended the elimination of districts and the creation of the county as a unit for all purposes as well as for that of administration. If such was the intention, the act was not clear and explicit in its provisions to carry the intent into effect. Nowhere in that act does it specifically authorize a county levy for the erection of school buildings. It does, however, provide in section 4:

"Nothing in this act shall be construed to affect the present plan of levying district as well as county, school taxes, nor to affect the obligations of any district for bond issues for school purposes or other debts peculiar to that district."

In section 6 it undertakes to provide for an estimate by the county school board to be furnished the board of supervisors for the needs of the next scholastic year for the support of the public schools of the county, the estimates to include money for necessary overhead charges, for instruction, for operation, for maintenance, for auxiliary agencies, for miscellaneous, including treasurers' commissions, and for permanent capitalization. Whether or not the provision for permanent capitalization is intended to include a county fund for building purposes is a question of great uncertainty. That, however, is the only provision which can be construed to provide for a county levy for building purposes.

In your letter you refer to chapter 73 of the Acts of Assembly of 1923, page 95, and say that it provides that all property theretofore vested in district boards is by that act vested in county boards. In this you are correct. But I do not think that the language of that act can be construed as authorizing a county levy to provide for district school buildings. In my opinion, the act referred to leads to a contrary conclusion, as it in terms allows the use of the profits of the funds referred to for the erection of school houses, with a proviso that if the fund does not exceed \$2000, the board may, if in their judgment expedient, use such fund in whole or in part in the erection of school houses in their counties.

The question as to whether school districts were abolished by the act of 1922 was before the Court of Appeals in *Gilbert v. County School Board*, in an appeal from the Circuit Court of Arlington County, 137 Va. 109. The court in that case held, in effect, that school districts were not abolished.

In an opinion given Mr. J. G. Henning, a school trustee of Chesterfield County, November 10, 1925 (Report of the Attorney General 1926, p. 149) I held that levies should be laid for both a county and district tax and that there was nothing in chapter 423 of the Acts of 1922 in conflict with my opinion.

Undoubtedly, money can be borrowed by a county school board for the purpose of erecting buildings in school districts, and a levy is authorized in such districts for its repayment.

Whether or not a county levy can be laid for the repayment of a loan is a question upon which I am not prepared to express an opinion.

I understand that there is now before the Legislature a bill to clarify the school situation. The Legislature should undoubtedly make provision for the present uncertain condition of the school law in reference to county and district school taxation.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**COUNTY TREASURER—Authority to levy on personal property for taxes on real estate.**

RICHMOND, VA., May 1, 1928.

MR. A. B. RICHARDS,  
County Treasurer,  
Leesburg, Virginia.

DEAR MR. RICHARDS:

I am in receipt of your letter of April 27, in which you ask if a county treasurer can levy and sell personal property for taxes on real estate and personal property belonging to the person in possession of such property, though there are liens on both the real estate and the personal property. You also ask if a person can claim a homestead or poor debtor's exemption as against taxes.

Section 2439 of the Code provides that any goods and chattels belonging to a person assessed with taxes may be distrained and sold for such taxes. Section 2443 provides that no deed of trust or chattels shall prevent the same from being distrained and sold for taxation against the grantor of the deed, as long as such goods and chattels remain in his possession; nor shall any such deed prevent the goods and chattels conveyed from being distrained and sold for taxes assessed thereon, no matter in whose possession they may be found.

Sections 6552, 6553, 6555 and 6562 make provisions for poor exemptions. Section 6563 provides that none of the articles nor the wages mentioned in those sections shall extend so as to give an exemption as to State, county or corporation taxes.

You can levy and sell personal property for State, county and corporation taxes assessed on real estate or on personal property belonging to the owner of the personal property. A tax debtor can claim no exemption against his taxation, neither the homestead nor the poor law exemption.

Yours very truly.

JNO. R. SAUNDERS,  
Attorney General.

**CANDIDATES FOR CONGRESS—Date for filing declarations.**

RICHMOND, VA., April 6, 1928.

HON. H. EARLTON HANES,  
Attorney at Law,  
Woodward Building,  
Washington, D. C.

MY DEAR MR. HANES:

I am in receipt of your letter of April 4, 1928, in which you say:

"Will you kindly refer to the Acts of the General Assembly of Virginia, extra session of 1927, Chapter 65, page 157, and advise me whether or not it is necessary for a candidate for the House of Representatives, U. S. Congress, to file his declaration of candidacy sixty, or ninety days before the date of the primary in order to have his name placed on the ballot for use in that primary. I note that the section specifies that 'for an office filled by election by the qualified voters of the state at large, at least ninety days,' should make and file a written declaration of candidacy, etc."

I have carefully examined the provisions of the Act referred to in your letter and there can be no doubt but that a candidate for Congress is required to file his declaration of candidacy sixty days before the primary, and not ninety days, because a candidate

for Congress is to be voted for by the qualified voters in his congressional district and not by the qualified voters of the State at large, the ninety days applying to an office filled by election of the qualified voters of the State at large.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**COMMONWEALTH ATTORNEYS—Duty to enforce Sunday observance law.**

RICHMOND, VA., *February 11, 1928.*

REV. W. S. LEAKE, *Pastor,*  
*First Baptist Church,*  
*Hopewell, Virginia.*

MY DEAR MR. LEAKE:

Acknowledgment is made of your letter of February 9th, in which you ask if the judge of a corporation court, or the Commonwealth's Attorney, has the right and power to close stores which sell merchandise other than necessities on Sunday. Section 4570 of the Code of 1924 provides as follows:

"If a person on a Sunday be found laboring at any trade or calling, or employ his apprentices or servants in labor or other business, except in household or other work of necessity or charity, he shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than five dollars for each offense.  
\* \* \*"

I am unable to find any other section pertaining to the Sunday observance law. Of course, it is the duty of the Commonwealth's Attorney to enforce this law.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**CONSOLIDATION, OF PUBLIC OFFICES—Superintendent of public welfare and superintendent of poor.**

RICHMOND, VA., *January 28, 1928.*

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

MY DEAR MR. GLOTH:

I beg to acknowledge receipt of your letter of January 26th, in which you ask for an opinion on the question of consolidation of the offices of the local superintendent of public welfare and superintendent of the poor.

I find that under section 110 of the Constitution of Virginia the office of superintendent of the poor is created, and it derives its right of function under section 2794 of the Code. The duties of the superintendent of public welfare are created under section 1902i of the Code.

In my opinion, I see no reason for a conflict in the duties of these offices as the statute well defines the duties in each, and there is no legal reason for not consolidating them.

Trusting this will give you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**CHILD LABOR LAW—Children doing farm work, etc.**RICHMOND, VA., *November 29, 1927.*

MRS. MARY L. SCROGHAM, *Director,*  
*Women and Children's Division,*  
*Department of Labor and Industry,*  
*Richmond, Virginia.*

DEAR MRS. SCROGHAM:

I beg leave to acknowledge receipt of your letter of recent date, which is as follows:

"I would appreciate very much a ruling by you on that part of the Child Labor Law mentioning work on farms as an exemption. There seems to be a question in the minds of some judges as to how far this exemption extends. Some claim that work around the markets selling farm products, shelling peas, or like work, is farm work and therefore, is exempted from the law. I contend that, as the law states 'work on farms,' these occupations are not exempted, and would therefore appreciate your ruling on this."

In this connection I have very carefully read section 3 of the Child Labor Laws of Virginia and am of the opinion that that part of this section which states "work on farms" does not mean that children can be employed around the markets selling farm products, shelling peas or like work. I think the statute means actually working on the farms and not away from the farms.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**COMMON CRIER—Services of.**RICHMOND, VA., *November 25, 1927.*

HON. THOMAS H. HOWERTON,  
*Commonwealth's Attorney,*  
*Waverly, Virginia.*

MY DEAR MR. HOWERTON:

Acknowledgment is made of your letter of November 23, 1927, in which you say:

"The question has been raised here in the Town of Waverly, as to whether or not a common crier who pays his \$5.00 license to the proper authorities of the County of Sussex and has a county license as a common crier, and lives outside of the corporate limits of the Town of Waverly, has no office within the Town of Waverly, but when he comes within the corporate limits of the Town to sell a farm on the outside of the corporate limits the local town authorities demand of him that he pay a town license in the Town. Is that correct?"

"I have advised this common crier that the Town of Waverly has no authority to require of him to pay a town license and that the Town of Waverly has no authority to pass any such ordinance, in view of section 71 of the Appendix in the Code of 1924, which reads in part as follows:

"A person licensed as a common crier may, except in cities of over 15,000 inhabitants, cry for sale at any place in the county or city, in which his license is issued, any property, real or personal \* \* \*"

"Am I correct in my construction of the law and is such a common crier as described above, liable for a town license? I await your reply with much interest."

I am of the opinion that you have correctly interpreted section 71 of the Tax Bill and that when a common crier complies with the provisions of that section and section 72 of the Tax Bill he cannot be required to obtain an additional town license.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**COMMONWEALTH ATTORNEY—Eligibility as inheritance tax commissioner.**RICHMOND, VA., *December 15, 1927.*

HON. QUINTON G. NOTTINGHAM,  
*Attorney at Law,*  
*Eastville, Virginia.*

DEAR MR. NOTTINGHAM:

I have your letter of the 14th, together with copy of letter to you from Honorable C. H. Morrisett, State Tax Commissioner, in which you ask me for my opinion as to the eligibility of an attorney for the Commonwealth to act as inheritance tax commissioner.

The statute under which such commissioner is appointed provides that the judge of the circuit court of every county and city shall designate a commissioner—presumably a commissioner in chancery—to investigate and report upon estates.

This duty is not incompatible with that of attorneys for the Commonwealth and, as no question has hertofore been made to the designation of commissioners to positions of like character and as the State Tax Commissioner is of the opinion that you are eligible to continue to perform the duties pertaining to the assessment of inheritance taxes, I see no reason why you should not continue to act in that capacity.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**COMMISSIONER OF AGRICULTURE—Construction of statutes.**RICHMOND, VA., *December 1, 1927.*

HON. GEORGE W. KOINER, *Commissioner,*  
*Department of Agriculture and Immigration,*  
*Richmond, Virginia.*

DEAR SIR:

Your letter of November 25 has been received. In this letter you quote at length from correspondence between your office and that of certain representatives of the Federated Fruit and Vegetable Growers, Inc., New York City, having referred to the application of certain sections of the Code of Virginia requiring commission merchants to register and obtain certificates from the commissioner and to post with him a bond for the protection of customers. In your letter you ask:

First—Whether your office has properly construed the law as to commission merchants in holding that the Federated Fruit and Vegetable Growers, Inc., are amenable to its provisions. In my opinion you have properly construed the law.

Second—If there is any statute which exempts from the provision of the law a co-operative organization that solicits, receives on consignment, and sells for the account of the consignee on commission, farm products, whether consigned by members of the organization or not. I can find no law that makes any distinction. Of course, where persons associated together employ an agent who operates strictly for his employers, he nor they will be subject to the law applicable to commission merchants. I do not understand, however, from your correspondence that such is the conduct of business in the case cited in your letter.

Third—You ask as to whether a distinction should be drawn between a co-operative association that solicits, receives and sells farm products on commission for members only and one that does not confine itself to members. I do not understand that such distinction exists.

Fourth—In view of answers to your first three questions, an answer to the fourth is unnecessary.

The passage of chapter 53a of the Code confirms me in the opinions I have expressed. This chapter provides for co-operation of agricultural interest and for the formation of associations with certain powers for certain purposes, but I do not understand that the Federated Fruit and Vegetable Growers, Inc., have undertaken to incorporate under this chapter of the Code.

From all of the correspondence, it does not appear that any of the benefits usually anticipated by co-operative selling has been available to persons dealing with the growers, and I can see no reason why they should be exempted from the provisions of law relating to permits to commission merchants.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### CONVICTS—Time for good behavior.

RICHMOND, VA., December 21, 1927.

L. GRAFTON TUCKER, ESQ.,  
*Attorney at Law,*  
*Lovingsion, Virginia.*

MY DEAR MR. TUCKER:

Acknowledgment is made of your letter of December 19, 1927, in which you say in part:

"There are two person in the Nelson County jail for a period of thirty days, being so sentenced for the violation of the prohibition laws of Virginia. The judgment of the court reads as follows:

"That Robert Carroll be and is hereby sentenced to the State Convict Road Force for one month, the term of the jail sentence imposed upon him aforesaid."

"My construction of section 2094 of the Code is that all persons sentenced to the State Convict Road Force, whether or not they actually served the sentence upon the road force, are entitled to a deduction of one-third of their sentence for good behavior. In these particular cases the parties were sentenced to the road force but, the period of thirty days being so short, the State would not receive them.

"I contend that these parties sentenced to the State Convict Road Force, now in jail, are entitled to have deducted from their sentence one third of the time for good behavior."

You then request my opinion as to this matter.

Section 2094 of the Code reads as follows:

"All persons sentenced by any of the courts of this Commonwealth, or by a justice of the peace, to work on the public roads or in public quarries, in lieu of jail sentence, and all persons confined in jail who are worked on said road or quarry force, shall be allowed credit for good behavior on their sentences to the same extent and upon the same terms as are provided for convicts in the penitentiary. When any prisoner is sentenced by any court or justice to work on the public roads or quarries, it shall be the duty of the judge or justice immediately to notify the superintendent of the penitentiary of such sentence in each case."

Section 5017 of the Code allows a deduction of ten days per month for convicts in the penitentiary for good conduct.

In my opinion section 2094 of the Code applies to every person sentenced to the Convict Road Force whether he serves the time on the road force or in jail. Therefore, the prisoners referred to in your letter are entitled to the deduction authorized by section 5017 of the Code, if their behavior has been good during the time they served in jail.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*



**COMMONWEALTH'S ATTORNEY—Fees of, in prohibition cases.**

RICHMOND, VA., March 30, 1928.

HON. J. E. PARROTT,  
*Commonwealth's Attorney,*  
*Standardsville, Virginia.*

MY DEAR MR. PARROTT:

Acknowledgment is made of your letter of March 27, 1928, in which you say:

"There are several cases of prohibition violations involving the capture of small quantities of ardent spirits in the possession of different parties. It is my desire to have these cases finally disposed of before a magistrate on a plea of guilty this next Saturday.

"There has arisen some contention as to whether my fee in such a case, where there is a final disposition before a magistrate, is \$10.00 or \$25.00. The fourth paragraph of section 20, page 420, Acts of 1926, has been pointed out to me as fixing the amount of my fee in a case finally determined before a magistrate, while the third paragraph of section 46, page 425, provides that in every case where a conviction is had on the final hearing the attorney for the Commonwealth shall be allowed a fee of \$25.00 to be taxed with the costs and paid by the defendant. Of course, I am anxious that the fee to which I am legally entitled be allowed me. I will appreciate it very much if you will write me your opinion on this point so that I may have it by Saturday morning."

If you will examine section 46 of the prohibition law as it appears in the Acts of 1924, you will see that the provision with reference to the fee of \$25.00 on a final hearing is contained in that section. The second paragraph of section 46, as amended by the Acts of 1926, which provides a fee of \$10.00 in misdemeanor cases before justices of the peace, is new, and, being the later amendment to this section, would take priority over the new which is now the third paragraph of that section.

Therefore, it is my opinion that, where a misdemeanor prohibition case is finally disposed of before a justice of the peace, other than a prosecution under sections 17 and 18 of the prohibition act, the fee of the attorney for the Commonwealth is \$10.00.

Trusting this gives you the desired information, I am

Very truly yours,

LEON M. BAZILE,  
*Assistant Attorney General.*

**CHILD LABOR—Children under age must have permit.**

RICHMOND, VA., February 24, 1928.

MRS. MARY L. SCROGHAM, *Director,*  
*Women's and Children's Department,*  
*Department of Labor and Industry,*  
*Richmond, Virginia.*

DEAR MADAM:

I am in receipt of your letter of yesterday, in which you inform this office that at a food show now in progress in Richmond children between the ages of 14 and 16 years are playing in an orchestra after six o'clock in the evening, and you ask an interpretation of the law as to the legality of their being employed in this way.

Children between the ages of 14 and 16 years should not be allowed to play after six o'clock P. M. in any public place, for which services they are being paid directly or indirectly, and prior to six o'clock P. M. they should have the permit provided for in the Child Labor Law.

Yours very truly,

EDWIN H. GIBSON,  
*Assistant Attorney General.*

**COMPTROLLER—Payment of fuel tax to various counties.**RICHMOND, VA., *August 21, 1928.*

HON. F. R. COMBS

*Comptroller,**Richmond, Virginia.*

MY DEAR MR. COMBS:

Acknowledgment is made of your request of this morning that I advise you whether, in my opinion, the comptroller would be authorized to pay to the several counties of the State that portion of the motor vehicle fuels tax appropriated to the several counties of the State for the maintenance of roads and bridges in the several county highway systems, and for the construction and reconstruction of such roads, in view of the enactment of the segregation laws, by reason of which taxes are no longer collected by the State on real estate and tangible personal property.

Section 4 of the law, which provides a tax on motor vehicle fuels, as amended by chapter 137 of the Acts of 1926, appropriates sixty-six and two-thirds per centum of the revenue derived from the present tax on motor vehicle fuels for use in the construction, et cetera, of roads in the State Highway System. Thirty-three and one-third per centum of the revenue derived from this tax, under the present law, is appropriated primarily for the maintenance of the roads and bridges embraced in the several county highway systems, et cetera, on the following basis provided in section 4 of said Act as amended:

“ \* \* \* in accordance with chapter four hundred and twenty-six of the Acts of Assembly of nineteen hundred and eighteen, and Acts amendatory thereof, and shall be apportioned quarterly among the several counties of this State in the same proportion and in the same manner as the State aid money is now distributed to said counties under existing law. Any balance remaining after such maintenance may then be applied to the construction or reconstruction of the roads and bridges embraced in such county highway systems. The counties shall be required to match said sums to the extent of one-third of said sum.”

It is provided by section 3 of chapter 426 of the Acts of 1918, in part, that the State money aid “shall each year be apportioned among all the counties of the State, except those counties excluded from such apportionment by the provisions hereinafter contained in paragraph seven of this Act, according to the respective total amounts of State taxes paid into the treasury from such counties on real estate, personal property, income and capitation tax the next preceding fiscal year.”

After a careful consideration of the above quoted provision of chapter 426 of the Acts of 1918, it is my opinion that the dominant object of the General Assembly was to apportion this gas tax among the several counties of the State on the basis of taxes on all the items or classes mentioned therein, and that the words “the next preceding fiscal year” were employed for the purpose of definitely fixing the period to be covered in computing the apportionment on the basis set out in the statute and not as a limitation on the items on which such apportionment is to be made.

While it is true that, under the laws putting into force tax segregation in Virginia, taxes on real estate and tangible personal property are no longer imposed by the State, nevertheless, in the absence of any amendment to section 4 of the motor vehicle fuels tax law, it would be the duty of the comptroller to apportion and pay out to the several counties of the State thirty-three and one-third per centum of the revenue derived from the four and one-half cent motor vehicle fuels tax. No authority, in the absence of a change in the law, would exist for an apportionment of this portion of the gas tax other than in accordance with chapter 426 of the Acts of 1918 and any Act amendatory thereof.

Therefore, in my opinion, if section 4 of the motor vehicle fuels tax law, as amended by chapter 137 of the Acts of 1926, remains, it would be the duty of the comptroller,

in making the apportionment, to take into consideration all the items mentioned in the Act of 1918 and, in doing so, he should include the taxes paid on real estate and tangible personal property for the year 1925, the last year for which such taxes were imposed by the State.

In view of the fact that the clear legislative intent was to include such taxes among the taxes on which the apportionment is to be made, it is my opinion that it would be the duty of the comptroller to do so as outlined above, in the absence of some direct legislative enactment to the contrary.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**CHAIN STORES—License on.**

RICHMOND, VA., February 15, 1928.

HON. WILBUR C. HALL, *Chairman,*  
*House Finance Committee,*  
*Richmond, Virginia.*

MY DEAR MR. HALL:

Acknowledgment is made of your letter of February 14, 1928, in which you say:

"At a meeting of the House Finance Committee, held on yesterday afternoon, the committee had under consideration a bill, a copy of which is herewith enclosed together with proposed amendments, which bill imposes a tax upon chain stores. The committee directed me to ascertain from you your views as to the constitutionality of this proposed law, and I would appreciate it if you would let me have your opinion by Wednesday afternoon, in order that I may lay it before the Committee."

Your letter did not reach me until five o'clock yesterday afternoon and, therefore, it has been impossible for me to give the subject of your inquiry any extended consideration, in view of your request that an opinion be given you in time for the meeting of your committee this afternoon. I have, however, given the bill such consideration as the limited time permitted me to do.

The bill is entitled "A bill to impose a license on all persons, firms, or corporations, operating more than five stores in Virginia, said license to be on each store so operated and to be in addition to the licenses imposed by law on merchants based on purchases."

The first paragraph of your bill reads as follows:

"Be it enacted by the General Assembly of Virginia, That every person, firm, or corporation, engaged in the business of a merchant and operating, directly or indirectly, more than five stores in this State shall, in addition to the license imposed by law on merchants based on purchases, pay for each store in excess of five, the sum of two hundred and fifty dollars per year for each store so operated, the said sum to be assessed by the Commissioner of the Revenue, and paid to the Treasurer at the time, now or hereafter provided by law for the payment of merchant's licenses in this State."

Of course, as you know, it is impossible for me to definitely say what the Court of Appeals of this State and the Supreme Court of the United States would ultimately decide as to the validity of this particular Act. However, from my examination of the opinion of our Supreme Court in *Standard Oil Company v. City of Fredericksburg*, 105 Va. 82 (1906), the decision of the Court of Appeals of Kentucky in *City of Danville et al v. Quaker Maid, Inc.*, 211 Ky. 677, 43 A. L. R. 590 (1925), and the very comprehensive

annotation to this case in 43 A. L. R. pages 592-595, it would appear almost inevitable that the courts would hold the proposed bill if enacted into law to be invalid.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**COMMONWEALTH'S ATTORNEY—Fee in confiscation of automobile.**

RICHMOND, VA., *February 1, 1928.*

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

DEAR SIR:

I have before me copy of the letter of Mr. Day of January 30 to Honorable W. R. Broaddus, Jr., attorney for the Commonwealth of Henry county, Virginia, relative to an allowance of Mr. Broaddus' claim against the State in the matter of an information filed by him against one Ford automobile, motor No. 13996792, in which Mr. Day wrote him that, acting upon my advice, he had disallowed an item in Mr. Broaddus' fee account against the Commonwealth of Virginia. I also have Mr. Broaddus' letter to Mr. Day, dated January 31, in reference to the same claim, and I note that Mr. Broaddus is of the opinion that the provision of law quoted by him from page 423 of the Acts of 1926, providing a fee to the attorney for the Commonwealth for filing information in the matter of proceedings against an automobile, where the automobile is not confiscated, covers his claim.

I do not construe his quotation to warrant the allowance claimed. The paragraph from which his quotation is taken covers the matter of a defense to an information in which any person interested may appear and be made a party defendant and contest the confiscation of the automobile. I take it that the contest provided for in that paragraph applies to a defense based upon the innocence of the automobile, and that the fee allowed the attorney for the Commonwealth as against the Commonwealth is limited to those cases in which there is a failure to establish the fact that the *car* is *guilty* of having been used in the unlawful transportation of ardent spirits.

My advice to Mr. Day was based upon the construction of the first paragraph on page 424 of the Acts of 1926, which provides:

“ \* \* 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.”

You will notice that that section provides that, in case the automobile is not confiscated or that there was a valid lien, the attorney for the Commonwealth shall receive a fee of \$10.00, to be taxed against the automobile or defendant, except in cases of theft, in which event, notwithstanding the guilt of the car, no costs are given against the automobile or defendant, but the same are paid by the Commonwealth.

This paragraph, immediately following the last paragraph on page 423, in my opinion, applies to the proceedings under that paragraph, and you will notice that therein relief is granted an innocent owner and lienor, without notice, and I take it that it was

the intention of the Legislature, when it granted innocent owners or lienors relief from the forfeiture of an automobile, it required them, and not the Commonwealth of Virginia, to pay the fees allowed attorneys for the Commonwealth and officers making the seizure.

I am enclosing copy of this opinion, as you may desire to send it to Mr. Broaddus.

Yours very truly,

EDWIN H. GIBSON,  
*Assistant Attorney General.*

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COMMISSIONER OF GAME AND INLAND FISHERIES—Expenditures.

RICHMOND, VA., *March 28, 1928.*

HON. E. R. COMBS, *Comptroller,*  
*Richmond, Virginia.*

DEAR MR. COMBS:

Mr. Tyus, of the Commission of Game and Inland Fisheries, has just handed me a letter written him by you, under date of the 27th instant, and signed for you by Mr. A. B. Gathright, Assistant Comptroller, in which letter Mr. Tyus is informed that bills, contracted prior to March 1, 1928, amounting to \$707.02, on account of items of legitimate expenditure in the Commission of Game and Inland Fisheries, are now being held in your office unpaid, and that refusal to pay these bills is based upon a recent ruling of the Attorney General.

The ruling of the Attorney General to which you refer was not meant and does not cover the payment of the items referred to. I have been advised by Mr. Gathright personally that the opinion to which your letter refers was given in response to your letter of February 21, in which you stated that you understood that several of the State departments and institutions had exceeded their appropriations for the year ending February 29, 1928, and that consequently the payment of these bills could only be made out of the appropriation for the year ending February 28, 1929.

My opinion was based upon a construction of section 5, chapter 136, Acts of 1926, page 234. This section expressly relates to expenditures in excess of appropriations and specifically prohibits payment thereof without the consent of the Governor, in writing; makes every person concerned in the payment of an excess expenditure personally liable and subject to removal from office by the Governor. Construing that section as applicable to your inquiry, I held that payments of amounts in excess of the appropriations were illegal and could not be made without consent of the Governor in writing.

The subject of the present inquiry is of an entirely different character. Previous to the 1928 session of the General Assembly, the expenditures of the Department of Game and Inland Fisheries were not included in the general appropriation bill or in any appropriation bill. By section 8 of chapter 295 of the Acts of 1926, the total expenditures of that department were limited to the amount of the game protection fund specifically set aside to that department. By chapter 356, page 648, of the Acts of 1926, the department was required to furnish budget estimates for the period beginning July 1, 1926, and ending February 29, 1928, to the Governor for his approval, or revision and approval, and with the further provision that the game fund can only be expended in the amounts and for the purposes set out in such estimates.

My information is that there was to the credit of the Commission of Game and Inland Fisheries in excess of \$14,000 on the 29th day of February, 1928. At the same time, there were a number of outstanding obligations of the Commission which are, in part, included in the items now before you for payment.

These items should be paid out of any fund remaining in the treasury on the 1st of March to the credit of the game protection fund. In my opinion, bills for legitimate expenses contracted for before the 1st of March, 1928, are a charge upon such unexpended balance in the treasury and need no appropriation by the legislature to make a fund available for that purpose. In no case, however, should bills be paid in excess of the amount available to the Commission for its legitimate expenditures.

Until the present appropriation bill, with the exception of the law applicable to budget estimates furnished the Governor, the Department or Commission of Game and Inland Fisheries was not within the appropriation bill. But, however that may be, I am of the opinion that bills for expenses incurred by that or any other department, payable prior to the 1st of March, 1928, are payable out of any surplus remaining to the credit of any fund against which the charge may be made. Certainly section 5 of

the appropriation act of 1926 does not cover expenses of amounts less than the appropriations. It was not intended to interfere and restrict the payment of expenses within an appropriation, but was intended solely to protect the interests of the State from unauthorized expenses in excess of the appropriations made and money allotted for the administration of particular departments of government.

The bills presented to your office by the Commission of Game and Inland Fisheries, within the fund remaining to their credit, February 29, 1928, should be paid out of that fund.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

### CONVICTS—Sentenced to capital punishment.

RICHMOND, VA., *January 17, 1928.*

MAJOR R. M. YUELL,  
*Superintendent of the State Penitentiary,  
Richmond, Virginia.*

MY DEAR MAJOR YUELL:

I beg leave to acknowledge receipt of your letter of January 17th.

In this you state that you are today in receipt of a court order from the Hustings Court of the city of Richmond, which order sentences one Shirley Winningham to be electrocuted on January 25th, 1928. You then call my attention to section 4942 of the Code, which contains the law relating to the transfer of a convict to the penitentiary; how death sentence executed, and so forth. One of the provisions contained in this section is as follows:

"Not more than thirty nor less than fifteen days before the time fixed, in the judgment of the court, for the execution of said sentence, the Superintendent of the Penitentiary shall cause to be conveyed to the said penitentiary such condemned felon in the manner now prescribed by law for the conveyance of felons sentenced to confinement in the penitentiary, \* \* \*."

You then state that you cannot comply with this provision of that section, as you only received the order today as the date for execution having been fixed in said order for January 25th, which is not fifteen days between the reception of the order and the date of execution.

It is my opinion that this provision of the statute as to time is merely directory, and it is your duty to send for Shirley Winningham, take him to the penitentiary and electrocute him on the 25th of January, the time fixed in the court order for said execution.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

### COMMISSIONERS OF REVENUE—Fees of.

RICHMOND, VA., *June 26, 1928.*

HON. J. J. TEMPLE,  
*Commonwealth's Attorney,  
Prince George, Virginia.*

DEAR MR. TEMPLE:

Colonel Saunders handed me for investigation your letter of the 7th instant, concerning the amount of commission to which county commissioners of the revenue are entitled and especially as to whether chapter 510 of the Acts of 1928 supersedes chapter 576 of the Acts of 1926.

In my opinion, the Act of 1926 fixes the commission of commissioners of the revenue upon the basis of commissions allowed these officers under section 2349 of the Code. The Act of 1928 specifically provides the commission. I take it that you desire an opinion as to whether or not commission due your commissioners is based upon the higher commission allowed in the 1928 Act to commissioners in cities, or the lower rate allowed county commissioners.

In my opinion, the commission is controlled by that paragraph of the law providing commissions to county commissioners and not by the provision providing for commissions to city commissioners. You will notice that the 1926 act provides commissions for the year 1927 and thereafter until otherwise provided by law. An alteration of the law applying to commissions was made in the Act of 1928 and, in so many words, applies to commissioners of the revenue on and after the first day of January, 1928.

I take it that the foregoing is applicable to your query as to whether or not the segregation act of 1926 is still applicable or repealed as to commissions. While the Act of 1928 does not refer to the Act of 1926, it deals with the same subject, and, as the commissions provided in the two acts are dissimilar, the later Act providing the amount of commissions is effective and, to the extent in which the two are in conflict, the later Act controls.

Yours very truly,

EDWIN H. GIBSON,  
*Assistant Attorney General.*

#### CONSTITUTIONAL AMENDMENTS—When effective.

RICHMOND, VA., June 8, 1928.

HON. I. G. VASS,  
*Town Manager,*  
*Galax, Virginia.*

MY DEAR MR. VASS:

Acknowledgment is made of your letter of June 7, 1928, in which you request me to advise you when the constitutional amendments will go into effect, if ratified by the people in the special election to be held on June 19, 1928.

The language of section 196 of the Constitution is as follows:

“ \* \* \* if the people shall approve and ratify such amendment or amendments by a majority of the electors, qualified to vote for members of the General Assembly, voting thereon, such amendment or amendments shall become part of the Constitution.”

Therefore, if ratified, these amendments will go into effect immediately, and will be in force on and after their ratification.

Trusting this gives you the desired information, I am,

Very truly yours,

JNO. R. SAUNDERS,  
*Attorney General.*

#### COMMONWEALTH ATTORNEYS—Fees in prohibition cases.

RICHMOND, VA., June 6, 1928.

MR. MERIWETHER I. ARMISTEAD,  
*Attorney-at-Law,*  
*Surry C. H., Virginia.*

MY DEAR MR. ARMISTEAD:

I am in receipt of your letter of yesterday, asking as to the fees allowed several officers upon the trial of prohibition cases before justices of the peace.

You are entirely correct in your conclusion that the fees of officers making arrests and attorneys for the Commonwealth appearing at a trial before the magistrate are limited to \$10.00 for the officers and \$10.00 to attorneys for the Commonwealth.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**COMMONWEALTH ATTORNEYS—Fee in confiscation of automobile.**RICHMOND, VA., *October 4, 1927*U-DRIVE-IT Co.,  
*Norfolk, Va.*

GENTLEMEN:

Your letter of the 3rd instant, containing the following request, has been received:

“Please advise the amount of fee that a Commonwealth’s Attorney is entitled to in the case of an automobile which has been charged with the illegal transportation of liquor and wherein the court rules that the car be returned to the owner upon the payment of costs.”

Under section 28 of the Layman Act, as amended by the Acts of 1926, there will be found on page 424 this provision:

“\* \* 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.”

You will see from the last phrase of the above quotation that where the automobile was stolen from the owner or person in possession no costs or fee is charged against the owner or lienor to whom relief is granted, and in all other cases where relief is granted the owner or lienor is required to pay a fee of \$10.00 to the attorney for the Commonwealth. Where it was stolen and no fee is payable by the owner or lienor the attorney for the Commonwealth is entitled to a fee of \$12.50 to be charged to the Commonwealth.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.***CONSERVATION AND DEVELOPMENT COMMISSION—Authority to obtain printing through State printer.**RICHMOND, VA., *October 27, 1927.*HON. E. O. FIPPIN, *Executive Secretary and Treasurer,*  
*State Conservation and Development Commission,*  
*Richmond, Virginia.*

DEAR MR. FIPPIN:

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

“Section 384 of the Laws of 1922, at page 734, says that all offices, departments, boards and institutions located at the seat of government shall have their printing done through the State printer. This Commission would like to get an interpretation from you on the following point:

“The Geological Survey and the Forest Service are located at Charlottesville and before their consolidation as a part of the Conservation and Development Commission they were clearly outside of the seat of government, and not affected by the section quoted above. Now that they report to the State Conservation and Development Commission, which has its office at the seat of government, would those two divisions be regarded as technically at the seat of government and, therefore, required to have their printing done through the State printer?”



The Commission on Conservation and Development is a department of the State government located at the seat of government. Section 3 of chapter 169 of the Acts of 1926 merged the State Geological Commission, the State Geological Survey, the office of the State Geologist and the office of the State Forester with that of the Commission on Conservation and Development.

I am advised by you that, pursuant to the provision of section 4. or the last paragraph of section 3, of the above Act, the State Commission on Conservation and Development has taken the necessary action to consolidate or merge the above named agencies with the Conservation and Development Commission.

It is, therefore, my opinion that the printing of the Geological Survey and the Forest Service, which are agencies of your Commission, must be done through the State Public Printer.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**CLERKS—Salaries, commission, fees.**

RICHMOND, VA., *August 5, 1927.*

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

MY DEAR MR. MOORE:

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

“Mr. William H. Duncan, Clerk of the Circuit Court of Arlington County, has made report of fees, allowances, salaries, commissions, etc., as clerk of that court, also report as clerk of the Trial Justice Court to be so considered with respect to receipts, expenses and annual allowance.

“Chapter 233, page 427, Acts 1926, amending and re-enacting sub-sections 11 and 12 of the Code section 4988 and adding a new sub-section, 14, provides the Clerk of the Circuit Court of each county affected by this section shall serve as clerk to the said trial justice appointed for his county and provides fees he shall receive, etc. This Act was approved March 23, 1926, but Code section 4988 as an entirety was amended and re-enacted by Act approved March 25, 1926 (two days later) chapter 511, page 862, Acts 1926, section 2 of which Act, on page 866, provides that all acts or parts of acts in conflict are repealed.

“It seems to me the Act of March 23, 1926, chapter 233, page 427, Acts 1926 is repealed by provisions of Act of March 25, 1926, which is chapter 511, page 862, Acts 1926, and Mr. Duncan is not required to act as clerk of the trial justice court and not entitled to fees, but if he is entitled to fees that it is not a separate and distinct office, but an office he holds by virtue of being clerk of the Circuit Court of the county, and the fees should be included in his report as Clerk of the Circuit Court and considered in determining excess, if any, to be paid by him.”

I have examined chapter 233 of the Acts of 1926 amending section 4988 of the Code, chapter 511 of the Acts of 1926 again amending section 4988 of the Code, and while I am not certain whether the last amendment of the section repeals the amendment or amendments contained in chapter 233 of the Acts of 1926, I am of the opinion that it is unnecessary to determine this question in view of the fact that under the provisions of the eleventh sub-section of section 4988 of the Code of 1919 as amended by chapter 233 of the Acts of 1926 the clerk of the Circuit Court of the county is made the clerk of the Trial Justice Court by virtue of his office as clerk of the Circuit Court of the county. Therefore, in my opinion such clerk holds but one office and in making his returns under

the West Fee Bill he should make but one report, namely, a report as clerk of the Circuit Court, in which report he should include all fees collected by him as clerk of the Trial Justice Court under authority of section 4988, as amended by chapter 233 of the Acts of 1926.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**CONVICTS—Sentence to run concurrently.**

RICHMOND, VA., *August 4, 1927.*

MAJOR R. M. YOELL, *Superintendent,*  
*State Penitentiary,*  
*Richmond, Virginia.*

MY DEAR MAJOR YOELL:

I have before me the papers in the case of J. Raymond Joo, from which it appears that on October 13, 1922, he was sentenced by the Hustings Court of the city of Norfolk to serve five years in the penitentiary for grand larceny; that this sentence was suspended, and on August 9, 1923, it appearing that he had not been of good behavior, the suspension of execution was revoked and an order entered requiring him to serve five years in the State penitentiary. It further appears that on July 16, 1923, he was convicted of grand larceny in the Hustings Court of the city of Richmond and sentenced to be confined in the penitentiary for a period of one year. I am informed by you that prior to this time he had been sentenced to the penitentiary and had served a term there and been discharged therefrom.

In accordance with the statute in such cases made and provided, when he was received in the penitentiary a second time he was indicted in the Circuit Court of the city of Richmond, and that court on May 16, 1924, imposed an additional sentence of two and a half years, to commence at the end of his present term of confinement in the penitentiary.

You ask me to advise you whether any of these terms run concurrently. In response thereto, I call your attention to 8 R. C. L., Title "Criminal Law," sec. 242, where it is said:

"When different sentences are imposed by different courts it seems that it is not necessary that the sentences should state that the second term is to begin at the expiration of the first."

It would, therefore, seem that the first two sentences above referred to, having been imposed by separate courts, would not run concurrently and, of course, the sentence imposed by the Circuit Court of the city of Richmond would not begin until the other two had been served.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**CONTRACTS—Conditional sales.**

RICHMOND, VA., *July 19, 1927.*

BUCYRUS COMPANY,  
*South Milwaukee, Wisconsin.*

GENTLEMEN:

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

"Our corporation sells considerable property in interstate commerce in your State under conditional sales agreements. Formerly the law required us to send to the county or corporation clerk a copy of our contract, together with a memorandum abstract thereof. The clerk would then file the memorandum and return the contract with an endorsement reading: 'Memo filed and docketed' with the name of the office, the date, the book and page and the hour. An amendment of 1923 dispensed with the filing of the memorandum. The Conditional Sales Service to which we subscribe interprets this amendment as making necessary the filing of the original contract.

"Most of the clerks in your State still continue to use the old rubber stamp, which is unquestionably incorrect, as it does us no good to have our contract returned with the endorsement that a memorandum has been filed and docketed, when no such memorandum has been filed and docketed, and the law no longer makes provision for the filing and docketing of such a memorandum. So that at least, we are correct in insisting that they strike out the 'Memo' in rubber stamping our contract.

"Our present practice is to send two copies of the contract, requesting that one copy be filed, and that the clerk endorse on the other copy: 'contract filed and docketed,' etc. This meets with the approval of most of the clerks. But occasionally one will refuse to keep the contract on file. The most recent occurrence of this sort is in the case of a contract which has just returned to us today from the office of the Clerk of the Chancery Court of the city of Richmond."

The subject of your inquiry is governed by section 5189 of the Code of Virginia, 1919, as amended by the Acts of 1923, page 193. This section requires a reservation of title contract to "be evidenced by writing, signed by the vendor and the vendee, setting forth the date thereof, the amount due, when and how payable, a brief description of the goods and chattels, and the terms of the reservation or condition." It is then provided that such contract shall not be valid as to creditors of or purchasers from the vendee, "unless said writing is filed for docketing with the clerk of the county or corporation, where deeds are admitted to record, as provided by law, in which said goods and chattels may be."

In the second paragraph of section 5189 of the Code it is provided:

"It shall be the duty of the clerk to docket the writings mentioned herein by setting out the above mentioned particulars of the contract in a well bound book, to be called the 'conditional sales book,' and to index the same, thereon, alphabetically, in the name of both the vendor and the vendee, \* \* \*."

I fully agree with you that a memorandum is no longer filed for docketing, and that the endorsement "Memo filed and docketed" is incorrect. I cannot agree with you, however, that the statute requires the contract to be permanently filed in the clerk's office where it is docketed. It is my opinion that, while the statute is awkwardly worded, the intention of the General Assembly was to merely require the filing of the contract for the purpose of having it docketed as provided in this section, and, when it has been docketed, the original contract can be returned by the clerk to the party filing it for docketing.

This has been, as far as I am able to ascertain, the uniform construction placed on the statute by the clerks of the various courts in Virginia, except the clerk of the circuit court of Henry county. I do not think that, once the contract has been docketed in the conditional sales book as provided by the statute, its validity could be in any manner affected by the withdrawal of the original contract.

Trusting that this gives you the desired information, I am

Very truly yours,

JNO. R. SAUNDERS,  
*Attorney General.*

**COUNTY SUPERVISOR—Holding other office.**

RICHMOND, VA., July 11, 1927.

HON. B. CLIFFORD GOODE, *Superintendent,*  
*Henry County School Board,*  
*Martinsville, Virginia.*

MY DEAR MR. GOODE:

Acknowledgment is made of your letter of recent date in which you request me to advise you whether a county surveyor is eligible to hold the office of school trustee. If you will examine section 6441 of the Virginia Code 1924, you will see that it is there provided:

“No Federal, State or county officer, or any deputy of such officer \* \* \* shall be chosen or allowed to act as member of the county school board \* \* \*.”

There are certain exceptions contained in this statute, but the office of county surveyor is not one of the exceptions.

The county surveyor is a county officer provided for by section 110 of the Constitution, and is therefore not eligible to be appointed a member of the county school board.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**DEEDS TO PRIVATE COLLEGES—Taxation of.**

RICHMOND, VA., May 5, 1928.

HON. DAN DRINKARD, *Clerk,*  
*Corporation Court City of Bristol,*  
*Bristol, Virginia.*

MY DEAR MR. DRINKARD:

Acknowledgment is made of your letter of April 4, 1928, in which you request me to advise you whether a deed to a private college, and deed of trust thereon, are entitled to be admitted to record without taxation.

I am of the opinion that such deeds are subject to tax under section 13 of the Tax Bill, and section 2403 of the Code.

I have heretofore ruled that the school houses referred to in section 2403 of the Code, as amended, are public school houses and that private schools are not included within the exemptions of this section of the Code. I sent a copy of this opinion to Mr. Claude Thomas, Clarendon, Virginia, on yesterday.

Very truly yours,

JNO. R. SAUNDERS,  
*Attorney General.*

**DEEDS OF TRUSTS—Recordation tax.**

RICHMOND, VA., April 30, 1928.

HON. E. R. COMBS, *Comptroller,*  
*State Library Building,*  
*Richmond, Virginia.*

MY DEAR MR. COMBS:

Acknowledgment is made of your request of April 28, 1928, that I give you my opinion on the following statement of facts furnished you by Hon. C. W. Woodson, clerk of Campbell county:

"The First Baptist Church of Altavista, in this County has borrowed \$10,000 from Mr. J. J. Anthony, and a deed of trust on the church building and lot securing this amount has been filed for record. I charged \$12.00 tax on this deed but do not feel sure that it should have been done.

"Will you please advise me on this point."

Section 13 of the Tax Bill provides that every deed, except a deed exempt from taxation by law, which is admitted to record, shall be taxed at the rate provided in this section.

The only exception to this statute is found in section 2403 of the Code which provides as follows:

"No deed or contract 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 sub-division of this State; no will shall be admitted to probate; and there shall be no grant of administration on the estate of any decedent, until the tax on such deed or contract, will, or grant is paid to the clerk."

The deed of trust in question is not a conveyance of land as a site for the church and, therefore, is subject to the recordation tax.

In this connection I call your attention to an opinion given by my former assistant, Hon. J. D. Hank, Jr., on May 21, 1923, to the clerk of the Circuit Court of Fluvanna county, in which a similar opinion was expressed, Report of the Attorney General 1922-1923, page 328.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**DEEDS—Taxes on.**

RICHMOND, VA., June 14, 1928.

LEO A. DENIT, *Esq.*,  
*Attorney-at-Law,*  
*Salem, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of June 13th.

It is my opinion that the tax to be paid on the deed admitted to record is to be paid on the consideration paid for the property, or in the cases of gifts and so forth, upon its actual value. See section 13 of the tax bill.

Where the property bought has a deed of trust on it assumed by the purchaser, I think that enters into the consideration and would not be deducted in considering the amount of the tax. Of course, where a deed of trust is put on simultaneously for the purpose of securing the unpaid portion of the purchase price, the amount of such deed of trust would not be deducted from the value of the property in computing the recordation tax. Indeed, the deed of trust would also be subject to tax when admitted to record.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**DEEDS—State tax thereon.**RICHMOND, VA., *May 28, 1928.*

HON. LANDON LOWRY,  
*Attorney-at-Law,*  
*Bedford, Virginia.*

DEAR SIR:

I am in receipt of your letter of the 26th instant, in which you say in part:

"Several years ago the Kent Manufacturing Company executed a deed conveying to the Bedford Woolen Mills, Inc., certain property it owned in the town of Bedford. This deed was properly recorded and the State tax thereon paid to the clerk. I prepared the deed, and afterwards discovered that a recital had been omitted with reference to the meeting of the stockholders authorizing the directors through their proper officers to make the deed. I have since prepared a new deed from Kent Manufacturing Company, conveying the identical property to the present owners, and a question was raised as to whether or not the tax should be paid again for recording this deed."

You then ask as to whether a State tax for recording the second deed should be paid.

Under an amendment to the Tax Code, page 1372 of the Acts of 1928, you will see that no tax is now required for admitting to record a deed of confirmation or correction where the tax has been paid at the time of the recordation of the original deed, provided that the full amount which should have been paid on the recordation of the original deed was in fact paid. This act was an emergency measure and is now in force.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**DEEDS—Subject to taxation.**RICHMOND, VA., *September 22, 1927.*

HON. MENALCUS LANKFORD,  
*Attorney-at-Law,*  
*Seaboard National Bank Bldg.,*  
*Norfolk, Virginia.*

MY DEAR MR. LANKFORD:

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

"The trustees of the Norfolk Lodge No. 39, Loyal Order of Moose, have asked me to write you with reference to the following situation:

"Due to the carelessness of the former secretary, this corporation lost its charter several years ago. It owns its home, worth from \$16,000 to \$18,000 on Freemason Street, and another small property where they take care of indigent members of the order. I have just secured another charter and want to transfer this property from the defunct corporation to the new corporation. It is simply a transfer of course, from the same parties to the same parties, but is being done to clear the title."

You then request me to advise you whether the deed in question can be admitted to record without the payment of the tax required by law.

If you will examine section 13 of the Tax Bill, you will see that it is provided therein that "on every deed, except a deed exempt from taxation by law," a tax must be paid for the recordation thereof. The deeds exempt from taxation by law are specified in

section 2403 of the Code, as amended. This section provides that the only deeds exempt from the payment of the tax required by law are deeds which convey land as sites for schoolhouses or churches, and those which convey property to the State or any subdivision of the State.

It, therefore, appears that the deed in question is subject to tax. I regret that this is the case, but the law is too plain for any other construction.

Very truly yours,

JNO. R. SAUNDERS,  
*Attorney General.*

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**DEEDS—Recordation of.**

RICHMOND, VA., *August 18, 1927.*

MR. F. S. McCANDLISH,  
*Attorney-at-Law,*  
*Fairfax, Va.*

MY DEAR SHIELDS:

I am in receipt of a copy of your letter of August 16, 1927, to Honorable C. Lee Moore, in which you say in part:

“By deed dated April 27, 1927, J. A. T. Hull and others conveyed to Walter A. and Ruth B. Warfield a tract of land described as containing 252 acres, 3 rods and 30 poles. This deed refers to the plat attached thereto and made a part thereof, but when the deed was recorded the plat was not actually attached to the deed because it simplifies the work of the Clerk in copying the plat on the records to have the plat attached. Through some inadvertence the plat was not handed to the Clerk with the deed and when this oversight was discovered a day or two later the Clerk, Mr. F. W. Richardson, stated that under the circumstances he could not record the plat with the deed. We then requested him to allow us to re-record the deed with the plat attached and he agreed to do this, but stated that under your ruling another state tax would have to be paid. It is our understanding that under the law and the interpretation placed thereon by the Attorney General that no additional tax is required where, as in this case, the instrument to be recorded does not convey any additional interest than has already been conveyed.”

You then desire to be advised whether or not any additional tax should be paid to the State for re-recordation of this deed. Unquestionably, no additional tax should be imposed. The State has already collected one tax and where the deed is again recorded without any alteration or change, certainly the State should not collect another.

I would further add that I have discussed this matter with Mr. Moore, the Auditor, and he concurs in this opinion.

Yours very sincerely,

JNO. R. SAUNDERS,  
*Attorney General.*

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**DAVIS CLINIC—Funds from Federal Government turned over to State treasurer.**

RICHMOND, VA., *June 25, 1928.*

HON. FRANK BANE, *Commissioner,*  
*Department of Public Welfare,*  
*State Office Building,*  
*Richmond, Virginia.*

DEAR SIR:

Relative to your inquiry as to whether all funds received by the Davis Clinic from

the Federal Government should be turned into the State treasury, I desire to state that section 10-c, of chapter 33, Acts of Extra Session, 1927, reads as follows:

"Every State department, division, officer, board, commission, institution or other agency owned or controlled by the State, whether at the seat of government or not, collecting or receiving public funds, all monies from any source whatever, belonging to or for the use of the State, or for the use of any State agency, shall hereafter pay the same promptly and directly into the treasury of the State without any deductions \* \* \* provided further that monies paid into the State treasury which are not now payable into the general fund of the treasury, shall be placed to the credit of the respective accounts which are required by law to be kept on the books of the Comptroller, or to the credit of new accounts to be opened on the books of the Comptroller, with such agencies so paying such monies into the treasury."

The contract which the Southwestern State Hospital has with the Veteran's Bureau of the Federal Government, provides that the monies paid by the Veteran's Bureau to the Southwestern State Hospital shall be used for the maintenance of operation of the Davis Clinic, and further that any balance which may accrue shall be used exclusively for capital outlay at the Southwestern State Hospital.

It is, therefore, my opinion that all monies which are received by the Southwestern State Hospital from the Federal Government should be turned into the State treasury; that the Comptroller should keep a separate account of this fund, and that all balances over and above the necessary outlay for maintenance and operation should be used exclusively for capital outlay at the Southwestern State Hospital in such a manner as its board of directors may designate, with the approval of the Commissioner of State Hospitals and the Governor of Virginia.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**EASTERN STATE HOSPITAL—Chauffeurs required to have license.**

RICHMOND, VA., July 19, 1928.

DR. G. W. BROWN, *Superintendent,*  
*Eastern State Hospital,*  
*Williamsburg, Virginia.*

MY DEAR DR. BROWN:

I beg leave to acknowledge receipt of your letter of the 17th. In this you ask whether or not the chauffeurs who are regularly employed by the Eastern State Hospital are required to pay a chauffeur's license tax.

In reply I will state that after an examination of the law, and discussion of the matter with the Motor Vehicle Commissioner, I find there is no exemption for this class of chauffeur. The law it seems contemplates that this license tax should be paid. I do not think the hospital is required to pay it, but it should be paid by each individual just as any other person who is required to pay a license tax to engage in a certain class of business.

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

Yours very sincerely,

JNO. R. SAUNDERS,  
*Attorney General.*



**ELECTIONS—Time of residence in order to vote.**RICHMOND, VA., *July 16, 1928.*MR. JOHN A. HOOKER,  
*Nokesville, Virginia.*

MY DEAR MR. HOOKER:

Acknowledgment is made of your letter of July 13, 1928, in which you state that you will shortly have a school district election; that there are several persons who have moved into the county and district from other States, but who will not have lived there quite two years on November 6, and that there are other persons who have become of age since January, or will be of age prior to November 6. You then ask me to advise you whether the new amendments to the Constitution will permit such persons to pay their capitation taxes now and vote in the special election.

Under section 18 of the Constitution as amended, in order to vote in an election one must have been a resident of the State one year, of the county, city or town six months and of the precinct in which he offers to vote thirty days next preceding the election in which he offers to vote. These are the residence requirements and, if they can be complied with, such persons are entitled, upon the payment of the proper capitation taxes, to register and vote if otherwise qualified.

• Any person, who will have resided in this State for one year on November 6, 1928, will be entitled to vote in that election, provided he has resided in the county, city or town six months preceding that date and in the precinct thirty days. See sections 26 and 35 of the Constitution. If such person moved into Virginia after January 1, 1927, the first year for which he would be assessable with a capitation tax would be for the year 1928. Taxes for 1928 are paid in advance in order for persons to register and vote in the elections held this year, but taxes for this year do not have to be paid six months prior to the election in order to entitle one to vote in the primary or the general election held in 1928, as the year 1928 is not any one of the three years preceding the year 1928. See section 21 of the Constitution.

The same thing applies as to young persons becoming of age after January 1, 1927.

As to your special election, I call your attention to section 83 of the Code (Virginia Election Laws, pages 18-19), a copy of which is enclosed.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.***ELECTIONS—Eligibility to vote.**RICHMOND, VA., *July 14, 1928.*HON. B. GRAY TUNSTALL,  
*City Treasurer,*  
*Norfolk, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of July 13, 1928, in which you refer to my opinion to Colonel T. J. Nottingham, dated July 3, 1928. You then say in part:

"Am I to understand from your letter that any person, who will have been in the State one year prior to November 6, 1928, (if otherwise qualified) may register now and vote in the Congressional primary and the presidential election of this year, by paying 1928 poll taxes under special assessment by the commissioner of the revenue?"

"I am not disputing your ruling in this matter, but I would be glad if you

will refer me to that section of the Constitution under which you have rendered this opinion.

"My contention is that in every case all poll taxes assessed or assessable against an individual must have been paid six months prior to the general election, in order to register and vote. This is my interpretation of the law in the case of a young man becoming of age in June of this year. While I admit he would be qualified to vote in November, my contention is that in order to do so he must have anticipated the payment of his 1928 or 1929 taxes, as the case may be, at least six months prior to the general election."

From what is said in your letter, I am not sure that you understood the particular facts upon which that opinion was based. Colonel Nottingham, in his letter to me, stated that the party referred to became a resident of Virginia after January 1, 1927, but that he would have been a resident of this State at least one year on November 6, 1928. The question I was asked to pass upon was what capitation tax or taxes this person was required to pay as a prerequisite to the right to register and vote, and when such tax or taxes could be paid. I shall try to give you the authority for the opinion expressed by me.

Section 18 of the Constitution was amended June 19, 1923. This section changed the residence requirements so that every citizen of the United States twenty-one years of age, who has been a resident of the State one year, of the county, city or town six months, 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 required by the Constitution, is entitled to vote.

As a prerequisite to the right to vote, a person, except one exempted by section 22 of the Constitution, is required to personally pay, at least six months prior to the election, "all State poll taxes *assessed or assessable* against him, under this Constitution, during the three years next preceding that in which he offers to vote" (section 21 of the Constitution). (Italics supplied.)

If you will examine section 173 of the Constitution, you will see that the General Assembly is authorized and required to levy a State capitation tax only on residents of the State not less than twenty-one years of age, except those pensioned by the State for military services. You will also see from an examination of Schedule A, sections 4 and 5 of the Tax Bill that a State capitation tax is imposed only on the male inhabitants of this State. A similar capitation tax is imposed on every female resident of the State by the Act extending the right of suffrage to women (See Virginia Election Laws, pages 94-95).

Capitation taxes are assessed or assessable as of the first of January of each year. Therefore, when one becomes a resident of Virginia after January 1, 1927, the first capitation tax with which he is assessable is for the year 1928. Section 21 of the Constitution requires the payment of capitation taxes at least six months prior to the election only when they are assessed or assessable for all or any one of the three years preceding the year in which a person offers to vote. As 1928 is not one of the three years preceding the year 1928, such capitation tax may be paid in advance at any time prior to the closing of the registration books, and, if such person is otherwise qualified, he is entitled to register and vote.

In this connection I also call your attention to sections 26 and 35 of the Constitution which relate to the right of a person to register and vote in cases of this kind.

Trusting this gives you the desired information, I am

Very truly yours,

JNO. R. SAUNDERS,  
*Attorney General.*

**ELECTORAL BOARD—Compensation for purging registration books.**

RICHMOND, VA., July 11, 1928.

W. MARSHALL KING, ESQ.,  
*Attorney-at-Law,*  
*Fredericksburg, Va.*

MY DEAR MARSHALL:

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

"Our electoral board has recently ordered and the registrars have just completed a purging of the registration book of the city of Fredericksburg, Virginia, and there is some misunderstanding as to the proper compensation for their services."

You request my opinion as to this matter.

Section 107 of the Code, which provides for the purging of registration books, makes no provision whatever for the payment of registrars for such services. The only section that I find in the Code providing compensation for registrars are Nos. 96 and 98. The first section provides in part:

"\* \* He shall receive a compensation of two dollars for each day that he is sitting as registrar, and one dollar for posting notices, to be paid out of the county or corporation treasury."

You will observe, from an examination of section 107 of the Code, that when the books are ordered to be purged, it is made the duty of the registrar within ten days previous to either of the regular days of registration to post printed notices at not less than three public places in his district, including the voting precinct therein, of the names of all persons who, in the judgment of the registrar, etc., are improperly on the registration books of that district. For this service, it is my opinion that the registrar would be entitled to a fee of \$1.00, as authorized by section 96 of the Code.

As section 107 of the Code requires the registrar to hear the testimony produced for or against the right of the persons named in the notice to have their names retained on the registration books on the regular day of registration, I am of the opinion that, if this work could be completed on the regular day of registration, he would be entitled to no additional compensation for such services. The section provides, however, that, if the work cannot be completed on the regular day of registration, hearings may be had at other times. If the registrar sits for the purpose of purging the books on some other day than the day of registration, for the reason that it could not be completed on that day, then, in my opinion, the registrar would be entitled to compensation of \$2.00 for each day that he sits as registrar for that purpose.

I think that the compensation of three cents for each ten words provided by section 98 of the Code is limited to the list required by that section.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**ELECTIONS—Persons eligible to vote.**

RICHMOND, VA., July 9, 1928.

MR. W. R. TERRILL,  
*Care N. & W. General Officers,*  
*Roanoke, Virginia.*

DEAR SIR:

Acknowledgment is made of your letter of July 7, 1928, in which you say:

"As an election officer, will you kindly advise me, if a person moved in this State March, 1927, by anticipating his 1928 poll tax, will he be entitled to vote in the coming November election?"

Under section 18 of the Constitution, as amended on June 19, 1928, the party in question will be eligible to vote so far as residence is concerned.

Not having been a resident of the State on January 1, 1927, he will be first assessable with a capitation tax for the year 1928. It is only taxes which are payable for any one of the three years preceding the year in which one offers to vote that must be paid six months prior to the election. (Section 21 of the Constitution.) 1928 not being one of the three years preceding the year in which he wishes to vote, his capitation tax for that year may be paid at any time prior to the closing of the registration books, and, if otherwise qualified, he may register and vote in the November election.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### ELECTIONS—Mail votes reaching polls after closing.

RICHMOND, VA., July 3, 1928.

HON. THOMAS J. NOTTINGHAM,  
*General Registrar,*  
*Norfolk, Virginia.*

DEAR SIR:

Acknowledgment is made of your letter of June 29, in which you request my opinion on the following matters, thus stated in your letter:

"A mail vote reaching the General Registrar's office after the polls have closed and ballots counted, what disposition must the general registrar make of the sealed ballot?

"A party called at the office and requested an answer to the following: 'An applicant desiring to qualify to vote becoming a resident of Virginia after January 1, 1927, or on or before November 6, 1927, what taxes (capitation) should he pay, when the amendments to the Constitution become effective, if in time for the presidential election.' This office answered that, if the party became a resident after January 1, 1927, on or before November 6, 1927, he would be entitled to register and vote in the November election, should the Governor issue a proclamation, proclaiming the Constitutional amendments before the registration books closed, by paying \$1.50 capitation tax for the year 1928. Was this answer in accordance with the election laws? It has been questioned."

The law is apparently silent as to what is to be done with a mail vote which reaches the registrar after the polls have been closed and the ballots counted. As an official ballot cannot be carried away by a voter or copied, I am of the opinion that it should not be returned to the voter. Not having been deposited in the ballot box, it, of course, cannot be certified to the clerk, as provided by sections 178, 180 of the Code.

The only suggestion that I can make is that you put an endorsement on the sealed envelope in which the ballot came that it was received too late, and that you file it among the records of your office until such time as authority is obtained for its destruction.

In response to your second inquiry, I am of the opinion that the answer given by you to the applicant is correct, provided, of course, the party will have resided in Virginia, at the time of the November, 1928, election, for a period of one year, and in the county, city or town six months, and the precinct in which he offers to vote thirty days, and, of course, is otherwise qualified.

I think the Constitutional amendments, however, go into effect without a proclamation by the Governor. See section 196 of the Constitution of 1902.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**ELECTIONS—Judges carrying returns to court—Payment of fee.**

RICHMOND, VA., July 2, 1928.

MR. WILLIAM W. MICHAUX,  
*Michaux, Virginia.*

DEAR SIR:

I am in receipt of your letter of the 30th of June, in which you write:

“Will you let me know at once if the judge of the June 19 election who carries the returns to the court house is entitled to mileage and \$5.00, also is the commissioner entitled to same?”

Chapter 205, page 637, of the Acts of 1928 provides for submitting the amendments to the Constitution to the electorate of the State, and in section 1 provides that:

“The election is to be held and conducted in the manner prescribed by law for holding and conducting special elections, and by the regular election officers,  
\* \* \*

The same section goes on to provide that the judges of election shall be paid out of the State treasury the per diem fixed by law for the holding of the election therein provided for. Such judges, as you know, are entitled to \$5.00 per diem.

The question then arises as to the pay of the judge returning the ballots from each precinct and the commissioners of election for canvassing and certifying the results of an election.

In an opinion written on June 25 to Hon. E. R. Combs, Comptroller, I held that, under section 1 of chapter 205, the State can only be held for the pay of judges. I am of the opinion, however, that the judges returning the ballots and the commissioners of election are entitled to their per diem and mileage, and I think that these charges should be paid, as other regular or special election charges are paid, by each county or city in which they act.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**ELECTIONS—Fee of judges carrying returns to courthouse.**

RICHMOND, VA., July 2, 1928.

MR. S. B. HURT,  
*Ballsville, Virginia.*

MY DEAR SIR:

You have asked my opinion as to the amount of compensation due to judges of election for the day's service for returning ballots from his precinct to the clerk's office, and especially as to whether or not he is entitled to his per diem and mileage.

Section 200 of the Code as amended by chapter 259, page 769 of the Acts of 1928, provides a compensation for judges, clerks, registrars and commissioners of election of \$5.00 for each day's service rendered. “\* \* \* and the judge carrying these returns

and tickets to and from his voting place, and to the county clerk's office, and the commissioners of election shall receive the pay and mileage now allowed to jurors for each mile necessarily traveled, to be paid out of the treasury of the county, city or town in which the election is held."

In my opinion, a judge carrying the returns and tickets to and from his voting place is entitled to a per diem of \$5.00 per day *and* the mileage allowed jurors for each mile necessarily traveled in carrying ballots to, and the returns and ballots from his precinct to the clerk's office of his county.

Judges of election are entitled to the per diem and mileage in the special election of June 19th, just as in all other elections.

Under the law submitting the Constitutional amendments, the State pays for the per diem of the judges of election for election day, the county paying the per diem and mileage for the return of the ballots, and the per diem and mileage for the commissioners of election.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**ELECTIONS—Who may vote by mail.**

RICHMOND, VA., *October 6, 1927.*

Mr. J. R. Gardner,  
*Hiltons, Va.*

MY DEAR SIR:

Your letter of September 24, in which you ask my opinion on the following questions, has been received.

1. Would it be legal to vote by mail, when you live in the precinct, because you think you will not be able to go to the polls?
2. Also if registrar gets application from voter when he expects to be away from home on election day, may he issue ballot to vote by mail?

In reply I will say that it is not contemplated that a person who will be present in his home precinct on election day should vote by mail, because of the fact that it may not suit him to go to the polls and it would be more convenient for him to mark and mail the ballot. The absent voters' law was intended for the benefit of those persons who, though duly qualified voters, would be absent from their polling places on election day. If your question means that the voter will really be away from his usual living place, so that it will be a hardship upon him to return and vote, he is entitled to a ballot and should be allowed to vote by mail.

In answer to your second inquiry, I would say that the registrar has little or no discretion as to whom he will mail or deliver a ballot upon the application of a voter. The law is contained in sections 202, 203 and 205 of the Code of 1924, as amended by the Acts of Assembly, 1926, page 463, and makes it the duty of "the registrar, upon receipt of application for ballot, if the applicant is duly registered in that precinct," to "enroll the name and address of the applicant on a list to be kept by him for the purpose and forward to the applicant by registered mail, or deliver to the said applicant in person, the following:" the remainder of the section providing as to sending envelope, ballot, instructions, etc., to the applicant.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**ELECTIONS—Legal residence of voter.**RICHMOND, VA., *October 6, 1927.*MR. R. M. HOWELL,  
*Fincastle, Va.*

MY DEAR SIR:

I have your letter of the 3rd instant, in which you state:

"James A. Anderson was born and reared in the Town Hall Precinct of Botetourt County, Virginia, his parents living on a farm just outside the corporate limits of Fincastle; his father died several years ago, but his mother and one or more members of the family still live on the home place. Several years ago James A. Anderson married and has for some years been working in Clifton Forge, Virginia, where he and his wife rent an apartment and board. He has always claimed and still claims Botetourt County as his residence, and has voted in one or more elections in that county since he has been working in Clifton Forge; he has always paid his poll tax in Botetourt County and has always claimed that as his legal residence. He is employed by the Chesapeake & Ohio Railway Company at Clifton Forge."

The right of Mr. Anderson to vote in Botetourt County depends upon the facts. He was a legally qualified voter in Botetourt County. If, when he left Botetourt for Clifton Forge, he intended to retain his legal voting residence in that county, he had a perfect right to do so. To constitute change of residence so as to deprive a person of his right to vote in his old home, two facts must exist, first, an actual change and, second, an intention to give up or abandon the old home and establish a permanent home at another place. Unless these two things occur, he does not give up his old place of residence, nor is he deprived of his right to vote in the old home precinct.

You will appreciate the fact that this office very much prefers not to undertake to pass on any particular case, but to give the general principles of law applicable to the matter of a person's right to vote.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.***ELECTIONS—Registration of ballots to judges.**RICHMOND, VA., *October 6, 1927.*MR. A. S. RHODES,  
*Success, Virginia.*

MY DEAR SIR:

Your letter of the 4th instant, asking whether or not it will be "legal to register ballots to the Judges of the out lying precincts", has just been received, and I note you say that it is the practice in some of the counties of the State.

There is no such authority conferred by law. The duty of the electoral board in respect to getting ballots to precincts is contained in section 158 of the Code of 1924, from which I quote:

"Upon each of said packages shall be endorsed the name of the precinct for which it is intended and the number of ballots therein contained. The packages designed for the various precincts shall be delivered to the secretary of the board and remain in his exclusive possession until delivered by him to the judges, or one of the judges, of election of the several precincts as provided by the following section, or until he shall have delivered the same to one of the other members of the board, as required by this chapter."

Under section 159 it is provided:

"Before every election the secretary of the electoral board shall deliver to the judges, or one of the judges, of election the package of official ballots for that precinct, taking a receipt therefor and a certificate that the seals appear to be untampered with, and, in the event of inability by sickness or other incapacity of said secretary to deliver said official ballots, the said electoral board or the said secretary may cause them to be delivered by another member of said board."

You will see that the law requires a personal delivery of the ballots by the secretary of the electoral board or by some member of that board to a judge or to the judges of each precinct. Therefore, mailing ballots is irregular and not according to the provisions of law.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### ELECTIONS—Voting by mail.

RICHMOND, VA., October 8, 1927.

HON. F. H. COMBS,  
*Chairman of the Electoral Board,  
Grundy, Virginia.*

MY DEAR MR. COMBS:

In answer to the two questions contained in your letter of October 5th, which I quote below, I beg leave to submit the following reply.

The first question is as follows:

"If a voter makes application for a ballot to vote by mail and the ballot is furnished him and he marks it and returns it to the registrar, who keeps it in the legal way until election day, and then that voter appears in person on election day and attempts to vote in person, should the judges of election allow him to vote in person, or should they refuse him another ballot, on the grounds that he has already voted by mail?"

This question unquestionably should be answered in the negative. We have written a number of opinions relative to this, and ever since the enactment of the absent voters' law this office has held that where an elector has received a ballot under the provisions of the absent voters' law from the registrar he cannot appear in person on election day and vote, but the ballot which has been returned to the registrar must be deposited by the registrar and the judges have no authority to deliver the elector another ballot.

In reply to your next question which is as follows:

"If a voter makes application for a ballot to vote by mail which is sent him, and then he fails to mark the ballot and return it to the registrar, but appears in person on the day of election, and requests to be allowed to vote in person, should the judges furnish him with another ballot and allow him to vote, or if he still has the ballot furnished him by the registrar should the judges allow him to vote it in person on election day, and if he does not have it, then should he be allowed to vote at all?"

I would state that where a ballot has been either sent or delivered to an elector and he fails to mark the ballot and return it to the registrar, he cannot vote in person on the day of election. It therefore follows, of course, that the judges cannot furnish him with another ballot and permit him to vote.

Trusting this gives you the desired information, and with kindest personal regards,  
I am

Yours very sincerely,

JNO. R. SAUNDERS,  
*Attorney General.*



**ELECTIONS—Transfer from one precinct to another.**

RICHMOND, VA., October 10, 1927.

H. D. WALLACE, Esq., Registrar,  
Honaker, Virginia.

MY DEAR MR. WALLACE:

Acknowledgment is made of your request of October 7 that I advise you on the following question:

"Can a man, who has never resided in a precinct, obtain a transfer from the precinct in which he resides to such other precinct and there register and vote?"

Sections 18 of the Constitution provides in part as follows:

"Every male 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 \* \* \*."

In order for a person to register and vote, he must first have acquired a legal residence in the State, county, city, or town, and in the precinct in which he offers to vote. One, who has once acquired a legal residence in a county, city, or town, and precinct, does not necessarily lose that residence by moving therefrom (*Williams v. Commonwealth*, 116 Va. 272), but one can never gain a legal residence in a State, county, city, or town, or precinct, unless he physically resides therein.

Therefore, it is my opinion that one, who has never been a resident of a precinct, cannot have his registration transferred to such precinct and there vote. It is further my opinion that, when one offers to register at or transfer to a precinct of which he is not a resident, the registrar should refuse to register such voter or transfer his name to the election books of such precinct, and that, in the event the registrar does register or transfer the name of a person who is not a legal resident of his district, upon proper challenge such person should be prevented from voting, because not qualified as to residence as required by section 18 of the Constitution. Of course, one not qualified to vote in person, because he is not a resident of the precinct in which he offers to vote, would not be qualified to vote at such precinct as an absent voter.

Trusting this gives you the desired information, I am

Very truly yours,

JNO. R. SAUNDERS,  
Attorney General.

**ELECTIONS—Legal residence of voter.**

RICHMOND, VA., October 11, 1927.

HON. E. C. CARRICO,  
Deputy Treasurer,  
Wise, Virginia.

MY DEAR MR. CARRICO:

Acknowledgment is made of your letter of October 8, 1927, in which you request me to advise you whether sections 4725 and 4726 of the Code of Virginia, 1919, could possibly be construed so as to prohibit legal residents of Virginia from voting in this State as absent voters, when they are temporarily residing out of the State on account of their work or other business.

It is my most emphatic opinion that these statutes are not open to any such construction. The Court of Appeals in *Williams v. Commonwealth*, 116 Va. 272, held that a legal

residence once acquired by birth or habitancy was not lost by temporary absence for pleasure, health or business, or while attending to duties of a public office, and that, where a man had two places of living, which was his legal residence was to be determined largely, where the right to vote or hold office was involved, by his intention. Where a man has once acquired a legal residence, in order to lose that residence he must not only physically remove to another place, but he must do so with the intention of abandoning his legal residence at the first place and acquiring a new legal residence at the place to which he has moved.

Any person who is a legal resident of Wise county, even through absent therefrom on account of his work or other business, is clearly entitled to vote as an absent voter, if otherwise qualified, under the provisions of our Code authorizing persons absent from the precinct or county in which they are registered to vote as absent voters (sections 202-218 of the Code, as amended).

Sections 4725 and 4726 of the Code, providing for the punishment of non-residents of the State or an election district, who vote in this State or in an election district in which they do not reside, have no application to bonafide residents of this State who are absent at the time an election is held.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**ELECTORAL BOARD—Authority to appoint judges and clerks.**

RICHMOND, VA., *October 11, 1927.*

E. E. MARTIN, ESQ.,  
*Secretary Electoral Board,*  
*Pearisburg, Virginia.*

MY DEAR SIR:

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

"It has been the custom here for many years for the electoral board to appoint judges and clerks of election in October instead of May, as prescribed by statute, and no question has ever been raised about it. We appointed judges and clerks last October, who qualified and took the oath of office, and did not appoint any in May this year.

"The matter of appointment again in this month has been brought up, and our attention has been called to the fact that section 148 of the Code says that the term of office of judges of election shall begin the first day of June following their appointment. Our attention has also been called to the case of *Redd v. The Supervisors of Henry County*, 31 Gratt. 695, wherein the court held that the fact that commissioners of election were not appointed at the time prescribed by law did not invalidate the appointment when made by the proper authority, and the oath prescribed by law was duly taken.

"From this it seems to us that the judges appointed last October could hold a valid election this coming November, and it seems that there might be a doubt if judges appointed now could serve and hold a valid election this fall, by reason of the fact that the statute provides that their term of office begins the first day of June following their appointment, which would be June 1, 1928.

"At a meeting of our board held on September 30, 1927, an order was made to the effect that we would submit the question to you for your opinion and advice, which we will be glad to have at your earliest convenience."

The question submitted by you is not entirely free from doubt, but, in view of the fact, as suggested by you, that the statute provides that the terms of office of the judges

of election shall begin the first day of June following their appointment, it is my opinion that it would be better to allow the present judges to hold over, if such can be done under the law.

Section 148 of the Code, as amended, which authorizes the appointment of judges of election by the electoral board, directs the board to make the appointment in May of each year, and thus provides that the terms of office of such judges so appointed "shall begin on the first of June following their appointment, who shall constitute the judges of election for all elections to be held in their respective election districts for the term of one year or until their successors are appointed."

It will be seen from the above quoted language of section 148 of the Code, as amended, that the judges who were appointed last year will continue to hold their offices as judges of election until their successors are appointed. In view of this, no possible question could arise as to the right of the present judges to conduct the election to be held on November 8, 1927. On the other hand, if the board were to appoint new judges of election at this time, a very grave question would arise as to their right to act in the November, 1927 election, in view of the provision contained in section 148 of the Code, as amended, that the terms of such judges, when appointed, shall begin on the first of June following their appointment.

For this reason, it is my opinion that the safest course for the electoral board to follow at this time, no appointment having as yet been made for the year 1927, would be to let matters rest as they are and in May, 1928 appoint the new judges as required by law.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,

*Attorney General.*

#### **ELECTION—Persons eligible to vote.**

RICHMOND, VA., *October 12, 1927.*

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

MY DEAR SIR:

Acknowledgment is made of your letter of October 10, 1927, in which you say:

"Is a party, who became twenty-one years of age between February 1, 1926 and January 1, 1927, who paid his capitation taxes assessable (1927 first assessment) during the period from May 8, 1927 to October 8, 1927, and whose name for the latter reason could not appear on the certified list of those paying prior to the six months' period (May 8 of current year), eligible to vote under the statutes?"

A young man, who became twenty-one years of age after the first day of February, 1926 and before the first day of January, 1927, would be assessable with a capitation tax for the year 1927.

Section 21 of the Virginia Constitution requires, as a prerequisite to the right to vote, the payment of "all State poll taxes assessed or assessable against him, under this Constitution, during the three years next preceding that in which he offers to vote." 1927 is not one of the three years preceding the year 1927 and, therefore, the young man in question, if otherwise qualified, was entitled to register and vote at any time prior to the closing of the registration books on October 8, 1927, if he paid his capitation tax. It is not necessary that his name appear on the tax list; all that he is required to do is to produce his tax receipt.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,

*Attorney General.*

**ELECTORAL BOARD—Appointing judges.**

RICHMOND, VA., October 17, 1927.

MRS. GUY C. ROOP,  
*Snowville, Va.*

MY DEAR MRS. ROOP:

In reply to your letter of October 14, I will state that the law provides that the electoral board shall appoint the judges of election in May. You will, therefore, see that it is too late for the electoral board to appoint any other judges, even if they desire to do so.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.***ELECTIONS—Request to vote in person after voting by mail.**

RICHMOND, VA., October 14, 1927.

MR. H. D. WALLACE, *Registrar,*  
*Honaker, Va.*

MY DEAR SIR:

I am in receipt of your communication of October 11, 1927, in which you request me to advise you "whether or not a voter who has cast his vote as an absent voter can return to the precinct on the day of election, demand his ballot, be allowed to see it and then cast his vote in person."

I unhesitatingly answer that he cannot. See sections 211, 213 and 214 of the Code, as amended (Virginia Election laws, pages 62-63). You will see from these sections that the registrar on receipt of a ballot must deposit the envelope containing the ballot unopened in a sealed box, in which it must be kept until the day of election. This box must be delivered by him on the day of election to the judges, for which the registrar receives a receipt. The box must remain unopened until the close of the regular balloting, at which time it is opened by the judges of election and the ballots deposited in the regular ballot box, as provided by section 214 of the Code. No ballot, however, can be examined or unfolded.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.***ELECTION—Erasure of name of deceased candidate from ballot.**

RICHMOND, VA., October 15, 1927.

N. A. POLLARD, ESQ.,  
*Secretary Elecioral Board,*  
*Sheppards, Virginia.*

MY DEAR MR. POLLARD:

Acknowledgment is made of your request that I advise you what to do on the following statement of facts:

"Mr. Hubbard, the Democratic nominee for county clerk of Buckingham county who had no opposition in the general election, died several days ago. The proof for the tickets had been delivered to the printer, they had been printed with Mr. Hubbard's name thereon, and were delivered to me the day after Mr.

Hubbard's death. They have not as yet been delivered to the electoral board and, of course, have not been officially sealed. Mr. Hubbard's name is on these tickets and, of course, if not erased therefrom, it would unquestionably cause serious complications."

On the above statement of facts, I am of the opinion, after having examined the Virginia Election Laws, especially sections 155, 156, 157 and 158 thereof, as amended, that the electoral board should draw a line through the name of Mr. Hubbard.

In view of the provisions of section 156 of the Virginia Election Laws, as amended, I am of the opinion that the tickets cannot be again delivered to the printer for this purpose, but that the erasure of Mr. Hubbard's name must be done by the electoral board. Of course, if Mr. Hubbard's name was left on the tickets, each voter would have the right, under section 162, to erase the same and substitute therein in writing the name of any person for the office of clerk for whom he may desire to vote. Inasmuch, however, as Mr. Hubbard is dead and the ballots have not as yet been sealed and delivered by the electoral board, I am of the opinion that it would be right and proper for that board to erase his name, so as to avoid mistakes that might possibly result from the failure of the voters to erase it. This erasure by the electoral board should be done previous to the delivery of the ballots to the various precincts.

Trusting this will give you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,

*Attorney General.*

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#### **ELECTION—Legal residence of voter.**

RICHMOND, VA., *October 14, 1927.*

MR. W. B. CLUVERIUS,  
*Little Plymouth, Va.*

MY DEAR MR. CLUVERIUS:

Your letter of October 12 received. In this you submit certain questions pertaining to the right of one to vote.

The Court of Appeals has decided in the case of *Williams v. Commonwealth*, reported in 116 Va. 272, that, in order to lose one's legal residence for the purpose of voting, there must be, first, a change of residence, coupled with the intention to change such residence, and where a residence has been once legally acquired at a place the same cannot be lost except by the combination of the two events above mentioned, viz: removal and the intention to change the place of residence.

This office has accordingly held that where a legal residence, for the purpose of registering and voting, has once been acquired at a place, that legal residence may be retained, even though the voter moves away, so long as he intends to keep his legal residence at the place where it was first acquired.

Now, as to the cases submitted in your letter, both of these, in my judgment, would have a right to vote.

In reply to your question as to whether a voter may ask for instruction from the judges, this depends entirely upon what instruction he desires. A judge cannot assist him in marking his ballot if he registered subsequent to 1904, unless he is physically disabled and cannot mark it. I doubt very much if the judges can give any instruction to a voter when he comes into the voting booth.

Yours very truly,

JNO. R. SAUNDERS,

*Attorney General.*

**ELECTION—Voting by mail, persons eligible.**RICHMOND, VA., *October 21, 1927.*

MR. M. R. KIRK,  
*St. Charles Hotel,*  
*St. Charles, Virginia.*

MY DEAR SIR:

In your letter of October 20th you ask me:

- "1. Can a person vote by mail when he is not away from his county, nor precinct, on election day unless he had been away and unexpectedly returned?"
- "2. Can a man vote personally before election day and not be away at all?"

In reply I will say that it is not contemplated that a person who will be present in his home precinct on election day should vote by mail, because of the fact that it may not suit him to go to the polls and it would be more convenient for him to mark and mail the ballot. The absent voters' law was intended for the benefit of those persons who, though duly qualified voters, would be absent from their polling places on election day. If your question means that the voter will really be away from his usual living place, so that it will be a hardship upon him to return and vote, he is entitled to a ballot and should be allowed to vote by mail.

In reply to your second question I would say that a person cannot personally vote except by mail, or in person at his regular voting precinct on election day. The absent voters' law is contained in sections 202, 203 and 205 of the Code of 1924, as amended by the Acts of Assembly, 1926, page 463. Section 202 providing:

"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."

I can only give you the general provisions of law and cannot undertake to apply them to any particular case, the application of the law being for the judges of election, subject in case of a contested election to the opinion of the circuit judge before whom the contest is heard.

Trusting that I have fully answered your letter, I am

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**ELECTIONS—Persons eligible to vote by mail.**RICHMOND, VA., *October 24, 1927.*

MR. D. K. OWENS,  
*Dante, Virginia.*

MY DEAR MR. OWENS:

Your letter of October 22nd received. In this you submit two questions which are as follows:

"1. If a voter makes application for a ballot so that he may vote before a notary and does vote before a notary, will it absolutely mean that he or she must be absent from the precinct on election day? You see a voter may expect to be absent and still something may happen after the voter votes to keep him from being absent.

"2. Can a voter who has voted by mail or in person return to the precinct in which he or she voted and demand their ballot returned and then vote again at the voting place on election day?"

The purpose of the absent voter's law is to give persons an opportunity to vote who expected to be absent from the polls on the day of election. If you will examine sections 202 and 218 of the law you will see that the first of these sections provides that any voter who may be absent on the day of election may vote, provided he complies with certain conditions contained in the law. Section 218 provides that the provision of this Chapter shall be liberally construed in favor of the absent voter.

The law does not mean that when a voter makes application for a ballot that it is essential that he should be absent on the day of election. If at the time the voter makes application to the registrar for ballot he expects to be absent from his voting precinct on the day of election, unquestionably he is entitled to receive a ballot and the registrar has no discretion whatever in the matter. If it develops later on that the voter is not absent on the day of election, but has marked his ballot and delivered it either in person to the registrar, or returned it to him by registered mail, that ballot should be deposited on the day of election and the voter has no right to make application for any other ballot though he may be present at the polls when the voting is going on.

I would add further that after an elector has received a ballot from the registrar he must mark and return this ballot as is required by law if he desires to vote, and even though he may not mark it and return it to the registrar he cannot obtain another ballot on the day of election and vote, although he may be at the precinct. In other words, the ballot which he has received from the registrar is the only ballot to which the voter is entitled, and he must either use that ballot as provided by the absent voters' law, or else he cannot vote. You can readily understand if the law were otherwise how easily fraud could be practiced.

This, in my judgment, fully answers your questions. Ever since the absent voters' law has been in effect this has been the consistent ruling of the office of the Attorney General.

Trusting I have made myself clear, I am

Yours very sincerely,

JNO. R. SAUNDERS,

*Attorney General.*

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#### **ELECTIONS—Absent voters' law.**

RICHMOND, VA., October 24, 1927.

HON. E. J. SUTHERLAND,  
*Commonwealth's Attorney,  
Clintwood, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of October 18, 1927, in which you say:

"There has arisen in the present political campaign in Dickenson County an acute situation, in regard to the absent voters' law, that demands careful and immediate action. I am writing to secure your opinion at once on the interpretation of the following questions, to-wit:

"1. Is a voter, who is qualified in all respects to vote and who has voted by mail or delivered his ballot in person to his registrar, authorized, under the absent voters' law, to appear at the polls on election day, demand a ballot from the election judges and vote in person, at the same time requesting the election officials to mark his mail ballot, or the ballot he delivered to the registrar, 'Rejected,' etc., as the law indicates? Does his mail vote bind him entirely on election day?"

"2. Is a voter entitled to vote by mail, or by delivering his ballot to his registrar, on his expectation of being absent from his precinct, when in fact he is at his polls or anywhere in his precinct on election day; in other words what effect does the presence of the voter, who has mailed his ballot or delivered it to the registrar previous to the election day, in his own precinct on election day

have on his mail ballot, or delivered ballot? Can a voter's ballot be counted as an absent voter's ballot, when in fact he is present in his precinct on election day?

"I will appreciate very much an early reply to this letter. I am besieged every day with requests for my official interpretation of these questions, and I feel that the bitterness already engendered in our campaign requires an immediate, unbiased, and complete understanding of these questions."

In response to the questions submitted by you, I am of the opinion that a voter, who has obtained his ballot as an absent voter, even though present at the precinct on the day of election, is not entitled to a new ballot. Having exercised his right to vote as an absent voter, he cannot be heard to demand the right to vote as being present on the day of election.

In 1923, Hon. C. R. McCorkle, the Commonwealth's Attorney of Wise County, requested a similar opinion from me. The voter in the case referred to by him having obtained a ballot from the registrar, expecting to be absent on the day of election, marked and returned it as required by law; but, having later discovered that he would be present on the day of election, he applied to Mr. McCorkle for advice, and in response to Mr. McCorkle's request that I give him my opinion, I did so. In that opinion I said (Report of the Attorney General, 1923-1925, page 109):

"In my judgment, as soon as the ballot is marked and deposited in the mail, that is equivalent to having voted, so far as the elector is concerned."

A similar opinion was also expressed by me on November 3, 1922, in an opinion given to Mr. W. W. Dennis, of Pearisburg, Virginia (Report of the Attorney General, 1922-1923, page 153).

If you will examine sections 211, 212, 213 and 214 of the Code, as amended, you will see from these sections that the registrar on receipt of a ballot must deposit the envelope containing the ballot unopened in a sealed box, in which it must be kept until the day of election. This box must be delivered by him on the day of election to the judges, for which the registrar receives a receipt. On the morning of the day of election on which the ballots are to be offered, the registrar is required to post a true copy of the lists of the names and addresses of all persons, who have applied for ballots as absent voters, in a conspicuous place at the polling place of his precinct. The box must remain unopened until the close of the regular balloting, at which time it is opened by the judges of election and the ballots deposited in the regular ballot box, as provided by section 214 of the Code, as amended. No ballot, however, can be examined or unfolded.

Therefore, it is my opinion that one, who has applied for a ballot as an absent voter and received the same, is not entitled to vote in person, even though he appears at the precinct on the day of election. His vote can be cast only as an absent voter.

Yours very truly,

JNO. R. SAUNDERS,

*Attorney General.*

#### **ELECTIONS—Registrar to deliver poll books to judge of election.**

RICHMOND, VA., October 25, 1927.

HON. LEWIS CRAWLEY, *Clerk,*  
*Cumberland County,*  
*Cumberland, Virginia.*

DEAR MR. CRAWLEY:

Your letter of the 21st received.

The second paragraph of section 38 of the Constitution, among other things, provides that the clerk shall deliver, or cause to be delivered, with the poll-books at a reasonable



time before the election to one of the judges of election of each precinct of his county or city, a like certified copy of the list (capitation tax list), which shall be conclusive evidence of the facts therein stated for the purpose of voting. It therefore follows that the party mentioned in your letter who has paid his capitation taxes for 1924, 1925 and 1926 six months prior to the general election, whose name does not appear on the tax list, cannot vote on the day of election.

The statute provides that where a party has paid his capitation taxes and the treasurer fails to put him on the list he can apply to the judge of the court and have his name placed on the list.

In the case of the young man mentioned in your letter, who was assessed for his first capitation tax 1927, and has paid this thirty or sixty days before the election and registered, he can vote on his tax receipt and it is not necessary for his name to appear on the tax list, because the Constitution provides that the list shall contain the names of those that have paid their capitation taxes six months prior to the election, and it was not necessary for the young man to pay his six months prior to the election.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### **ELECTIONS—Names contained on ballot.**

RICHMOND, VA., *October 26, 1927.*

HON. HARRY C. FICKLEN,  
*886 Grove Street,  
Danville, Virginia.*

MY DEAR MR. FICKLEN:

I beg leave to acknowledge receipt of your letter of October 25, the contents of which I have carefully noted.

I am of the opinion that an elector has a perfect right to vote for any one of a number of candidates for the same office whose names are printed on the official ballot, provided of course he erases the names of the other candidates for whom he does not desire to vote, and the ballot should be counted for the candidate whose name is not erased. Section 28 of the Constitution, among other things, provides: "All ballots shall contain the names of the candidates, and of the offices to be filled, in clear print and in due and orderly succession; but any voter may erase any name and insert another."

If the voter has the right to erase the names of all of the candidates and substitute the name of the other person, clearly he would have the right to erase the names of all of the candidates except one. No wording on the official ballot can have the effect of changing the provisions of the Constitution and the law.

In your other question you state there are seven Magisterial Districts in Pittsylvania County, and then ask: "Under section 155, should not each Magisterial District have its own particular ballot, because the Supervisors and Magistrates come only before the voters of a particular District?" Of course the ballot should contain the names of those candidates who are to be voted for. Section 155, as amended, in my judgment so provides. I would further state that this is the usual manner in which ballots are printed.

I do not think that the printing of the ballot which contained the names of all of the supervisors in the seven districts would render it illegal.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**ELECTION—Balloting by telegram.**RICHMOND, VA., *October 26, 1927.*MR. A. B. WOOLWINE,  
*Ceres, Virginia.*

MY DEAR SIR:

In reply to your letter of October 19, as to whether an application for a ballot by telegram is legal, section 203 of the Election Laws provides that application shall be made to the registrar in writing for a ballot, which application may be handed to the registrar in person, or forwarded to him by mail, and shall contain the necessary postage for registering the ballot and returning it to the elector. But, the failure to enclose necessary postage shall not render void a vote otherwise legally cast.

If a voter requests a ballot by telegram and the registrar forwards it to him, I do not think this is illegal. Of course, it is not mandatory upon the registrar to send the ballot, because the elector has not complied with the law which requires him to furnish the necessary postage for registration, and so forth.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.***ELECTION—Persons unable to attend polls by physical disability.**RICHMOND, VA., *October 27, 1927.*E. L. PAISLEY, ESQ., *Registrar,*  
*Mouth of Wilson, Virginia.*

MY DEAR SIR:

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

"As registrar for this voting precinct, I desire some information as to the voting of a person not physically able to get to the voting place though living in the precinct. I have some voters here who desire to vote who live within a short distance of the voting place and who are sick and cannot get to the place to vote.

"Now, I will appreciate it if you will advise me by return mail just what provision is made in the election law, if any, for a case of this kind. I cannot find in the election law any provision for them voting by mail, as the only statement I find along this line says that such persons must be absent from the precinct and, of course, these people will not be absent on election day."

I am unable to find any provision in the election laws which would apply to a case of this kind. It is my definite opinion, however, that such persons are not entitled to vote by mail as absent voters.

Trusting this will give you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.***ELECTIONS—Transfer of voters, right to vote.**RICHMOND, VA., *October 27, 1927.*MR. F. L. SUTHERLAND,  
*Tiny, Virginia.*

DEAR SIR:

Acknowledgment is made of your letter of October 18, 1927, in which you say:

"I want your opinion as to a registered voter who moves all of his or her effects out of Dickenson County for 12 months or 2 years, lives or rents as a tenant in Russell County, but does not move his transfer. Can he move back to Dickenson County and vote unless he has been back 12 months before the election of November 8, 1927, although he is paid up on the poll tax list for 1924-25-26? Has he a right to vote November 8, 1927?"

It is impossible for me to give you a definite opinion on the above statement of facts. The Court of Appeals held in *Williams v. Commonwealth*, 116 Va. 272, that where a person had once acquired a legal residence in one place, he could lose that residence only by the combination of two acts; first, a physical removal and, second, the intention of abandoning the legal residence at the place from which he moved and acquiring it elsewhere.

If at the time the man in question left Dickenson County he intended to abandon his residence in that county and acquire it elsewhere, of course, he would not be eligible to return and vote at this time. If, on the other hand, he intended to retain his legal residence in Dickenson County, in my opinion, he would be entitled to return and vote; but, as I have said, it is largely a question of fact to be determined by the election officials on the facts and circumstances of each case.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**ELECTIONS—Candidate using automobile to carry parties to polls.**

RICHMOND, VA., *November 1, 1927.*

MR. C. C. WILLIAMSON,  
*Crewe, Virginia.*

MY DEAR SIR:

I beg leave to acknowledge receipt of yours of October 28, 1927, in which you ask several questions.

In reply to your first question as to whether or not a candidate for a county office can use his own car or employ the use of other cars to carry voters to the polls to vote, I would call your attention to section 251 of the Code of Virginia, which provides what expenses a candidate may incur in his campaign. If you will read this section you will see that it provides among the items of expense which a candidate is allowed to have is the expense of transportation of voters to and from the election.

I know of no reason why a candidate cannot be at the polls on election day and hand out his card and request voters to vote for him.

Section 202 of the absent voters' law provides that 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 he complies with the other requirements of the absent voters' law. Of course, if a voter has made application to the registrar for a ballot to vote by mail, marks his ballot and returns it to the registrar, that is, the ballot which should be deposited on the day of election, and the voter cannot make application to the judges, even though he be present on the day of election, for another ballot and vote in person.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**ELECTIONS—Transfer of voters.**

RICHMOND, VA., November 1, 1927.

HON. R. B. STEPHENSON,  
*Commonwealth's Attorney,*  
*Covington, Virginia.*

DEAR MR. STEPHENSON:

I am in receipt of your letter of October 28, in which you say:

"Covington is a town in excess of 2500 inhabitants. A voter who has moved from the town to a precinct out in the county and has resided there more than thirty days has applied to be transferred from Covington precinct to the district in which he is now living. Section 100 of the Virginia Election Law provides that a voter may transfer within the county or city at any time, 'but in cities and towns containing over 2500 inhabitants, the name of such person shall only be entered by the registrar prior to the days named in Section 98.' It would seem that the word 'entered' means that the registrar in a city or town cannot receive a transfer within thirty days, but apparently the first part of this section means that the registrar in a town could transfer a voter out to another voting precinct in the county. Please advise if this interpretation is correct at once, as we are anxious to have this matter passed on before the day of election."

I am persuaded that a careful consideration of the section to which you refer confirms your view of the proper interpretation to be placed on section 100 of the Virginia Election Laws, to the effect that a registered voter who changes his place of residence from a town having a population in excess of 2500 to a precinct in the same county may, upon his transfer, at any time previous to election day, have his name placed upon the registration books of the county precinct, though the reverse of this does not seem to be true.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**ELECTIONS—Registration of voters.**

RICHMOND, VA., November 1, 1927.

MR. CHARLES T. GARTH,  
*Secretary of the Electoral Board,*  
*Geer, Virginia.*

MY DEAR MR. GARTH:

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

"Is it legal for a registrar to enter the name of a voter, transferred from another county, on the registration book, if the aforesaid voter did not present his transfer until within thirty days of the election to be held November 8, 1927?"

Under the provisions of section 98 of the Code of Virginia, 1919 (Election Laws) the registration books are closed in the counties thirty days previous to the regular November election. Such being the case a voter cannot be transferred from one county to another after the registration books are closed.

I would also call your attention to section 100 of the Code of Virginia, which states that a party can receive his transfer up to and including the regular days of registration, which of course are thirty days previous to the general election.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**ELECTIONS—Application to vote by mail.**RICHMOND, VA., *November 1, 1927.*

MR. THEODORE A. POBST,  
*Tazewell, Virginia.*

MY DEAR SIR:

I am in receipt of yours of October 31, 1927, in which you call my attention to that section of the absent voters' law which states that application for a ballot should be made not more than sixty days, nor less than five days before the election. You then desire to be advised when the five days will expire.

The election day is on the 8th. In my judgment, the last day on which application for ballot could be made is on Thursday the 3rd of November.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**ELECTORAL BOARD—Illegal registration of voters.**RICHMOND, VA., *November 1, 1927.*

E. B. MAYS, ESQ.,  
*Secretary Electoral Board,  
Lebanon, Virginia.*

MY DEAR SIR:

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

"My attention as a member of the County Electoral Board of Russell County, has been called by a judge of the election of the Cleveland precinct to the fact that some one hundred voters in the precinct were registered illegally. The facts are that we removed the registrar of this precinct on account of being absent from the county last spring. We appointed another registrar in his stead and notified him to turn over the books to the new registrar, which he failed to do. About the fifteenth of September we had a meeting of the board, and the matter was brought to our attention that the old registrar had returned to his precinct and wanted to act as registrar. We decided, under the circumstances, to remove the then qualified registrar and re-appoint the old registrar, which we did and notified him of his appointment. He failed to come and qualify until late at night on October 8. I am now advised by one of the judges, who will assist in holding the election on November 8, that the registrar we last appointed, before qualifying, had registered some one hundred voters at this precinct. *He did not require the parties to fill out an application in their own handwriting, but only required them to sign the oath. I am further advised that some thirty of those registering had not paid any poll taxes.* Please advise me if, in your judgment, the parties attempting to register will be qualified to vote in the coming November election."

I have taken the liberty of italicizing that portion of your letter to which my reply is especially addressed. While the other matters referred to are highly irregular, I do not think that they would have the effect of disfranchising the persons who registered in good faith before such appointee. However, the matters raised by that portion of your letter, which I have taken the liberty of placing in italics, are of an entirely different nature.

Paragraph second of section 20 of the Constitution provides, as a prerequisite to registration:

"That, unless physically unable, he make application to register in his own hand-writing, 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; \* \*.”

This section was deliberately incorporated into the Constitution of Virginia for the purpose of preventing persons incapable of meeting the requirements of this section from registering and becoming voters in this State, and, in my judgment, any person who has been allowed to register without complying with this section of the Constitution has had his name placed upon the registration books illegally and, because of this, is not entitled to vote.

Judge James L. McLemore, of the second circuit and now a member of the Special Court of Appeals of Virginia, In Re Validity of Local Option Election Held in the City of Suffolk, on the 19th day of December, 1910, 17 Va. Law Reg. 353, 358 (1911), held that the provision of clause 2 of section 20 of the Virginia Constitution was mandatory “and the observance thereof on the part of the voter necessary in order to give jurisdiction to the registrar to act.” He, therefore, held that, where the registrar had placed on the registration books the names of persons as voters who had not complied with this section, such persons could not vote.

The same conclusion was reached by Judge Barksdale in the case of *Stokes et als, v. Hatchett*, in the Circuit Court of Lunenburg County, 18 Va. Law Reg. 251 (1912).

With reference to those persons who had not paid the poll taxes required by law, they are, of course, not entitled to vote, whether or not registered. See section 21 of the Constitution which requires that, as a prerequisite to the right to vote, all State poll taxes assessed or assessable, under the Constitution, during the three years next preceding that in which he offers to vote, shall have been paid at least six months prior to the election.

It is, therefore, my opinion, first, that one who has been registered by the registrar, without complying with the second paragraph of section 20 of the Constitution, is illegally registered and not entitled to vote; and, second, that one who has not paid, at least six months prior to November 8, 1927, all the capitation taxes with which he was assessed or assessable during the three years next preceding the year 1927 is not entitled to vote in the election to be held on November 8, 1927.

Trusting this will give you the desired information, I am

Yours very truly,

LEON M. BAZILE,  
*Assistant Attorney General.*

## ELECTIONS—Tax.

RICHMOND, VA., November 2, 1927.

MR. L. H. FRISTOE,  
*Member of Board of Supervisors,  
Bentonville, Virginia.*

MY DEAR SIR:

Your letter of October 31st has been received, and I note that you state—

“Mr. F. L. Kelley, a resident and voter of this county and district at the present time, but who moved here from Shenandoah County a year or two ago, paid his 1924 capitation tax to the Treasurer of Shenandoah County January 16, 1925, and his 1925 capitation tax was paid to some county April 23, 1926. He was then due to pay his 1926 capitation tax in this county, which he did February 26, 1927, and has all these receipts in his possession to bear out this statement. He was transferred from Shenandoah County to this (Warren) county and to this

district and precinct some months ago. It appears this party's name was not put on the voting list by our Treasurer from some cause, and it has also been omitted from the supplementary list. So far as we can see and understand, he was qualified to vote on the 8th of November, except his name does not appear on the voting list. We would like to know whether the party can or is entitled to vote on November 8th, so am writing this for your advice."

In my opinion, Mr. Kelley's right to vote without his name appearing upon the tax list is governed by section 115 of the Code, which provides:

"In any case where a voter has been transferred from one city or county to another city or county, and has paid his State poll taxes for the three years next preceding that in which he offers to vote, or for any of said years, in any county or city in this State, such voter may exhibit to the judges of election the certificate of the treasurer of the city or county wherein the said taxes were paid, showing such payment, and that the same was made at least six months prior to the election, by the person offering to vote, such certificate shall be conclusive evidence of the facts therein stated for the purpose of voting. The treasurer of any county or city, upon the application of any such voters, shall furnish the certificate herein required. \* \* \*"

Upon presentation of the certificate called for in this section and his receipt for his 1926 tax showing the same to have been paid six months before November 8, 1927, I am of the opinion that he should be allowed to vote at his precinct in Warren County.

I take pleasure in forwarding you a certificate which I think will answer your purpose when signed by the Treasurer of Shenandoah County.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### ELECTIONS—Residence.

RICHMOND, VA., *November 2, 1927.*

MR. JAMES E. QUESENBERRY,  
*Coeburn, Virginia.*

DEAR SIR:

I am in receipt of your letter of October 29, in which you say in part:

"I desire to ask a question. A man who resided at Coeburn until September, 1925, moved away. He pays no property tax here and owns no property here. He owns a home in a city in another county. He has shown several indications of an intention to stay away, has removed his church membership, withdrawn from the lodges and has no interest here. A mail vote will be presented for him. Under the circumstances stated, should that vote be received? It will be challenged upon the ground that he is a non-resident. I have been appointed Judge of Election at the precinct where it will be presented. Many mail votes will be presented and I hope you will give me some advice as to how to proceed in such a case."

In reply to your request as to this particular man, I will say that my opinion has been requested upon a number of occasions as to the right of an individual to vote at a certain specified place, though he is not at the time a resident of such place. My practice has been to give general principles, the application thereof depending on facts about which there may be and often are disputes.

Whenever a person has acquired a legal voting residence in one place and is temporarily removed therefrom, it does not deprive him of his legal right to vote at that place. To lose his right, he must have actually left that place and have done so with the intention of making some new locality his permanent home and, consequently, have given up the former home and intention of returning.

This question has been passed upon by the Supreme Court of Appeals of Virginia in *Williams v. Commonwealth*, 116 Va. 272, which may be found in any lawyer's office.

The determination of this man's right to vote at your precinct depends upon the application of these principles to his case, and must necessarily be determined by the Judges of Election, should he be challenged, and such Judges should be guided by their judgment upon the question as to whether or not, if a party moved from his precinct, he intended to give up his residence there and to make his permanent home elsewhere. If he did so determine, he should not be allowed to vote. If, however, he did not intend to give up his legal residence and is only temporarily absent, it does not matter for what length of time, whether for two, four, six, eight or ten years or longer, just so he has not both left the vicinity and abandoned his old home as his residence.

You further say:

"I think we will have presented at our precinct some 50 to 75 mail votes. In some instances the party is in another state. Does a person cease to be a resident in the absent voter's law, when he has been away two, four, eight or even a greater number of years? As Judge of the Election I shall have to face such questions. If the fact that one is on the poll tax list and on the registration book all the evidence one has to consider. Many votes will be challenged. An early reply will be appreciated."

The absent voters' law gives every person who expects to be absent from his precinct or county on election day the right to apply to the registrar of his precinct for a ballot, which the registrar is obliged to give him. Upon receipt of the ballot the voter takes it before a Notary Public, or other officer authorized by law to take acknowledgments to deeds, marks and refolds the ballot, without assistance, places the ballot in an envelope provided for the purpose, etc., and mails the ballot to the registrar. The registrar on the morning of the election carries the box with the ballots to the Judges of Election and posts a list of absent voters at the precinct. After all other voting has taken place the Judges open the boxes containing the absent voters' ballots and, as each one is taken out, he is checked up to see if his name is on the voters' list, and, if he is and is a resident of the precinct at the time and there is no valid ground of challenge justifying the Judges to reject his ballot, it should be cast by placing the ballot unopened in the ballot box.

Trusting that this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,

*Attorney General.*

#### **ELECTIONS—Judges rendering assistance to voters.**

RICHMOND, VA., November 3, 1927.

M. S. CARTER, ESQ., *Clerk of Election,*  
*Battery Park, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of October 26, 1927, in which you submit for my consideration and opinion five questions which I shall answer in their order.

Your first question is as follows:

"What assistance can a judge of the election render a voter?"

The answer to this question is governed by section 21 of the Constitution, and section 166 of the Code. If the voter was registered prior to January 1, 1904, and if he requests it, one of the judges may assist him in the preparation of his ballot, but, no judge can voluntarily give any assistance to any voter whether registered before or after 1904. If the voter was registered subsequent to January 1, 1904, he may be assisted by one judge



designated for the purpose by the other judges in those cases where the voter is unable to prepare his ballot from physical causes, which would consist of blindness, the loss of both hands, or possibly paralysis, or some other cause preventing the use of his hands. Ignorance on the part of the voter can never be an excuse for a judge assisting such a voter.

Your second question is as follows:

“Has a judge the right to enter the voting booth and mark, erase or write additional names on the ballot of a voter?”

If the voter was registered prior to January 1, 1904, and requests one of the judges to assist him in the preparation of his ballot, such judge may enter the voting booth with the voter, but only in those cases where he has been requested to do so by a voter registered prior to January 1, 1904. If the voter was registered after January 1, 1904, the judge could enter the booth with him only in those cases where he is physically unable as mentioned in answer to question No. 1.

Your third question is as follows:

“Should rubber stamps with citizens names upon same be left in the voting place, and has the judge the right to instruct or show a voter how to use said rubber stamp?”

Section 21 of the Constitution provides that a voter, unless physically unable to do so, must prepare and deposit his ballot without aid on such printed form as the law may prescribe.

Section 162 of the Code provides that every elector qualified to vote at a precinct shall, “when he so demands, be furnished with an official ballot by one of the judges of election selected for that duty by a majority of the judges present.” It is, therefore, my opinion that no judge of election has the right to give to a voter anything other than an official ballot, and, of course in view of the provisions of section 21 of the Constitution, no judge has the right to instruct, or show a voter how to use a rubber stamp.

Your fourth question is as follows:

“Can an outsider in anyway assist a voter, and how far removed from the voting booth must a third party be?”

Of course, no outsider can in any way assist a voter in the preparation or casting of his ballot, and section 161 of the Code prohibits persons other than the elector offering to vote to be within forty feet of the ballot box.

In response to your fifth question, it is my opinion that the judges and clerks must record the names of the candidates voted for as their names appear on the ticket. Therefore, when a name has been written on a ticket in more ways than one a separate count should be made for each name. See section 178 of the Code.

Trusting this gives you the desired information, I am

Very truly yours,

JNO. R. SAUNDERS,  
*Attorney General.*

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#### ELECTIONS—Eligibility to vote.

RICHMOND, VA., November 4, 1927.

MR. A. J. COUNTS, *Registrar,*  
*Freeling, Virginia.*

MY DEAR SIR:

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

"Please advise me this week on the following:

"If a person offer to vote in the election to be held next Tuesday, and the person is challenged upon the ground that he or she has within the last few years voted at general elections in Kentucky, and that the person has not, since voting in Kentucky, either resided in Virginia for 2 years and in the county 1 year and has not registered in Virginia since voting in Kentucky, will it not be proper for the election officers to ask the person to be qualified and state upon oath whether or not he or she is legally entitled to vote, if the person challenged insists upon being allowed to vote?

"And if the person challenged refuses to state upon oath that he or she is legally entitled to vote, will it not be proper to refuse such person the right to vote?"

Unquestionably, it is entirely right and proper to challenge the vote of this party, and if he refuses to answer the questions relative to this matter he should not be permitted to vote.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### ELECTIONS—Voting by mail, subsequent death of party before date of election.

RICHMOND, VA., *November 4, 1927.*

C. W. FRANKLIN, ESQ.,  
*Judge of Election,*  
*Cumberland, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your communication of November 2, 1927, in which you state that Mrs. C. D. Diggs of your county applied for a ballot as an absent voter, and, after receiving, marking and depositing it in the mail, she died. You request me to advise you whether her ballot can be cast on the day of election.

It is my opinion that it cannot. Under section 214 of the Code, when the box containing the ballots of the absent voters is opened and their names checked, the envelope containing her ballot should be taken out and not cast.

Trusting this will give you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### ELECTIONS—Persons eligible to vote.

RICHMOND, VA., *November 4, 1927.*

HON. R. A. FULWILER,  
*Buchanan, Virginia.*

DEAR MR. FULWILER:

I am in receipt of your letter of the 1st instant, in which you state certain facts concerning first, a gentleman and wife who resided in Buchanan for many years, etc., second, Mr. G. O. Givens and wife who resided at Buchanan, etc., third, Mr. Harry Hodges and Mrs. Lena Hodges, his wife, who resided in Roanoke City, etc., and, fourth, D. P. Lankford and Mrs. Tessie Lankford, his wife, who have resided at Buchanan, etc., stating certain facts in each case, and ask for my opinion as to their rights to vote predicated on your statement of facts.

On October 31, in answer to a letter asking my opinion as to the right of a certain

person to vote in Mineral Precinct, Louisa County, I wrote the following, and I think my answer, so far as it concerns the rights of the parties you have named to vote, controls the cases you have cited:

"Whenever a person has acquired a legal voting residence in one place and is temporarily removed therefrom, it does not deprive him of his legal right to vote at that place. To lose his right, he must have actually left that place and have done so with the intention of making some new locality his permanent home and, consequently, have given up the former home and intention of returning.

"This question has been passed upon by the Supreme Court of Appeals of Virginia in *Williams v. Commonwealth*, 116 Va. 272, which may be found in any lawyer's office.

"The determination of the right of the man in question to vote at Mineral depends upon the application of these principles to his case and necessarily must be determined by the judges of election of Mineral Precinct, should his right to vote be challenged."

On the 24th of October I wrote to the Honorable E. J. Sutherland, Commonwealth's Attorney of Dickenson County, concerning the question embodied in one of the paragraphs of your letter, as follows:

"Therefore, it is my opinion that one who has applied for a ballot as an absent voter and received the same, is not entitled to vote in person, even though he appears at the precinct on the day of election. His vote can be cast only as an absent voter."

In another paragraph you ask if a voter residing some distance from his voting residence and precinct has made application for ballot to vote by mail and, although the ballot may have been mailed to him, is he entitled to receive a ballot and cast same at the election if he fails to receive the official ballot by mail and returns to his legal residence and precinct and offers to vote?

I do not think he can. Should he have received a ballot in person from the Judges of Election of his precinct and mutilated or defaced the same, in order for him to receive another ballot, he must have returned the original to the Judges of Election. It is my opinion that when a person applies to the registrar for a ballot, under the absent voters' law, and such ballot is delivered to him or is mailed to him, he is not entitled to another ballot.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### ELECTIONS—Eligibility to vote.

RICHMOND, VA., November 4, 1927.

HON. C. M. SHANNON, *Chairman,*  
*Shenandoah County Democratic Committee,*  
*Mt. Jackson, Virginia.*

MY DEAR MR. SHANNON:

I beg leave to acknowledge receipt of your letter in which you submit the following questions for an opinion:

First, whether or not a voter who became of age prior to February 1, 1927, has to pay his poll tax six months prior to the election in order to vote. In reply I would say that he does not have to pay his poll tax six months prior to the election, for the reason the voter is only required to pay all State poll taxes assessed or assessable against him for the three years next preceding that in which he offers to vote. The poll tax for 1927, of course, could not possibly be one of the three years preceding the election held

in 1927, and no poll tax was assessable against him in 1926, because he did not become of age until 1927.

In reply to your second question as to what poll tax a man who moved into the State February, 1925, has to pay before he can vote in the general election this fall, I would say he is only required to pay his poll taxes for the year 1926, because that was the only poll tax assessed or assessable against him since he has moved into the State, except the poll tax for 1927 which of course he is not required to pay before this coming election. This opinion is based upon the presumption that he came to Virginia after the 1st day of February, 1925.

In reply to your question as to whether a voter who is physically unable to leave home can vote under the absent voters' law on the day of election, I would state that it has been the consistent ruling of this office that the absent voters' law does not apply to a case of this kind.

In reply to your question as to whether or not a member of the electoral board is disqualified to serve as judge of the election, I am of the opinion that he is and should not serve as such for the reason that the electoral board appoints the judges, and surely it would not be proper for the board to appoint one of its members as judge of the election.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**ELECTIONS—Registrar acting as Notary Public in cases of ballots received by mail.**

RICHMOND, VA., *November 4, 1927.*

MR. GEORGE L. TAYLOR,  
*Attorney at Law,*  
*Big Stone Gap, Virginia.*

DEAR SIR:

In reply to your letter of October 13, concerning the election laws and other matters, I will say in response to your first question—

“Is it legal or proper for a registrar who is also a notary public to act in his capacity as a notary public with reference to one voting by mail in the precinct for which he is registrar?”

In my opinion it is neither legal nor proper for the same person to act in the dual capacity of a registrar and a notary public in the matter of the ballot and voting of one person as an absent voter.

In response to your second question—

“Is it legal or proper for a candidate who is also a notary public to fill out and execute as a notary public certificate required of a person voting by mail, he being one of the candidates to be voted for in said election?”

I would say that it is neither legal nor proper for a candidate to act as a notary public in the matter of a person offering to vote by mail as an absent voter.

In my judgment, the law contemplates the functions of registrar and notary public should be exercised by different persons. If you will examine sections 84 and 86 of the Code, I think that you will arrive at the same conclusion. The law expressly provides that no person who is a candidate, nor the deputy nor the employee of a candidate, may act as judge or clerk of an election, and, while the absent voters' law did not have in mind and provide for the case of a candidate who undertakes to act as notary public,

I think it would be improper for him to act as a notary in preparing a ballot to be cast in an election at which he is a candidate.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**ELECTIONS—Transportation of voters.**

RICHMOND, VA., *November 4, 1927.*

MR. C. BROOKS WORRELL,  
*Hillsville, Virginia.*

MY DEAR SIR:

I am in receipt of your letter of the 2nd instant, in which you say:

“Please advise me as quick as possible whether or not it is legal to hire cars to carry voters to an election precinct to vote for the person who pays for the service.”

In reply I will say that, under section 251 of the Code of 1924, which provides that no person shall pay—promise—except for expenses herein expressly allowed, the last line of said section being “for transportation of voters to and from election,” it is undoubtedly legal to hire cars to carry persons to the polls.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**ELECTIONS—Order in which names shall appear on ballot.**

RICHMOND, VA., *September 28, 1927.*

MR. LLOYD SULLENBERGER,  
*Secretary of the Electoral Board,  
Monterey, Virginia.*

DEAR SIR:

Acknowledgment is made of your letter of September 16, in which you request me to advise you in what order the names of candidates for particular offices should be printed on the ballot.

In response thereto, I will call your attention to section 28 of the Constitution, which reads as follows:

“The General Assembly shall provide for ballots without any distinguishing mark or symbol, for use in all State, county, city, and other elections by the people, and the form thereof shall be the same in all places where any such election is held. All ballots shall contain the names of the candidates, and of the offices to be filled, in clear print and in due and orderly succession; but any voter may erase any name and insert another.”

Section 153 of the Code contains the same provision found in section 28 of the Constitution. You will see from an examination of the constitution and the statute that no provision is made as to the order in which names shall be printed on the ticket.

I am, therefore, of the opinion that the matter is one to be decided by the electoral board.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**ELECTIONS—Parties voting in democratic primary, duty to support nominee.**RICHMOND, VA., *September 30, 1927.*Mr. W. C. BRODIE,  
*Figsboro, Virginia.*

MY DEAR SIR:

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

“Regarding primary election held in Franklin county on August 2, 1927, for purpose of nominating candidates for county officers, several of said candidates had no opposition in primary but their names appeared on official ballot along with those who had opposition. Now we have a Republican running as an Independent, who is a candidate for one of the offices, and he is telling the Democrats who voted in said primary that they are under no obligation to support the Democratic nominee, for the reason that said Democrat had no opponent and should have been declared the nominee, and should not have had his name printed on the ballot.”

Section 246 of the Code provides that, when there is only one declaration of candidacy in a political party for the nomination for any office, the name of the person filing such declaration shall be declared the nominee of such party for the office for which he has announced his candidacy. Therefore, those candidates in the primary, who had no opposition, became the nominees of the primary without being voted for.

Every person, who participated in that primary, is morally bound to support every nominee of the party in whose primary he voted, whether such nominee was nominated by the votes cast in the primary or under authority of section 246 of the Code, and, of course, any person who participated in the Democratic primary, who does not vote for all the nominees of that party in the succeeding election will lose his standing as a member of the Democratic party, and be ineligible to vote in the succeeding primaries. See section 228 of the Code, as amended (Virginia Election Laws, pages 66–67).

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.***ELECTIONS—Change of residence, persons eligible to vote.**RICHMOND, VA., *September 24, 1927.*Mr. A. J. COUNTS, *Registrar,*  
*Freeling, Virginia.*

DEAR SIR:

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

“Please be so kind as to answer the following question at your earliest possible convenience and greatly oblige:

“A citizen and voter of this county moved to Kentucky some years ago to engage in business, leaving his farm. After he had been in Kentucky a year or two he started voting in that state and, of course, stopped voting in Virginia.

“After learning this, as registrar I erased his name from the registration books, assuming that when he started voting in Kentucky he relinquished citizenship in Virginia.

“After living in Kentucky several years and voting over there all the while, this man moved back to this state a few months ago and has his poll taxes paid up for three years back and, I understand, will maintain that he did not relinquish his citizenship in Virginia by voting in Kentucky.

"I maintain that when he started voting in Kentucky he lost his citizenship in Virginia and that before he can become a voter here he must reside in the state two years and register here."

You are entirely correct in your position. A man who was once a resident of this State cannot maintain his legal residence here and at the same time vote in another State. In order to again vote in this State the man in question must reside in Virginia two years, in the county or city one year, and in the precinct thirty days, before he will be again be eligible to vote. Of course, he must register again.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**ELECTIONS—Attorney not practicing eligible for Commonwealth Attorney.**

RICHMOND, VA., *September 23, 1927.*

MR. WM. W. ACKERLY,  
*Attorney at Law,*  
*Lexington, Virginia.*

MY DEAR MR. ACKERLY:

In reply to your letter of recent date, in which you submit the following question:

"Is a man who is not a practicing lawyer eligible to have his name placed on the official ballot as a candidate for election to the office of Commonwealth's Attorney?"

I beg to submit the following:

I can find nothing in the statute which definitely settles this question. However, it seems to me it would be entirely useless to place the name of a party who is a candidate for office on the official ballot, who would not be eligible to hold the office should he be elected.

Of course, there are two ways in which this question can be settled. The candidate may apply to the electoral board for a writ of mandamus to compel them to place his name on the ballot, should the electoral board decline to do this. Should the electoral board decide to place his name upon the ballot, the question then might be settled by an injunction enjoining and restraining them from so doing. A man who is not a practicing attorney, of course, could not qualify, even if he were elected as Commonwealth's Attorney.

Section 229 of the primary law is very clear on the subject. This, among other things, provides that

"The name of no candidate shall be printed upon the official ballot used at any primary unless such person is legally qualified to hold the office for which he is a candidate. \* \*"

I regret that I cannot give you more definite information.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**ELECTIONS—Payment of capitation tax, eligibility to vote.**RICHMOND, VA., *September 23, 1927.*MISS EDNA L. WELCHLIN,  
*Farmville, Virginia.*

MY DEAR MISS WELCHLIN:

You state that you became 21 years of age in January of this year, that you have not paid any capitation tax and you desire to be advised whether or not this will prevent your voting in the general election this fall.

Certainly it will not. You were not assessable with any capitation tax on the first of January of this year, due to the fact that you were not 21 years of age. The Constitution only requires the payment of all taxes assessed or assessable against a party as a prerequisite to vote. As none was assessed or assessable against you on the first of January, it was, therefore, not necessary for you to pay this capitation tax six months prior to the nomination. Hence, it will be only necessary for you to go to the Commissioner of the Revenue, have yourself assessed with one year's capitation tax, then pay \$1.50 to the Treasurer of your county, take a receipt therefor and appear before the registrar in your district and register, which will qualify you to vote in the coming election this fall.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.***ELECTIONS—Assessments, prerequisite to vote.**RICHMOND, VA., *September 22, 1927.*L. D. ROBINSON, ESQ.,  
*King William, Virginia.*

MY DEAR SIR:

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

"A man was 21 years of age in November, 1924. He was not assessed in 1925, but was assessed in 1926, and has paid all taxes assessed against him before May 1, 1927.

"Can this man have himself assessed and pay this omitted capitation tax at this time and be allowed to vote in the election November 8?"

Section 21 of the Constitution of Virginia provides that as a prerequisite to the right to vote one must have paid at least six months prior to the election in which he offers to vote 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.

The first tax assessable against this man was as of February 1, 1925. As 1925 was one of the three years preceding the year 1927, the man in question is not eligible to vote, as his tax for that year cannot now be paid six months prior to the November, 1927, election.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*



**ELECTIONS—Residence, payment of capitation tax, eligibility to vote.**RICHMOND, VA., *September 2, 1927.*

HON. HARRY K. GREEN,  
*Commissioner of Revenue.*  
*Clarendon, Virginia.*

MY DEAR MR. GREEN:

I beg leave to acknowledge receipt of your letter of the 30th.

In this you state that Mr. H. A. Robertson left Virginia with the intention of changing his residence and did stay out of the State over two years; that he afterwards returned to Virginia and has now been residing in the State for the past two and one-half years, and has paid his 1925 and 1926 capitation taxes. You then desire to be advised whether or not he is eligible to vote in the general election this fall, and if it is necessary for him to re-register in order so to do.

In reply I will state that it will be necessary, in my judgment, for Mr. Robertson to re-register, as I presume his name has been struck from the registration books on account of his absence. If the capitation taxes for the years mentioned above have been paid six months prior to the November Election and he re-registers, of course he can vote.

Trusting this gives you the desired information and with regards, I am

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**ELECTIONS—Duty of Registrar.**RICHMOND, VA., *September 9, 1927.*

MISS IVA JERRELL BOGGS,  
*R. F. D. 1,*  
*Bumpass, Virginia.*

DEAR MADAM:

Acknowledgment is made of yours of the 5th, in which you ask me whether it is necessary for you as registrar to show to all citizens applications made to you for registrations.

In reply I will say that section 93 of the Code requires these applications to be filed and preserved as a part of the records of the office of the registrar, but makes no mention of their being open to inspection by the public. Section 104 of the Code provides that poll books shall at all times be open to public inspection. It is my opinion that, if the Legislature had desired the applications to be subject to public inspection, it would have made a similar provision in regard to them as it made in regard to the poll books. Therefore, I am of the opinion that these applications can be inspected only by virtue of an order of court.

You further ask me how soon after a person who has been refused registration may he or she make another application. This statute does not fix any number of times that applications may be made or any interval between them. Consequently, I think applications may be renewed at any time.

Respectfully yours,

JNO. R. SAUNDERS,  
*Attorney General.*

**ELECTIONS—Time allowed candidates to give notice.**RICHMOND, VA., *September 12, 1927.*HON. F. E. SNIDOW, *Clerk,*  
*Pearisburg, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of September 9, 1927, in which you say in part:

"Section 154 of the Code, as amended by the Acts of the General Assembly of 1926, page 458, provides that candidates for office shall give notice at least sixty days before a general election to the court clerk, whose duty it is to certify the same to the secretary of the electoral board of his county. I desire that you give me your opinion as to the last day and minute that a candidate can file to get his name upon the official ballot for the election to be held on November 8, 1927, and to illustrate I here give you the following facts.

"A candidate for the House of Delegates filed a notice with me at 8:00 o'clock p. m. on September 8, 1927, another candidate filed a notice with me at 11:30 p. m. on September 8, 1927, and still another one did not reach me until about fifteen minutes after 12:00 o'clock (midnight), which would be forty-five minutes after the second man filed. Some contend that September 8, midnight, was the last minute that a candidate could file and get his name placed upon the ballot, and others claim that September 9 is still sixty days before the coming election. I accepted the last man's notice and told him that I would submit the proposition to you for a ruling, and would be governed by the same as to whether or not his name would be certified to the electoral board."

Section 154 of the Code, as amended by the Acts of 1926, requires a candidate to "give notice at least sixty days before such election, if it be a general election, and at least thirty days before such election if it be a special election, to the county clerk or clerks of the county or counties, and to the clerk or clerks of the corporation courts of the city or cities whose electors vote for such office."

It is provided by the eighth sub-section of section 5 of the Code that—

"Where a statute requires a notice to be given, or any other act to be done, a certain time before any motion or proceeding, there must be that time exclusive of the day for such motion or proceeding, but the day on which such notice is given or such act is done, may be counted as part of the time."

In my opinion this section is applicable to the matter here under consideration. The Court of Appeals considered this sub-section of section 5 of the Code in an exhaustive opinion in *Kelly v. Trehy*, 133 Va. 160. Counting the time in accordance with the terms of the statute last above quoted, in my opinion, would make the 9th day of September, 1927, the last day on which a notice of candidacy could be filed under section 154 of the Code, as amended. Thus counting, we would have twenty-two days in September, thirty-one days in October and seven days in November, making sixty days prior to November 8, 1927, the day on which the election is to be held.

It is, therefore, my opinion that the notice received by you fifteen minutes after the beginning of the morning of September 9, 1927, was filed in time, and that any notice filed prior to midnight following the beginning of September 9, 1927, was filed in time.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**ELECTIONS—Legal residence of voters.**RICHMOND, VA., *September 12, 1927.*

MR. D. M. AUSTIN,  
*Fincastle, Virginia.*

DEAR MR. AUSTIN:

I am in receipt of your letter of September 9, in which you state that Mr. W. A. Watkins, a young man employed by the Eastern Bus Company as a driver, pays his poll tax and is registered in Botetourt County, but his work is such that he is not permanently located at any particular place, but is frequently transferred from one place to another. You then desire to be advised whether under these conditions Mr. Watkins is entitled to vote in the election to be held on November 8.

In reply I will state that, if Mr. Watkins claims Botetourt as his legal residence, has paid his capitation tax and is duly registered as stated in your letter, unquestionably, he is entitled to vote in that county in the November election. The mere fact that the man is absent from his home temporarily does not preclude him from voting.

This opinion is also applicable to the case of the Lugar Brothers, referred to in your other letter of September 9, in which you state that these parties are registered in Botetourt County, but work outside of the county at present, though not permanently located, and still claim Botetourt as their home.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**ELECTIONS—Democratic nominee's name to appear on ballot in general election.**RICHMOND, VA., *September 21, 1927.*

HON. A. D. SEEDS,  
*Waverly, Virginia.*

MY DEAR MR. SEEDS:

In reply to your inquiry as to whether or not, under the following conditions, your name should be printed on the official ballot to be used in the general election to be held on November 8, 1927, I beg to submit the following:

You state that you were the only candidate for the office of treasurer in the county of Sussex at the Democratic primary held in August, 1927; that no other candidate offered for this office, hence you were declared the nominee by the proper party authorities. You further state that you have failed to notify the clerk of the court within the sixty days previous to the November election; that you were a candidate for this office to be voted for in the general election. You then desire me to advise you whether or not, under these conditions, your name should be printed on the official ballot.

There can be no doubt whatever that your name should be printed on the official ballot. I have before me copy of an opinion rendered by Attorney General John Garland Pollard, who was my predecessor, to Mr. Frank Stuart, Clerk of Westmoreland County, copy of which I am enclosing. You will observe that he quotes from the provisions of section 225 of the primary law, which quotation is as follows:

"Any candidate for a party nomination of any office who receives the plurality of the votes cast by his party shall be the nominee of his party for such office and his name shall be printed on the official ballot used in the election for which the primary was so held."

You were the nominee of the party, regardless of the fact that your name did not

appear on the official ballot, because the primary law provides that when there is no opposition to a candidate in the primary, he shall be declared the nominee of the party.

Moreover, section 154 of the general election laws, which was amended by the legislature at its last session of 1926, contained two amendments. This section prior to these amendments only required thirty days notice to be given by the candidates to the clerk. It was so amended as to require sixty days notice. Another sentence in this section reads as follows:

“No person not announcing his candidacy as above, or who is not qualified to vote in the election in which he offers as a candidate shall have his name printed on the ballots, provided for such election, unless he be a party primary nominee.”

The words “unless he be a party primary nominee” is one of the amendments contained in section 154, as amended by the legislature of 1926.

This amendment is in keeping with the opinion of Mr. Pollard referred to above, in which opinion he stated that it was not necessary for a nominee in a democratic primary to file this notice with the clerk in order to have his name printed on the official ballot, and certainly now it is entirely clear with the amendment to section 154 of the election laws just referred to that a nominee in a primary is not required to give notice of sixty days to the clerk in order to have his name printed upon the official ballot.

This is unquestionably the law and I cannot understand how anyone could differ from this construction.

Yours very sincerely,

JNO. R. SAUNDERS,

*Attorney General.*

#### ELECTIONS—Residence, eligibility to vote.

RICHMOND, VA., *September 20, 1927.*

MR. T. H. POTTER,

*Troutville, Virginia.*

DEAR SIR:

In reply to your question as to whether, when a voter becomes of age only a few days before the election, he is required to pay his poll tax six months prior to the election, I would say that he is not. The party in question can have himself assessed, pay his poll tax now and register, provided, of course, he is otherwise qualified.

When a voter moves from one county to another with the fixed purpose of making the county to which he has moved his residence, I doubt very much if, under the law, he would have a right to return to the county from which he moved and vote, due to the fact that the Constitution says that, in order for one to vote in an election, he must have been a resident of the county in which he votes for at least twelve months.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,

*Attorney General.*

#### ELECTION—Judge in primary, candidate in general election.

RICHMOND, VA., *September 19, 1927.*

MR. J. J. PATTERSON,

*Chatham, Virginia.*

DEAR MR. PATTERSON:

Your letter of September 16 received.

In my judgment it would be highly improper for a party who acted as judge in the

regular primary to become a candidate in the general election against a nominee in the primary. Unquestionably, a man who voted in the August primary is morally bound to support the nominees of the primary in the general election.

Of course, there are some men who do not regard this obligation and in the general election vote as they think proper, but under the provisions of section 228 of the primary law it is contemplated that those who participate in the primary shall support the nominees of the primary.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**ELECTIONS—Payment of taxes, prerequisite to vote.**

RICHMOND, VA., September 19, 1927.

HON. C. M. SMITH, *Treasurer,*  
*Farmville, Virginia.*

MY DEAR MR. SMITH:

Acknowledgment is made of your letter of September 10, 1927, in which you say in part:

“Will you please advise me if a person, who was twenty-one years old January 7, 1927, would have to pay his taxes by, on or before May 8, or can he pay them now and vote in the general election in November?

“Also please advise me if a hireling, who came from Mecklenburg county into this county, commencing to work on April 1, 1927, and becoming twenty-one at this time, can now qualify himself to vote and vote in the general election in this county.”

In reply to your first question I call your attention to section 1 of the Tax Bill as amended by the Acts of 1926, pages 288–289. Under this section, the first capitation tax assessed or assessable against this young man would be as of January 1, 1928. Therefore, his capitation tax for 1928 may now be assessed against him and paid, and, if otherwise qualified, he may register at any time prior to the closing of the registration books and vote in the November, 1927, election. See section 2420 of the Code. The only capitation taxes, which have to be paid six months prior to the election, are those assessed or assessable against a person for one or more of the three years preceding the year in which the election is held. See section 21 of the Constitution. Of course, a capitation tax assessable for the year 1928 would not be for one of the three years preceding the year 1927.

With reference to your second question, I call your attention to section 18 of the Constitution, which provides in part that “every male 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,” may vote, etc. The young man in question has not been a resident of Cumberland county long enough to vote in the November, 1927, election.

With my best wishes, I am

Sincerely yours,

JNO. R. SAUNDERS,  
*Attorney General.*

**ELECTIONS—Democratic nominee's name to appear on ballot in general election, duty to support nominee.**RICHMOND, VA., *September 19, 1927.*

HON. JOHN P. LEE,  
*Commonwealth's Attorney,*  
*Rocky Mount, Virginia.*

MY DEAR MR. LEE:

Your letter of September 17 received.

In this you state that you were a candidate for the office of Commonwealth's Attorney of Franklin County, subject to the August Primary; that you had no opposition, and was declared the nominee by the executive committee; that the committee placed your name on the official ballot used in the Primary and you were voted for along with the other candidates in the Primary.

You further state that you have opposition in the general election to be held in November, and your opponent is stating to the voters that it is not their duty to support you in the general election.

I cannot comprehend how any man who is a candidate for office can use such an argument. Unquestionably, any man who voted in the Democratic Primary is honor bound to support the nominees of the Primary. This is clearly contemplated and fully set forth in the provisions of section 228 of the primary law.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**ELECTIONS—Voting by mail.**RICHMOND, VA., *August 22, 1927.*

HON. GEORGE L. TAYLOR,  
*Attorney at Law,*  
*Appalachia, Virginia.*

DEAR MR. TAYLOR:

I beg leave to acknowledge receipt of your letter of August the 20th in which you refer to the absent voters' law, and submit the following questions for reply:

"1. Under the statute must there be a bona fide intention on the part of the voters to be absent from precinct or county?

"2. Can a person legally vote by mail when he is not absent from the precinct on day of election?"

"3. Can a voter confined to his room and bed by illness legally qualify to vote by mail under absent voter's law?"

Your first question must be answered in the affirmative. The law, in my judgment, unquestionably contemplates absence from the precinct on the day of the election when the voter applies for a ballot to vote by mail.

Your second question should be answered as follows: It frequently happens that a party who has made application for a ballot is present on the day of election. If in the meantime he has returned his ballot to the registrar, then the registrar should deposit it and he should not be permitted to personally vote in the election.

In answer to your third question, I would state that there is no provision in the absent voters' law whereby a party who is confined to his home on account of sickness can vote by mail.

In reply to the postscript of your letter as to whether or not a registrar is authorized

to carry ballots out of his precinct into another precinct or county and deliver them in person to voters, I would state that section 205, until amended by the Legislature at its session of 1926, provided that the registrar should forward the ballot to the applicant by registered mail. The amendment of 1926 provides, however, that the registrar can do this or deliver the ballot in person to the applicant.

While the law is not very clear as to whether or not the registrar can carry ballots from one precinct to another precinct or county and deliver them in person to voters, at the same time I do not think that the law contemplates that this should be done.

Trusting I have given you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### ELECTIONS—Declaration of candidates.

RICHMOND, VA., August 22, 1927.

MR. WILLIAM A. COOKE,  
*Buckner, Virginia.*

MY DEAR SIR:

I am in receipt of your letter of August 19th in which you state the following and request an opinion in reference thereto:

"According to section 246 of Virginia Code—whenever within the time prescribed by this chapter there is only one declaration of candidacy in a political party for the nomination for any office, the name of the person filing such declaration shall be declared the nominee of such party for the office for which he has announced his candidacy.

"Now here in Louisa there was only one declaration of candidacy for the House of Delegates, yet instead of declaring said party the nominee, his name was put on the ballot in recent Primary. Does this when it is not following the law, make him the nominee for that office? Also are the voters bound by their vote when they are voting for a man whose name is not legally upon the ballot?"

While it is true that section 246 of the Primary Law provides that where there is only one declaration of candidacy in a political party for the nomination for any office, the name of the person filing such declaration shall be declared the nominee of such party for the office for which he has announced his candidacy.

I am of the opinion that the provisions of this section are directory and the fact that the party authorities saw fit to place the name of this candidate on the official ballot is not illegal, and such candidate is unquestionably the nominee of the party. It, therefore, follows, of course that the electors who participated in the primary, and who vote in the coming fall election, are both legally and morally bound, in my judgment, to support this nominee. I don't think there can be any question about this.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### ELECTIONS—Time for filing expense account of candidates.

RICHMOND, VA., August 12, 1927.

HON. F. W. RICHARDSON,  
*Fairfax, Virginia.*

MY DEAR MR. RICHARDSON:

Acknowledgment is made of your letter of August 11th, 1927 in which you say in part:

"I am of the opinion that the candidates in the primary should file their expense account and swear to same with me in twenty days after the primary election.

"Am I right in this?

"I am also of the opinion that under the Act of March 23, 1926, Acts 1926, page 458, any candidate at the election to be held on November 8th, 1927, should give me notice of his candidacy, sixty days before November 8th, 1927, dated and signed by him and witnessed by two witnesses.

"This notice is not to be acknowledged by the candidate, unless he be incapable of writing his name. Am I right in this? Please answer at once."

In view of the provisions of section 232 of the Code I am of the opinion that all candidates for office in the primary must file their expense accounts with you within twenty days after the holding of the primary in which they were candidates.

Section 253 of the primary law also requires that every candidate for the Senate, or for the House of Delegates, shall within thirty days after the primary election is held to fill such offices make out and file with the officer or board empowered by law to issue certificates of election to such office or place, and a duplicate thereof with the clerk of the circuit court of the county or corporation court of the city for any county or city in which such candidate resides, a statement in writing, which statement and duplicate shall be subscribed and sworn to by such candidate before an officer authorized to administer oaths, setting forth in detail all sums of money contributed, and so forth. This section apparently requires the candidate to duplicate what he has already done under section 232, so far as filing his expense account is concerned.

In response to your second inquiry, I am of the opinion that you are entirely correct, except with reference to the nominees in the primary.

In view of the provisions of section 225 of the Code, which declares that the names of the nominees in the primary "shall be printed on the official ballots used in the election for which the primary was held." I am of the opinion that the names of all of the nominees in the primary must be printed on the ballot, whether they comply with the provisions of section 154 of the Code as amended or not. See report of the Attorney General, 1917, page 70.

Sincerely yours,

JNO. R. SAUNDERS,  
*Attorney General.*

#### **ELECTIONS—Duty to support democratic nominee in general election.**

RICHMOND, VA., August 16, 1927.

MR. J. W. KIMMAN, *Chairman,*  
*Democratic Committee for Spotsylvania County,*  
*McHenry, Virginia.*

MY DEAR SIR:

I beg leave to acknowledge receipt of your letter of August the 14th in which you submit the following question:

"Does a person voting in the Democratic primary legally and morally obligate himself to support the nominees of the party whether the names of the nominees appeared on the ticket or not?"

You further state that in Spotsylvania County several of the county officers had no opposition; that their names did not appear on the official ballot used in the primary and therefore were declared the nominees.



Unquestionably, a person who participates in the primary obligates himself, both morally and legally, to support the nominees of the party, even though the names of some of the nominees do not appear on the official ballot. Section 246 of the Primary Law provides:

"Whenever within the time prescribed by this chapter there is only one declaration of candidacy in a political party for the nomination for any office, the name of the person filing such declaration shall be declared the nominee of such party for the office for which he has announced his candidacy. \* \* \*"

Section 228 of the Primary Law prescribes who shall be permitted to vote in the primary. Among other things it provides:

"No person shall be permitted to vote for the candidates of any party in any primary unless such person is a member of such party and in the last preceding general election, in which such person participated, he or she voted for the nominees of such party; and, upon challenge, such person shall declare on oath that he or she is a member of such party and supported such nominees as hereinbefore required before being permitted to vote.

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

Unquestionably it follows that any person who has announced his candidacy in the primary has complied with all of the requirements of the law in connection therewith, and who has been declared the nominee is in fact as much a nominee of the party as if his name had appeared on the official ballot, and he had been voted for in the regular primary.

It therefore follows, as stated above, that everyone who participates in the primary is legally and morally bound to support the nominees of the party, even though the names of some of the nominees did not appear on the ballot.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### **ELECTIONS—Payment of capitation tax by female.**

RICHMOND, VA., *August 16, 1927.*

MR. R. E. L. FRALIN,  
*Glade Hill, Virginia.*

MY DEAR SIR:

Your letter of August 8th, 1927 addressed to His Excellency, Governor Byrd, was referred by him to me for attention, and received this morning.

Chapter 400 of the Acts of 1920, as amended, assesses a capitation tax on every female residing in this State above the age of twenty-one years. She is personally responsible for the payment of this tax, and if she has any money or property out of which the tax can be made, it can be collected out of her by levy, garnishment or otherwise, after it has become three years past due. The payment of it cannot be enforced by legal means until it has become three years past due, but after that time it can be collected.

Trusting that this is the information which you desire, I am

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**ELECTIONS—Residence of voters.**RICHMOND, VA., *August 17, 1927.*

HON. LEWIS CRAWLEY, *Clerk,*  
*Cumberland, Virginia.*

DEAR SIR:

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

"I will thank you for your opinion on the following:

"First, can a lady register and vote in Madison District, County of Cumberland, State of Virginia, in the November election? She having been born and reared in Randolph District, of said county, married a man of Madison District, of said county, and lived in said Madison District for several years, after her husband's death returned to her old home in Randolph District, leaving her house furniture in the Madison District, where it now remains, but has been assessed and paid her capitation taxes in the Randolph District for the past three years, but having secured a position in Madison District and working in said Madison District 10 hours per day for the last two years and assessed in Madison District with capitation taxes for the year 1927, but spends her nights in Randolph District?"

"Second, is a man eligible to vote in the county of Cumberland who was born in said county and reared in said county until the age of about 19 years, leaving said county with his father and family and moving to another county in this state and living with his father until he became 21 years of age, late in the year 1926, and closed a contract on the first day of November, 1926, to work in the county of Cumberland for the year 1927, but did not move to said Cumberland County, until January 1, 1927? I will state further that he was not assessed anywhere for the year 1927 as to capitation taxes, but under your former ruling I think he can be assessed and pay his capitation taxes any time within thirty days of the election."

Replying to your first question, I would say that the lady should vote in the district of which she is a resident. Whether she resides in Madison District or Randolph District is a mixed question of fact and intention. I would think that, having lived for several years in Randolph District and being domiciled there at present, she should continue to pay her capitation tax in that district and vote there. The mere fact that her employment takes her to Madison District every day would not change her place of residence.

Replying to your second question, if this young man has never lost his residence in the county of Cumberland and became 21 years of age late in the year 1926, he can have himself assessed with the capitation tax for 1927 and register within thirty days of the general election and vote. If, in leaving the county with his father and family and moving to another county, he intended to change his residence, he cannot acquire a new residence until he has resided in the county of Cumberland for a period of one year. Whether it was his intention to change his residence or not is a question which he only can answer.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**ELECTIONS—Candidates, residence, place of voting.**RICHMOND, VA., *August 10, 1927.*

HON. S. P. POWELL,  
*Commonwealth's Attorney,*  
*Spotsylvania, Virginia.*

MY DEAR MR. POWELL:

Acknowledgment is made of your letter of August 2nd, 1927 in which you say in part:

"I notice your public opinion in the papers concerning the right of Senator Smith to run for the position of Senator and hold the office if elected while making his home in Richmond, but preserving a residence in Louisa, by payment of poll taxes there for purpose of voting where he owns considerable property. Please advise if the same construction would apply to married or single people living in Washington, D. C. and other states owning no property in Spotsylvania County but paying their poll taxes there for the purpose of voting; also if it would apply to people who have sold all their property in Spotsylvania and moved to Fredericksburg or other cities where they maintain homes, but continue to pay poll taxes in Spotsylvania County."

The Court of Appeals held in *Williams v. Commonwealth*, 116 Va. 272 that where a person had once acquired a legal residence in one place and that legal residence could be lost for the purpose of voting only by the combination of two acts; first, a physical removal; second, with the intention of abandoning the legal residence at the first place and acquiring a new legal residence elsewhere.

Of course, the establishment of one's intent with reference to a matter of this kind is a question of fact to be determined as any other fact is determined. I would say, however, that where one continues to pay his capitation taxes and taxes on intangibles at the old place of residence and returns to vote that that in itself is a fair indication of the fact that in physical removing such person did not intend to abandon his legal residence, but intended to retain it at the place from which he moved. However, as I have said the question is one of fact to be determined as other facts are determined.

Trusting that this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### **ELECTION—Payment of taxes—Prerequisite to vote.**

RICHMOND, VA., August 8, 1927.

M. A. JOHNSON, ESQ., *Registrar,*  
*Roanoke, Virginia.*

MY DEAR MR. JOHNSON:

Acknowledgment is made of your letter of August 6, 1927, in which you say:

"R. M. Jones, who will be twenty-one years of age on October 1, 1927, wants to register. Can he pay one year tax now and register and vote in the November election, or should he have paid his capitation tax six months prior to the November election?"

"John Smith joined the United States Army in Roanoke (his home) in 1924, was out of the State in 1925, came back the first of the year 1926 and has paid his capitation tax for the year 1926. Can he register, or must he pay all back taxes for the three years while away working for the government?"

Mr. Jones can pay his capitation tax for the year 1928 at any time prior to the closing of the registration books for the November election, 1927, and register and vote in such election, if otherwise qualified. The capitation tax of a young person just coming of age does not have to be paid six months prior to the election in which he offers to vote.

In the case of Mr. John Smith on the facts stated in your letter, if he were twenty-one years of age prior to February 1, 1924, it is necessary that he must have paid his capitation taxes for the years 1924, 1925 and 1926 at least six months prior to the date of the November, 1927 election in order to entitle him to vote in such election.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**EMBALMING, STATE BOARD OF—Reward for violation of practice.**RICHMOND, VA., *August 1, 1927.*

L. T. CHRISTIAN, Esq., *Secretary,*  
*State Board of Embalming,*  
*Richmond, Virginia.*

DEAR MR. CHRISTIAN:

Acknowledgment is made of yours of July 30, in which you say:

"The State Board of Embalming desires to prosecute violators of the law pertaining to the practice of embalming.

"It is difficult to get evidence and the Board is of opinion that to secure conviction a reward will have to be offered.

"The Board desires to know, if, under chapter 72 of the Code, it is authorized to pay a reasonable reward, say \$25.00, in order to secure conviction."

In reply I beg to say that after a careful examination of chapter 72 of the Code, I am unable to find any authority for offering a reward to secure convictions in the cases you mention. Section 5068 of the Code authorizes the Governor to offer rewards in certain cases, but they do not include ordinary violations of the law.

I would suggest that you take the matter up with the Attorney for the Commonwealth in any city or county where you are convinced that the law is being violated and, if necessary, appoint a special investigator to report whether there have been violations or not.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**ELECTIONS—Legal residence of voter.**RICHMOND, VA., *July 30, 1927.*

HON. WILSON M. FARR,  
*Commonwealth's Attorney,*  
*Fairfax, Virginia.*

MY DEAR MR. FARR:

Acknowledgment is made of your letter of July 29, 1927, in which you ask for my ruling on the following statement of facts:

"Assuming that a party was born and raised in this county and that such party moved from here to the city of Washington and maintains a domicile there, accepts either governmental employment or private employment there, but announces his or her intention of retaining his or her residence in this county, causes his or her name to be placed upon the poll book list and pays within proper time taxes for the requisite years, is such party, in your opinion, entitled to vote in the primary and in the general election?"

"Adding to the above statement of facts, the ownership of real estate in this county, would such owner of real estate, under the conditions above set forth, be entitled to vote?"

The Court of Appeals held in *Williams v. Commonwealth*, 116 Va. 272, that, where a person had once gained a legal residence at a place, he could lose that legal residence only by a combination of two acts: first, physical removal from the place of legal residence; second, with the intention of abandoning the old legal residence and acquiring a new legal residence at the place to which such person has moved.

Under authority of that case this office has uniformly ruled that where a party had once acquired a legal residence at one place, when he moved away from there, he could

retain his legal residence at the first place and return there and vote, if otherwise qualified. I would say that in all cases, where the party moving away declares his intention to retain his legal residence at the place from which he has moved, or evidences that intention by other sufficient acts, such as the payment of his capitation and intangible property taxes at the place from which he has moved, that is sufficient evidence of the fact that in moving he intended to retain his legal residence at the old place. Being a question of intention, each case would necessarily have to depend upon the facts connected with it.

I do not think that the fact that the party owned real estate, or did not own real estate, in the county in which he offers to vote would in itself have any controlling effect on the question. I do not know how a party could more effectively evidence his intention not to abandon his legal residence in a place than by announcing his intention of retaining his legal residence at such place and by paying his capitation taxes in the county or city in which such residence is claimed.

Trusting this gives you the desired information, I am

Very truly yours,

JNO. R. SAUNDERS,  
*Attorney General.*

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**ELECTIONS—Voting by mail, how ballots to be acknowledged.**

RICHMOND, VA., July 29, 1927.

HON. R. L. WATKINS,  
*Commonwealth's Attorney,  
Franklin, Virginia.*

MY DEAR MR. WATKINS:

Acknowledgment is made of your letter of July 28, 1927, in which you say:

"The Registrar of this (Franklin District) applied to the Electoral Board of Southampton County for ballots to be furnished upon application, to absent voters. It appears that the Electoral Board has furnished to the Registrar envelopes and coupons that were prepared under Acts 1922, pages 875-876, which authorized acknowledgment to be made before a Postmaster. This act was re-enacted and amended in Acts 1924, pages 644-645.

"Code of 1924 provides in section 208 that the acknowledgment shall be taken before a Notary Public or other officer authorized to take acknowledgments to deeds. The voter acts, of course, on the information set out by the Electoral Board, and doubtless some of the ballots which have been mailed out will be returned with the acknowledgment taken by the Postmaster, which conforms to the instructions furnished by the Electoral Board to the voter.

"It is further provided by statute that the statute shall be liberally construed in behalf of the voter.

"The voter having conformed to the rules as published by the Electoral Board, and having done all other things required by the statutes, except acknowledging and having his ballot certified by a Notary Public or other officer authorized to take acknowledgments to deeds, has followed strictly the instructions as given to him by the proper constituted authorities, should his ballot, even though acknowledged improperly but executed in good faith and under direction of the proper authorities, be rejected because acknowledged before a Postmaster and not before a Notary Public as provided under section 208?

"We anticipate that this question may arise in the present primary on account of the misdirection on the part of the Electoral Board to the voter, and will thank you for your opinion that the judges may be properly guided should this question arise.

"There is no fraud nor attempted fraud on the part of the voter or Electoral Board and the question would only involve the interpretation of this statute under the circumstances recited.

I have examined sections 202-218 of the Code, as amended, (Virginia Election Laws, pages 60-63) with care and in my opinion, in view of section 218, which declares "the provisions of this chapter shall be liberally construed in favor of the absent voter," such ballots, even though they are acknowledged before a Postmaster, should be accepted as valid ballots by the election officials, inasmuch as the applicants for such ballots were misled by the forms furnished them by the election officials of the county for the purpose of voting by mail.

Trusting that this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### **ELECTIONS—Negroes, not qualified to vote in primary.**

RICHMOND, VA., July 29, 1927

CHARLES G. STONE, ESQ.,  
*Attorney at Law,*  
*Warrenton, Virginia.*

MY DEAR MR. STONE:

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

"Will you kindly advise me whether a negro who is duly registered and has paid his poll taxes is qualified to vote in the coming primary; assuming, of course, that he represents himself as a member of the Democratic party and pledges himself to support the nominees thereof.

In reply I beg to say that the primary plan of the Democratic party adopted in 1924, so far as it relates to the qualification of voters in the primary, is as follows:

"All white persons qualified to vote at the election for which the primary is held may vote at the primary; provided, however, that no person shall be permitted to vote unless such person is a member of the Democratic party and at the last preceding general election in which such person participated voted for the nominees of the Democratic party; provided, further, that if he did not vote at such general election, then upon his declaration that he will support at the ensuing election the nominees of the party, he shall be allowed to vote. When challenged, he shall make his declaration on oath."

This regulation was adopted by authority of statute and will hold good until the statute has been declared unconstitutional by some court of last resort.

I do not think that the decision in the Ohio case necessarily determines the validity of our Virginia statute, as the Ohio law is radically different in many respects from that of Virginia. I see no course to pursue except to follow the Virginia law as it is.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### **ELECTIONS—Woman marrying alien loses right to vote.**

RICHMOND, VA., July 29, 1927.

D. B. ELLIS, ESQ., *Registrar,*  
*Drewry's Bluff, Virginia.*

DEAR SIR:

Acknowledgment is made of yours of the 21st, in which you say:

"Please let me know if a woman born in the United States who marries an alien can register and vote, or is she a citizen of the country of her husband."

In reply I beg to say that, according to an act of Congress, a woman born in the United States loses her citizenship and consequently her right to vote by marrying an alien.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

N. B.—This opinion applies to a woman, a citizen of the United States, who married an alien before September 22, 1922.

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**ELECTIONS—Eligibility to vote.**

RICHMOND, VA., July 29, 1927.

MR. W. G. OLMSTEAD,  
*Front Royal, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of July 28, 1927, in which you request me to advise you whether it is necessary for the name of a young man, coming of age, at a time no tax was assessed or assessable against him during any of the three years preceding the year in which he offers to vote, to appear on the tax list in order to entitle him to vote.

Only the names of such persons as were assessed or assessable with capitation taxes during the three, or any one of the three years preceding the year in which the election is held must appear on the tax list in order to entitle such persons to vote. A young man just coming of age is entitled to vote on his tax receipt, if he is registered and otherwise qualified.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**ELECTIONS—Date of registration.**

RICHMOND, VA., July 29, 1927.

HON. C. W. SMITH, *Clerk,*  
*Appomattox, Virginia.*

MY DEAR MR. SMITH:

Acknowledgment is made of your letter of July 28, 1927, in which you request me to advise you what is the last day on which a voter desiring to vote by mail can make application to a registrar for a ballot.

Section 203 of the Code, as amended, provides that application must be made to the registrar not less than five nor more than sixty days prior to the primary or general election in which the voter desires to vote, when he is within the confines of the United States.

Section 5 of the Code (8) provides as follows:

"Where a statute requires a notice to be given, or any other act to be done, a certain time before any motion or proceeding, there must be that time exclusive of the day for such motion or proceeding, but the day on which such notice is given or such act is done, may be counted as part of the time."

It is my opinion that section 203 of the Code, as amended, is to be construed in accordance with the above quoted paragraph of section 5 of the Code. As the primary will be held on August 2, 1927, five days exclusive of that day, computed in accordance

with the eighth sub-section of section 5 of the Code, would make July 28 the last day on which application could be made for a ballot.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### **ELECTION—Legal residence of voter.**

RICHMOND, VA., July 26, 1927.

MR. L. P. FRAZIER,  
R. F. D. No. 5,  
Richmond, Virginia.

MY DEAR MR. FRAZIER:

Acknowledgment is made of your request of July 26th, that I advise you whether you are entitled to vote in the August, 1927 primary to be held in Henrico County.

You state you were born and reared in Henrico County, that you have always paid your capitation taxes there, including the year 1926; that you always paid your income and tangible property tax there and have always claimed Henrico County as your home; that when you reached the age of twenty-one years you registered in Henrico County and have always voted there; that several years ago you moved your living quarters to the city of Richmond, but always claimed Henrico County as your place of legal residence and did not intend when you moved to Richmond to change it to the city of Richmond.

On these facts it is my opinion that you are a legal resident of Henrico County. See *Williams v. Commonwealth*, 116 Va. 272. In that case the Court of Appeals held that when one had once acquired a legal residence in one place that that residence could be lost only by the combination of two acts; first, a physical removal; second, with the intention of abandoning the legal residence acquired at the old place and acquiring a new legal residence elsewhere.

You also state in your communication that the same facts stated with reference to you and above quoted apply to your wife, and request me to advise you whether she is entitled to vote in Henrico County. I would say that the opinion given above with reference to you equally applies to your wife.

Yours very truly,

LEON M. BAZILE,  
*Assistant Attorney General.*

#### **ELECTIONS—To what extent judges may assist voters.**

RICHMOND, VA., July 28, 1927.

W. W. BLAKE, ESQ., *Superintendent,*  
*Turbeville Agricultural High School,*  
*Alton, Virginia.*

DEAR SIR:

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

"Please advise if it is compelling for a voter who has registered since 1904 to mark his own ballot in the coming primary, August 2nd. In other words, can a voter ask the judges or any of them for help, so that his vote may be correctly marked."

In reply I beg to say that section 166 of the Code provides in part as follows:



"Any person registered prior to the first of January, nineteen hundred and four, shall, if requested, be assisted in the preparation of his ballot by one of the officers of election designated by himself. The judges, or a majority of them, shall designate one of their number, whose duty it shall be, at the request of any elector registered after the first day of January, nineteen hundred and four, who may be physically unable to prepare his ballot, to enter the booth with said elector and render him assistance in preparing his ballot by striking out such names as he shall designate \* \* \*."

Hoping this will give you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**ELECTION—Candidate's right to have a representative at polls.**

RICHMOND, VA., July 26, 1927.

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

MY DEAR SIR:

I beg to acknowledge receipt of your letter of the 16th in which you ask for an interpretation of that part of section 248 of the Virginia Election Laws, which reads as follows:

"\* \* \*, at all primaries held under this chapter each candidate may have a representative at the polls, except when there are more than two candidates in which case there shall be only two representatives, one to be appointed by a majority of the candidates and the other by the minority of the candidates."

You then say:

"I understand, and I think its quite clear that in holding primary, if they so desire, opposing candidates may get together and select a representative, who will have the right to stay inside the polling place and represent them during the entire election, in the capacity of challenger, or in any other way in which he may legally look after their interest.

"This question I know will come up in the conduct of the primary this August and I would like to know clearly if this interpretation is correct."

I am of the opinion that you are in error in your belief that the representative or representatives selected by the opposing candidates will have the right to remain on the inside of the polling place or booth and represent these candidates during the entire election in the capacity of challenger, or in any other way which they may deem it advisable to look after the interest of the candidates.

I do not think that these representatives have any right to stay within the polling places until after the voting is over. Then, these representatives have a right to go into the polling places, see the ballot boxes opened and be present while the ballots are being counted. Of course, these representatives would have a perfect right to act in the capacity of a challenger on the outside, but not within the polling place.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**ELECTION—Assessment of capitation tax.**

RICHMOND, VA., July 26, 1927.

THOS. J. NOTTINGHAM, ESQ.,  
*General Registrar,*  
*Norfolk, Virginia.*

MY DEAR SIR:

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

"A Norfolk gentleman married an English lady and brought her to Norfolk in July, 1924, with the intention of becoming a citizen of Virginia. She was naturalized in April, 1927, and desires to be a registered voter.

"This office ruled that under the law she should pay capitation taxes for 1925 and 1926, while her husband claims she should pay only capitation tax for 1928, the same as a young man or woman becoming of age since January 1, 1927.

"Kindly advise if the ruling in this case is according to law."

If you will examine schedule "A" of sections 4 and 5 of the Tax Bill and section 4 of chapter 400 of the Acts of 1920 (Virginia Election Laws, page 86), you will see that the State capitation tax is imposed upon all residents of this State, regardless of whether they are citizens or not. Therefore, when the lady in question became a resident of the city of Norfolk in July, 1924, she was assessable with capitation taxes for the years 1925-1927.

Under section 21 of the Constitution, this tax must have been paid at least six months prior to the date of the November, 1927, election, in order to entitle her to vote in that election and in the primary to be held in August of this year.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**ELECTIONS—Persons entitled to vote, whose name does not appear on qualified voters' list.**

RICHMOND, VA., July 21, 1927.

ALLAN L. BAXTER, ESQ.,  
*225 Plume Street,*  
*Norfolk, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of July 20, 1927, in which you, as a judge of election in Princess Anne county, ask the following questions:

"Should a person be allowed to vote if their name is not on the qualified list, although they can produce their tax receipts? Can a person move from a county to a town and return to the county and vote, after they have lived in the town over thirty days?

"After moving from one precinct to another and residing in the new precinct over thirty days, is a person entitled to return to the precinct from which he moved and vote, or does he lose his vote if he has not been transferred?"

Only those persons whose names appear on the tax list can be permitted to vote, except in the case of young men and women just coming of age and the case where a voter has moved into a county and votes on a transfer, not having lived in that county a sufficient length of time for his name to be placed on the tax list there as having paid all the capitation taxes assessed or assessable against him during the three years preceding the year in which he offers to vote. In those cases a voter producing his tax receipt or receipts would be entitled to vote, but, where a voter has resided in a county

and was assessed or assessable there with capitation taxes for the three years preceding that in which he offers to vote, it is necessary, in order for him to vote, that his name be on the treasurer's tax list as a person eligible to vote in that county.

Your two remaining questions will have to depend for their answers upon the facts and circumstances in each particular case. The Court of Appeals in *Williams v. Commonwealth*, 116 Va. 272, decided that, where one had once acquired a legal residence for the purpose of registering and voting, he could lose that residence only by a combination of two acts: first, a physical removal; second, with the intention of abandoning his legal residence at the place from which he has moved and acquiring a new legal residence elsewhere. Therefore, a person can physically remove from a precinct, county or city and still retain his legal residence there, if he so desires.

As I have said, it is always a question of fact as to what the voter's intention was in any particular case, and this is to be determined from the acts and declarations of the party involved just as any other fact is to be determined.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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#### ELECTIONS—Judges assisting voters with ballot.

RICHMOND, VA., July 22, 1927.

LEWIS WILLIAMS, ESQ.,  
*Chairman of the Electoral Board,  
Buckingham, Virginia.*

MY DEAR MR. WILLIAMS:

Acknowledgment is made of your request, through Hon. John B. Easley, that I advise you what assistance a judge may render a voter in the preparation and casting of his ballot at an election.

The answer to this question is found in section 166 of the Code (Virginia Election Laws 1924, page 49). This section reads as follows:

"Any person registered prior to the first of January, nineteen hundred and four, shall, if requested, be assisted in the preparation of his ballot by one of the officers of election designated by himself. The judges, or a majority of them, shall designate one of their number, whose duty it shall be, at the request of any elector registered after the first day of January, nineteen hundred and four, who may be physically unable to prepare his ballot, to enter the booth with said elector and render him assistance in preparing his ballot by striking out such names as he shall designate. In case said elector be blind, said judge of election so appointed and designated shall prepare said ballot for said elector in accordance with his instructions, but the said judge shall not enter the booth with the voter unless requested by him, and shall not in any manner divulge or indicate, by signs or otherwise, the name or names of the person or persons for whom any elector shall vote. The said judges, or a majority of them, shall have power, from time to time, when and as often as they may see proper, to change the appointment and designation of the judge who shall discharge the duty of assisting voters who are physically disabled or blind, as above provided, and designate another judge in his place and stead to perform the same; and for a corrupt violation of any of the provision of this section, the person so violating shall be deemed guilty of a misdemeanor and be confined in jail not less than one nor more than twelve months."

You will see from an examination of this section that a judge of election cannot assist any person registered after January 1, 1904, unless such person be physically unable to prepare his ballot. In assisting those voters who registered prior to January 1, 1904, the judge designated to assist them, as provided in section 166 of the Code, can

render assistance only when requested by the voter to do so. If the voter registered after January 1, 1904, and is physically unable to prepare his ballot, then the judge designated as provided in the statute may, if requested by the voter, render him assistance in preparing his ballot by striking out such names as the voter shall designate, but in no instance is the judge permitted to enter the booth with the voter unless requested by the voter to do so.

Trusting this gives you the desired information, I am

Very truly yours,

JNO. R. SAUNDERS,  
*Attorney General.*

#### **ELECTIONS—Persons eligible to vote in democratic primary.**

RICHMOND, VA., July 21, 1927.

MR. J. C. DRAKE,  
*Capron, Virginia.*

MY DEAR SIR:

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

“As one of the judges of election in Capron precinct, I would like to know whether the voters who participated in the last Democratic primary, but did not vote in the general election, have a right to vote in the coming primary?”

The answer to your question depends upon whether the voters referred to are members of the Democratic party, and whether, in the last preceding general election in which such persons participated, they voted for all the nominees of such party. If the voters referred to are members of the Democratic party and if, in the last general election in which they participated, they voted for all the nominees of such party, and are otherwise qualified, they would be entitled to vote in the Democratic primary to be held in August, 1927. See section 228 of the Code of 1919, as amended (Virginia Election Laws, pages 66-67).

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### **ELECTIONS—Eligibility of voters.**

RICHMOND, VA., July 20, 1927.

HON. J. P. JONES,  
*Commonwealth's Attorney,  
New Castle, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of July 18, 1927, in which you submit for my opinion the following questions:

“(1). John Smith became twenty-one years of age on March 1, 1926. He has not as yet paid any poll tax whatever. He has the required residence in the State two years, the county one year and the precinct thirty days. May he today (July 18, 1927—within the six months period immediately preceding the November, 1927, election) pay to the county treasurer \$1.50, one year's poll tax, and register and be qualified to vote in the November election?

“(2). Would there be any difference in above case whether the Commissioner of the Revenue did or did not assess him with poll tax February 1, 1927?

“(3). William Brown becomes twenty-one years of age November 1, 1927,

and desires to vote in the November, 1927, election; he thus attains his majority during the thirty day period in which the registration books are closed. May he have himself assessed, pay one year's poll tax, register and be qualified to vote?

"(4). If the last above inquiry (3) be answered affirmatively, must he have himself assessed, pay the one year's poll tax and register all thirty days or more before the election, and thus actually register before he is twenty-one years of age?

"You will observe the above inquiries all relate to the general election in November and not to primaries."

1. You will observe from an examination of section 21 of the Constitution that it is there provided that, unless one is exempted by section 22 of the Constitution, he "shall, as a prerequisite to the right to vote \* \* personally pay, at least six months prior to the election, all State poll taxes assessed or assessable against him, under this Constitution, *during the three years next preceding that in which he offers to vote.*" (Italics supplied.)

You will also observe from an examination of sections 4 and 5 of the Tax Bill, and chapter 400 of the Acts of 1920, that only those persons who are twenty-one years of age are assessable with a capitation tax. Prior to reaching that age, no such tax is assessable. These taxes, prior to the amendment to section 1 of the Tax Bill by the Acts of 1926, which became effective in 1927, were assessable as of the first day of February of each year.

Therefore, when John Smith became twenty-one years of age on March 1, 1926, he was not assessable with a capitation tax for the year 1926, because he was not twenty-one years of age on the first day of February of that year. The first capitation tax assessable against him is for the year 1927. As the year 1927 is not one of the three years preceding the year 1927, his capitation tax may be paid at any time before the registration books are closed, and he may register and vote, if otherwise qualified.

2. This question should be answered in the negative. See the case of *Smith v. Bell*, 113 Va. 667, 669, 75 S. E. 125 (1912).

3. William Brown may pay his capitation tax for the year 1928 at any time prior to the closing of the registration books, and, if otherwise qualified, register and vote. Your attention is called to section 26 of the Constitution and, with reference to his right to vote in the primary, to section 35 of the Constitution. In this connection I also call your attention to section 2420 of the Code.

4. The young man in question must pay his capitation tax as a prerequisite to registration, and, as it is necessary for him to register before the registration books are closed, it is necessary for him to pay his capitation tax more than thirty days prior to the general election. The fact that he is under twenty-one years of age at the time he pays his capitation tax and registers is immaterial, provided he will be twenty-one years of age on the day the election is held. See section 26 of the Constitution.

Trusting this will give you the desired information, I am

Very truly yours,

JNO. R. SAUNDERS,  
*Attorney General.*

#### **ELECTIONS—Who may assist voter in marking ballot.**

RICHMOND, VA., July 19, 1927.

J. HORACE WHITE, ESQ.,  
*Attorney-at-Law,*  
*Dillwyn, Virginia.*

DEAR MR. WHITE:

Acknowledgment is made of yours of the 18th, in which you ask me the following questions:

"(1) Under Code section 162, after ballot has been marked, may the elector designate which of the judges is to deposit his ballot in the ballot box, or may the judges elect one of the judges to do this exclusively, even though the elector might desire another of their number to do this?

"(2) Under section 166, may an elector registered prior to January, 1904, designate which of the judges he may wish to assist him in marking his ballot should he desire such help?

Under the same section, is it not mandatory that any elector registered since January, 1904, shall mark his own ballot without any assistance from a judge, unless and only in case he should be physically unable to do so.

"(3) Would former residents of this county, now married and the heads of families, who have resided outside of the county for more than three years, and whose names have not appeared on the list of qualified voters as having paid their capitation taxes, until they appear upon the list for 1926 as having paid all taxes required as a prerequisite to the right to vote, have a right to participate in the coming primary and election?"

In reply I beg to say that, in my judgment, (1) section 162 of the Code clearly provides that the majority of the judges shall select one of their number to whom voters shall apply for ballots and who shall receive the ballots folded after the voters have marked them; so your first question must be answered in the negative.

(2) Section 166 uses the following language:

"Any person registered prior to the first of January, 1904, shall, if requested, be assisted in the preparation of his ballot by one of the officers of election designated by himself. \* \* \*."

Therefore, your second question, so far as it relates to the elector, registered prior to January, 1904, must be answered in the affirmative.

Section 166 of the Code also provides for assistance by one of the judges designated by a majority of the judges to assist any elector registered after the first day of January, 1904, who may be physically unable to prepare his ballot, to enter the booth with said elector and render him assistance in preparing his ballot by striking out such names as he shall designate. This paragraph of question (2) must also be answered in the affirmative.

(3) If voters have moved away from a county and, as you say, "resided outside" the county for more than three years, they have lost their rights to vote, for only continuous residence for one year in a county can qualify one, who is otherwise qualified, to vote in that county, under section 82 of the Code and section 18 of the Constitution. However, the mere absence of a resident from a county for a period of three years does not necessarily deprive him of his residence in the county, as such absence may be only temporary and there may be the intention of returning to the county and holding an uninterrupted legal residence there. Of course, if a voter gives up his residence in a county and moves to another county or to a city, where he registers and votes, he cannot be permitted to return to the county of his former residence and vote without remaining there the required period of one year. It is, therefore, evident that question (3) cannot be definitely answered in a wholesale manner, but each case must be considered upon its own facts, among them the intentions of the persons offering to vote.

Trusting this will give you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**ELECTIONS—Eligibility of voter.**

RICHMOND, VA., July 18, 1927.

HON. C. G. AVERY, *Treasurer,*  
*Holdcroft, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of July 15, 1927, in which you say:

"I would appreciate your opinion on the following:

"If a person becomes twenty one years of age between February and May, but was not assessed with capitation taxes, can he at this time be assessed, pay the tax and be eligible to vote in the coming election, provided he can register?

"If a person becomes twenty-one years of age after May 8 of this year, can he then be assessed with, pay the poll tax and vote in the coming election, provided that he complies with the registration laws?

Section 35 of the Constitution authorizes any person qualified to vote at the next succeeding general election to vote at any legalized primary election for the nomination of any candidate for office.

Section 26 of the Constitution provides:

"Any person who, in respect to age or residence, would be qualified to vote at the next election, shall be admitted to registration, notwithstanding that at the time thereof he is not so qualified, and shall be entitled to vote at said election if then qualified under the provisions of this Constitution."

Under the law, the young men referred to in your letter, if they become of age at any time after the first of January, 1927, and before the date on which the November, 1927, election will be held, are entitled to pay their capitation taxes for 1928 at any time before the registration books are closed for the general election, and, if otherwise qualified, to register and vote in the general election in 1927 and the primary held in 1927, provided their capitation taxes for the year 1928 are paid before the date of the primary and they are registered on or before that date.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**ELECTIONS—Challenging voters.**

RICHMOND, VA., July 15, 1927.

HON. A. B. RICHARDS, *Treasurer,*  
*Leesburg, Virginia.*

MY DEAR MR. RICHARDS:

Acknowledgment is made of your letter of July 14, 1927, in which you say:

"Would it be proper to challenge or otherwise hinder from voting in the coming primary of August 2 a person who has never voted and is qualified to vote in the November election on November 8, 1927, on account of Republican ancestry or suspected Republican leaning?"

In response to your inquiry, I call your attention to section 228 of the Code as amended by the Acts of 1924, page 415 (Virginia Election Laws, pages 66, 67), a copy of which I herewith enclose.

You will see that the fourth paragraph of this section provides:

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

In order to ascertain whether such person will support the nominees of the party in the ensuing election, I think that the judges or any elector may challenge him as authorized in this section, and on such challenge the procedure directed by section 228 should be followed.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**ELECTIONS—Woman marrying alien loses right to vote.**

RICHMOND, VA., July 18, 1927.

J. E. JORDAN, ESQ.,  
*Justice of the Peace,*  
*Haymarket, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of July 16, 1927, in which you say:

"There seems to be a difference in opinion in regard to the primary election law, and I would appreciate it if you would set us right. Some contend that a Republican has a right to vote in the Democratic primary, providing he agrees to support the nominee.

"If an American woman marries an alien, does she forfeit her American rights?"

The law with reference to your first inquiry is found in the third paragraph of section 228 of the Code (Virginia Election Laws, page 66), which reads 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."

Under the provisions of 34 U. S. Stat. at L. 1228, chapter 2534, section 3, as construed by the Supreme Court of the United States in *MacKenzie v. Hare*, 239 U. S. 299, 307, 60 L. ed. 297, when an American woman marries an alien she loses her American citizenship. If the husband subsequently dies and the woman lives in the United States, or returns to the United States within one year and registers as an American citizen, she again becomes a citizen of this country.

Trusting this will give you the desired information, I am

Very truly yours,

JNO. R. SAUNDERS,  
*Attorney General.*

N. B. This opinion applies to a woman, a citizen of the United States, who married an alien before Sept. 22, 1922.

**ELECTION—Legal residence of voter.**

RICHMOND, VA., July 15, 1927.

FORREST O. BAUM, ESQ.,  
*St. Brides, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of July 11, 1927, in which you say in part:

"The following people have been regular residents of Blackwater District, Princess Anne County, and have moved away from there, but have always retained



the idea of returning to vote there, have maintained their legal residence there, and have paid the proper poll taxes in that district. They have been voting in this district from time to time:

"Dr. L. B. Baxter has his residence for himself and family in Norfolk, but owns property in Blackwater district. He has always maintained his legal residence in Blackwater and voted there. Cannot he vote there?"

"Mr. U. M. Wood sold his property in Blackwater some years ago, but has always retained his legal residence there, and votes there when he votes at all.

"Mr. Howard L. Culpeper moved from Blackwater district about three years ago, but runs a store there and farms there personally, has always maintained his legal residence and voted there."

The Court of Appeals decided in *Williams v. Commonwealth*, 116 Va. 272, that where a person had acquired a legal residence in one place for the purpose of registering and voting, that residence could be lost only by the combination of two acts: first, removal; second, the intention of abandoning the legal residence and acquiring a new legal residence at the place to which such party has moved. It, therefore, follows that one who once had a legal residence in Princess Anne county can retain his legal residence there for the purpose of registering and voting, if he so desires, even though he moves away from the county.

In the absence of facts other than those stated in your letter, I would say that the parties referred to are entitled to vote in Princess Anne county, so far as residence is concerned, if otherwise qualified.

Trusting that this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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#### ELECTIONS—Legal residence of voter, how designated.

RICHMOND, VA., July 11, 1927.

MR. FRANK M. THOMPSON,  
1120 Rhode Island Avenue, N. W.,  
Washington, D. C.

MY DEAR MR. THOMPSON:

Acknowledgment is made of your letter of July 9th in which you say in part:

"I am writing to find out where I stand in regard to voting in Virginia. I was born in Virginia and lived there continuously up to ten years ago. I am employed by the U. S. Government and have been thus employed for 29 years. In 1917 I moved to Washington, D. C. where I have since resided. I have always kept my tax paid and have voted at all elections up to the present time, and no question has been raised as to my eligibility as a voter."

You then state that at a recent town election you were denied the right to vote on the ground that you were not a resident of Virginia, and request me to advise you whether you are a legal resident of Virginia within the meaning of our election laws.

The Court of Appeals decided in *Williams v. Commonwealth*, 116 Va. 272 that where a person had acquired a legal residence in one place for the purpose of registering and voting that that residence could be lost only by the combination of two acts; first, a physical removal, second, accompanied by intention to abandon the place of legal residence and to acquire a new legal residence in the place to which such person had moved. You will therefore see that the question as to one's legal residence for the purpose of registering and voting is largely a matter of intention.

Unquestionably you had the right when you moved to Washington in government work to retain your legal residence in the State of Virginia for the purpose of registering and voting if you desired to do so. The fact that you claimed Virginia as your place of legal residence, paid your capitation taxes here and insisted upon exercising your right of suffrage, indicates to me that when you moved to Washington you did not intend to change your legal residence from Virginia, but intended to retain it here. If that was your intention it is my opinion that you are a legal resident of this State, and as such entitled to vote in our elections, if otherwise qualified.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**ELECTIONS—Legal residence of voter.**

RICHMOND, VA., July 11, 1927.

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

MY DEAR MR. WATSON:

Acknowledgment is made of your letter of July 9th, 1927, in which you say:

"John Doe and his wife lived in Orange County for years on their own farm or lot, and in or about the latter part of 1925 they moved to Fredericksburg, Va., and rented out their home in Orange County. The Commissioners of the Revenue of Orange County did not assess them for a head tax in 1926 by reason of the fact that they were not the First of February, 1926 living in the County of Orange. In the spring of 1927 the Treasurer of Orange County seeing they were omitted, or rather not charged with a head tax in Orange County for 1926 called their attention to this fact and they came forward and paid the 1926 capitation tax in Orange County, and their names appear on the list of paid up voters of the county for 1927, by reason of the fact that the Treasurer of Orange County was of the opinion they had been overlooked in the assessment of head tax for 1926, and that they were February 1st living in Orange County. Upon further investigation the said Treasurer of Orange County finds they were February 1st, 1926 living in Fredericksburg, Va., and were assessed with capitation tax in the City of Fredericksburg for the said 1926. Now the matter at issue is where should they vote this year, since having been out of the County of Orange for already about 18 to 20 months? Will thank you to advise me in this matter."

The question as to whether the two parties referred to are entitled to vote in Orange county or not is purely one of intention. The Court of Appeals held in *Williams v. Commonwealth*, 116 Va. 272 that where one had once acquired a legal residence in one place that residence could be lost only by combination of two acts; first, by removal from the place of legal residence to another place, second, with the intention of abandoning the legal residence in the place and acquiring a new legal residence in the place to which the party has moved.

All that I can say in the case referred to in your letter is that if when the parties moved to Fredericksburg they intended to keep their legal residence in Orange county they could do so. If on the other hand when they moved to Fredericksburg they intended to abandon their residence in Orange county and to acquire a new legal residence in Fredericksburg, then they cannot vote in Orange. But, as I have said the answer to your question is one of fact to be determined from all of the facts and circumstances, including the declarations of the parties.

Trusting that this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**ELECTIONS—Qualifications of candidate for office.**

RICHMOND, VA., July 8, 1927.

MR. J. R. BROYLES,  
*Luray, Virginia.*

MY DEAR SIR:

I beg leave to acknowledge receipt of your letter of July 6th in which you say:

“Could a man be elected justice of the peace at the November election who has not paid his taxes for several years be sworn into office by paying up his taxes—capitation or otherwise?”

In reply to your letter I will state that section 32 of the Constitution of Virginia, among other things, provides:

“Every person qualified to vote shall be eligible to any office of the State, or of any county, city, town or other sub-division of the State, wherein he resides, \* \* \*.”

Section 229 of the Virginia Election Laws provides:

“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, \* \* \*.”

Unquestionably, the party referred to in your letter could not be a candidate in the Democratic primary which is to be held on August 2nd, and the Constitution which I have just quoted would seem to indicate that unless a party is qualified to vote he is ineligible to any county office.

However, the right to hold office is one in the end which should be passed upon by the court and I would hesitate to express a definite opinion in a matter of this character.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**ELECTIONS—Residence of voter, eligibility to vote.**

RICHMOND, VA., July 5, 1927.

E. J. TIMBERLAKE, ESQ.,  
*Sabot, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your communication of July 5, 1927, in which you request my opinion on the following statement of facts:

“For a great many years I lived in Brookland District, Henrico County, Virginia; was registered at Lakeside precinct and always paid my capitation taxes in Henrico County. My name appears on the voting list of Henrico County as one of the voters who has paid all the capitation taxes assessable against him during the three years preceding the year 1927. About three years ago, I bought a large farm in Goochland County, Virginia, to which I moved my dairy, and where I spend the most of my time. When I moved there, however, I did not intend to abandon my legal residence in Brookland District, Henrico County, Virginia, where I still own property, but I have always claimed Lakeside precinct, Brookland District, Henrico County, as my place of legal residence. As I have said, I have always paid my capitation taxes in Henrico County and not in Goochland County; also my income and personal property taxes.

“I would thank you to advise me whether, on this statement of facts, I am entitled to vote at Lakeside precinct, Brookland District, Henrico County, Virginia.”

The Court of Appeals decided in *Williams v. Commonwealth*, 116 Va. 272, that, where a man had once acquired a legal residence in one place, that legal residence could be lost only by a combination of two acts: first, a removal from the place of legal residence to another place; second, with the intention of abandoning the legal residence acquired at the first place and acquiring it at the second place.

It will, therefore, be seen that the question as to where a man's legal residence is is largely a question of fact. On the facts submitted to me by you, I would say that your place of legal residence is Lakeside precinct, Brookland District, Henrico county, Virginia, as you unquestionably had the right to retain that as your place of legal residence when you moved to Goochland county.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### **ELECTIONS—Negroes not eligible to vote in democratic primary.**

RICHMOND, VA., July 6, 1927.

HON. THOMAS H. HOWERTON,  
*Commonwealth's Attorney,*  
*Waverly, Virginia.*

MY DEAR MR. HOWERTON:

Acknowledgment is made of your letter of July 5, 1927, in which you say:

"Can negroes vote in the primary in Virginia? I would like to have this information, because several people have asked me to obtain this for the guidance of the election officers in our county in the primary to be held in August, 1927."

In response to your inquiry I call your attention to section 228 of the Code, as amended (Virginia Election Laws, pages 66-67), and to the second paragraph of the primary plan of the Democratic party adopted June 11, 1924 (Virginia Election Laws, page 90).

You will see that the party plan provides only for white persons, and section 228 of the Code appears to authorize this.

Sincerely yours,

JNO. R. SAUNDERS,  
*Attorney General.*

#### **ELECTIONS—Filing declarations, vacancies occasioned by death.**

RICHMOND, VA., July 5, 1927.

MR. W. R. PITTMAN,  
*Seabrell, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of July 2, 1927, in which you call attention to my letter of June 24 to Mr. G. O. Sledge, chairman of the electoral board of Southampton county. You then say that the county chairman has called a meeting of the electoral board for the purpose of considering the question as to whether the committee shall permit the filing of declarations of candidacy for nomination in the approaching primary for the office of constable in your district occasioned by the death of Mr. L. H. Brantley, who was the other candidate for this office and who occupied the office at the time of his death.

In my letter to Mr. Sledge in some manner I overlooked the amendment to section 226 of the Code. This section, as amended, so far as is applicable to the question here under consideration, reads as follows:

"This chapter shall not apply to the nominations of presidential electors, nor to the nominations of candidates to fill vacancies unless the candidates for nomination to fill vacancies are to be voted for on the date set by this chapter for regular primaries. Whenever, by reason of the death, resignation or removal of the incumbent, a vacancy shall occur less than sixty days before the date fixed by section two hundred and twenty-three for the holding of a primary, but more than thirty days before such date, the properly constituted party authorities may permit the filing of declarations of candidacy for nomination in the said primary to such office. \* \*"

It would seem from this section of the Code that, on the facts in this case, Mr. Brantley having died less than sixty but more than thirty days before the date fixed for the primary, the properly constituted party authorities may, within their discretion, permit the filing of declarations of candidacy for nomination in the primary to such office. This section, however, does not require the party authorities to permit the filing of declarations of candidacy, but merely authorizes them to permit the same in their discretion.

Trusting this gives you the desired information, I am

Very truly yours,

JNO. R. SAUNDERS,  
*Attorney General.*

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**ELECTION—Sickness does not entitle one to vote, within the meaning of statute pertaining to absent voters.**

RICHMOND, VA., July 29, 1927.

HON. E. PEYTON TURNER,  
*Commonwealth's Attorney,  
Emporia, Virginia.*

MY DEAR MR. TURNER:

Acknowledgment is made of your letter of July 28, 1927, in which you request me to advise you whether a person confined to his home by sickness is entitled to vote as an absent voter.

It is my opinion that a voter confined to his home on account of sickness is not entitled to vote as an absent voter.

Very truly yours,

JNO. R. SAUNDERS,  
*Attorney General.*

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**ELECTIONS—To fill unexpired term.**

RICHMOND, VA., February 10, 1928.

MR. CREED KELLY,  
*Big Stone Gap, Virginia.*

DEAR SIR:

You desire the opinion of this office as to the law governing special elections to fill vacancies, and especially in reference to the election of a Senator to fill the vacancy occasioned by the death of Senator J. M. Beaty, of Wise county, Virginia, particularly concerning official ballots to be used in said election.

By section 81 of the Code of Virginia, in case of a vacancy occurring during a session of the legislature, the President of the Senate is authorized to call a special election, a copy of which call must be posted at each voting precinct throughout the senatorial district at least ten days before election day.

Unfortunately, the legislature of Virginia has not provided as to the duty of candidates, in cases of such an election, where the call is made on less than thirty days' notice. Section 154 of the Code of Virginia, as amended by an Act approved March 23, 1926, to be found on page 458 of the Acts of 1926, provides:

"\* \* \* Any person who intends to be a candidate for any office not embraced in the foregoing, at any election, shall give notice at least sixty days before such election, if it be a general election, and at least thirty days before such election if it be a special election, to the county clerk or clerks of the county or counties, and to the clerk or clerks of the corporation courts of the city or cities whose electors vote for such office, which notice shall in all respects be in the same form as that above described required to be given to the secretary of the Commonwealth. No person not announcing his candidacy as above, or who is not qualified to vote in the election in which he offers as a candidate, shall have his name printed on the ballots provided for such election, unless he be a party primary nominee. On receipt of the foregoing notice it shall be the duty of the secretary of the Commonwealth to notify the secretary of each electoral board of each county and city of the State or of said congressional district, and it shall be the duty of said clerk or clerks to notify the secretary of the electoral boards of their respective counties and cities, which notices shall be sent by the secretary of the Commonwealth and clerks immediately after the time has expired in which candidates may give notice of their candidacy as prescribed by this section. \* \* \*

As you will see, no person can comply with the provisions of the law at this special election. Not being able to give thirty days' notice, the provision "No person not announcing his candidacy as above, or who is not qualified to vote in the election in which he offers as a candidate, shall have his name printed on the ballots provided for such election, unless he be a party nominee" makes it impossible for any person to legally have his name printed on the official ballot.

The only regular manner of conducting an election in your district, according to law, is for the electoral boards of the senatorial district to have printed official ballots without the name of any candidate printed thereon. There is no time specified for the electoral board to print ballots prior to an election, nor is there a law authorizing boards to fix a date, after which they will refuse to accept a candidate's nomination.

This state of affairs should be corrected by an amendment to the present election laws specifying the limit within which a candidate may file his declaration and within which electoral boards must receive names of candidates before proceeding to have printed official ballots. If such a law is passed, every person desiring to become a candidate will be afforded an opportunity to do so.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### **ELECTIONS—Eligibility to vote and hold office.**

RICHMOND, VA., *March 12, 1928.*

HON. HARRY C. FICKLEN,  
*House of Delegates,*  
*Richmond, Virginia.*

DEAR SIR:

Acknowledgment is made of your letter of March 9, 1928, in which you say:

"Will you kindly give me in writing your ruling upon the following case?

"The question is as to the right of John Doe to vote in the councilmanic election in Danville, Virginia, on June 12 next, and also the eligibility of said John Doe to be a candidate for council in said election.

"John Doe was a voter in the 6th ward of Danville. On July 30, 1925, he got a transfer from the 6th ward to Dan River district in Pittsylvania County, and on September 14, 1927, he got a transfer from said county to the 5th ward in Danville. It is said he 'returned to Danville to live on September 1, 1927.' The last Danville treasurer's tax list does not show that in said city he has paid any poll tax in 1927 or 1928.

"Question: Can John Doe vote or be a candidate in the councilmanic election in Danville on June 12 next?"

Section 32 of the Constitution of Virginia, so far as it is applicable to the question here under consideration, provides as follows:

"Every person qualified to vote shall be eligible to any office of the State, or of any county, city, town or other sub-division of the State, wherein he resides, except as otherwise provided in this Constitution, and except that this provision as to residence shall not apply to any office elective by the people where the law provides otherwise; any except, further, that the requirements of this section as to residence and voting qualifications shall not apply to the appointment of persons to fill positions under a municipal government requiring special technical or professional training and experience. \* \* \*"

Section 18 of the Constitution, as a qualification to vote, requires one to be a citizen of the United States and 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.

Residence, as was pointed out by the Court of Appeals in the case of *Williams v. Commonwealth*, 116 Va. 272 (1914), is very largely a matter of intention and depends upon a number of factors. Where a person has once gained a legal residence in one place that legal residence can be lost only by a combination of two acts: first, a physical removal; second, with the intention of abandoning the legal residence at such place and acquiring a new legal residence at the place to which the party has moved. Intention, of course, is a question of fact to be determined as any other fact, and is very generally evidenced by the declarations and acts of the party whose intention is to be thus determined.

In the case of John Doe, referred to in your letter, it appears that, after he moved from Danville to Pittsylvania county, he obtained a transfer from Danville to the last mentioned county and that, after moving from Danville, he did not pay any capitation taxes in that city but paid them elsewhere, if at all.

These facts indicate to my mind that, when John Doe moved to Pittsylvania county, he moved with the intention of abandoning his legal residence in the city of Danville and that, in order to acquire a new legal residence in that city, he must reside there one year before he will be qualified to vote in that city, or to hold the office of councilman therein, section 2979 of the Code expressly providing that in cities of ten thousand or more population the members "shall be residents of their respective wards and qualified voters therein."

Trusting this gives you the desired information, I am

Yours very truly,

LEON M. BAZILE,

*Asst. Attorney General.*

**ELECTIONS—State primary.**RICHMOND, VA., *January 23, 1928.*

MR. CHARLES E. FORD,  
*201-204 Law Building,*  
*Newport News, Va.*

DEAR SIR:

Yours of the 21st instant has been received. You quote parts of sections 222 and 227 of the Code and from the primary plan of the democratic party adopted June 11, 1924, and state that the democratic committee of your city has decided to hold a primary for the nomination of candidates for the city council, and ask whether such primary is to be held under the primary law of the State or under the direction and regulation of the city committee.

In my opinion, having called a primary, such primary must be held under the provisions of the State primary law and not by the city committee. I took the liberty of calling up Mr. M. A. Hutchison, Secretary of the Commonwealth and Secretary of the Democratic State Committee, and he concurs with my opinion.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**ELECTIONS—Counting ballots, democratic primary.**RICHMOND, VA., *January 9, 1928.*

MR. R. LEE ROBINSON, *Chairman,*  
*Newport News Democratic Executive Committee,*  
*Newport News, Virginia.*

DEAR MR. ROBINSON:

I am in receipt of your letter of the 8th instant, in reference to counting the ballots to be cast in the Democratic Primary to be held in Newport News on April 3rd.

You state that there are three places to be filled and ask if ballots should be counted which contain less than three names.

By analogy to the general law, I would say that each ballot should be counted upon which there are not more than three names, giving credit to each candidate whose name is contained upon the ballot, whether the elector votes for one, two or three of the candidates.

There is no express provision in the Democratic Primary plan covering the situation.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**ELECTIONS—Dates for qualifications to vote.**RICHMOND, VA., *December 1, 1927.*

HON. H. L. HULCE, *Treasurer,*  
*City of Richmond,*  
*Richmond, Virginia.*

MY DEAR MR. HULCE:

In response to your inquiry as to what is the last day capitation taxes can be paid by voters who desire to participate in the regular June election to be held on the second Tuesday in June, 1928, I beg leave to state that it is my opinion that the 12th day of December is the last day on which a voter can pay his capitation tax.



The regular election for cities falls on the second Tuesday in June—the second Tuesday in June comes on the 12th day of the month. It, therefore, follows, in my judgment, that the 12th day of December, which is six months prior to said election, is the last day on which such capitation taxes can be paid.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**ELECTORAL BOARD—Eligibility of mayor to serve.**

RICHMOND, VA., *November 18, 1927.*

MR. C. W. HEATER,  
*Strasburg, Va.*

DEAR SIR:

I am in receipt of your letter of the 9th instant, in which you ask:

“Can a mayor of a town serve on county electoral board?”

In reply I will say that he cannot. Section 84 of the Code of Virginia provides:

“No person, nor the deputy of any person, holding any office or post of 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.”

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**ELECTORAL BOARD—Per diem allowance.**

RICHMOND, VA., *November 17, 1927.*

HON. W. B. F. COLE,  
*Commonwealth's Attorney,  
Fredericksburg, Va.*

DEAR MR. COLE:

Your letter of the 16th instant, asking me to give you my opinion as to the legal per diem allowed members of electoral boards, under chapter 521 of the Acts of 1926, page 872, has been received.

In an opinion given Mr. Joseph A. Billingsley, King George Courthouse, Virginia, on the 15th instant, I advised him that, while sections 87 and 200 of the Code, as amended by the Act referred to, are in direct conflict, taking into consideration the fact that section 89 has been carried for a number of years practically unamended while section 200 has been so amended as to add registrars and members of electoral boards to the category of officials provided for in that section, members of electoral boards are entitled to a per diem of \$5.00 without mileage.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**ELECTORAL BOARDS—Pay of members.**RICHMOND, VA., *November 15, 1927.*

HON. JOSEPH A. BILLINGSLEY,  
*Attorney for the Commonwealth,  
King George C. H., Va.*

DEAR MR. BILLINGSLEY:

I am in receipt of your letter of the 14th instant, asking for my opinion as to the amount which should be paid members of county electoral boards, under sections 89 and 200 of the Code, as amended by the Acts of 1926.

Previous to 1920, provision for the payment of members of the electoral boards was made separate and distinct from that of judges and clerks of election, and so was that of registrars. Beginning with 1920, registrars and members of the electoral boards were put in the same classification as judges, clerks, etc., of election and, while there is unmistakable conflict in provisions of the Acts of 1926, I conclude, on account of the fact that members of the electoral board, under section 200, have been placed in the same category as judges, clerks, registrars and commissioners of election, that they should receive each the flat sum of \$5.00 per day without mileage.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**ELECTIONS—Payment of judges.**RICHMOND, VA., *November 15, 1927.*

MISS LOURA SHELOR, *Clerk,  
Circuit Court of Floyd County,  
Floyd, Virginia.*

DEAR MISS SHELOR:

I am just in receipt of your letter of the 14th instant, in which you ask my opinion as to the amount allowed judges for their services on election day and for pay for returning precinct results of election. I note what you have to say as to your opinion and that of several of your lawyers.

In my opinion, judges of election are not only entitled to receive \$5.00 per day for election day services, but \$5.00 for the day on which they return the election returns, and that commissioners of election are entitled to \$5.00 for each day they sit in canvassing votes and the same mileage allowed to jurors.

The section is inartificially drawn. The first part of the section unequivocally gives to judges, clerks, registrars, members of the electoral board and commissioners of election the flat sum of \$5.00 per day for each day's service rendered, while the concluding part of the sentence gives to the judge returning the ballots and commissioners of election the pay and mileage now allowed jurors for each mile travelled. Standing alone, I would say that the latter part of the sentence would restrict the judge returning the ballots and election commissioners to the pay and mileage of jurors, but that it having been stated previously without the necessity of construction that each is to receive the flat sum of \$5.00 per day, I conclude that a fair construction of the whole section allows that \$5.00 per day for each day of their services with mileage.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**ELECTIONS—Eligibility to vote in general election.**RICHMOND, VA., *November 16, 1927.*HON. THOMAS NEWMAN,  
*Newport News, Virginia.*

MY DEAR MR. NEWMAN:

December 12, 1927, is the last day on which capitation taxes can be paid in order for one to vote in the general election to be held in your city on the second Tuesday in June, 1928. The second Tuesday in June comes on the 12th day of the month. Six months prior to that day is December 12th.

Of course, you are familiar with the section of the Constitution requiring all capitation taxes assessed or assessable against the party to be paid six months prior to the election. There can be no doubt about the 12th day of December being six months prior to the 12th day of June, 1928, which is the time for the general election in cities and towns.

In this connection I call your attention to sub-division 7 of section 5 of the Code of Virginia, which reads as follows:

“Unless otherwise expressed, the word ‘month’ shall be construed to mean a calendar month, and the word ‘year’ a calendar year; and the word ‘year’ alone shall be equivalent to the expression ‘year of our Lord.’ ”

In the decision of the Court of Appeals referred to under this section, the court said from February 3rd to March 3rd is a month. It therefore follows that from February 3rd to March 3rd is a month, from December 12th to June 12th is six months.

I am very glad to give you this information.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**ELECTIONS—Regular and special.**RICHMOND, VA., *May 14, 1928.*HON. A. F. DIZE, *Mayor,*  
*Cape Charles, Virginia.*

MY DEAR MR. DIZE:

Acknowledgment is made of your letter of May 11, 1928.

So far as the payment of capitation taxes is concerned, the only persons, who will be eligible to vote in the municipal election to be held on June 12, 1928, are those who have paid the capitation taxes assessed or assessable against them, during the three years preceding the year 1928, at least six months prior to the date of such election. Therefore, unless their taxes were paid on or before December 12, 1927, they will not be eligible to vote.

In the special election to be held on June 19, 1928, all persons, who have paid the capitation taxes assessed or assessable against them for the three years preceding the year 1928, on or before May 5, 1928, will be eligible to vote. The difference is this: the municipal election is a regular election governed by the provisions of section 21 of the Constitution, while the election of June 19, 1928, is a special election not controlled by that section.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**ELECTIONS—Eligibility to vote in regular and special elections.**RICHMOND, VA., *April 30, 1928.*

HON. M. A. TROUT, *Clerk,*  
*Warren County,*  
*Front Royal, Virginia.*

MY DEAR MR. TROUT:

Acknowledgment is made of your letter of April 28, 1928, in which you say:

"I have seen a good deal in the papers as to the date voters must pay their taxes in order to vote on the amendments to the Constitution in June. The last I saw was that it was your opinion that those who would be eligible to vote in the coming November election, would be eligible to vote in the June election.

"I would be glad to know just what is right."

My opinion is that every person who will be eligible, so far as the payment of his capitation taxes is concerned, to vote in the regular November election, 1928, will be eligible to vote in the special election to be held on June 19th for the purpose of ratifying or rejecting the proposed amendments to the Constitution.

In order to be eligible to vote in the regular November election it will be necessary for every person assessed or assessable with capitation taxes during the three years preceding the year 1928 to pay the same on or before May 5, 1928.

I do not think that persons who will eligible to vote in the regular November election on account of coming of age just prior to that date, or on account of becoming residents of this State, will necessarily be entitled to vote in the special election in June. In order to vote in that election they must have been residents of this State, county and precinct the required time, and also must be twenty-one years of age on or before that date.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**ELECTIONS—Printing of sample ballots.**RICHMOND, VA., *April 2, 1928.*

HIS EXCELLENCY, HARRY F. BYRD,  
*Governor of Virginia,*  
*Richmond, Virginia.*

MY DEAR GOVERNOR:

Acknowledgment is made of your request of March 31, 1928, that I advise you whether the law prohibits the printing and distribution of sample ballots containing the information that will be printed on the official ballots in the special election to be held on June 19, 1928, for the ratification or rejection of the proposed amendments to the Constitution.

The only prohibition contained in the statute with reference to the copying of ballots is found in section 163 of the Code, which provides in part that "it shall be unlawful for any elector to carry the official ballot furnished him by the judge of election further than the voting booth or to make any copy thereof," and in section 167 of the Code, which prohibits any person from selling or giving to any person whomsoever, except as authorized by law, "any official ballot or copy, or any *fac simile* of the same, or any information about the same," and also prohibits the counterfeiting, or attempting to counterfeit, the same.

Therefore, there is no prohibition in the law, in my opinion, against the printing and circulating of sample ballots, which do not purport to be official ballots, containing the information that will be printed on the official ballots to be used in said special election. Especially is this true where the act of the General Assembly, providing for the election, has prescribed what shall be printed on the ballots. I would suggest that some word or words be used on the ballot to clearly indicate that it is only a sample ballot.

For your information I am enclosing a copy of the schedule of the bill, as amended, which contains the words to be printed on the ballot.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**ELECTIONS—Date for payment of taxes as a prerequisite to vote.**

RICHMOND, VA., *April 4, 1928.*

HON. B. GRAY TUNSTALL,  
*City Treasurer,*  
*Norfolk, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of April 3, 1928, in which you say:

“Will you please be so good as to advise me the last date for the payment of poll taxes as a prerequisite to vote in the Special election to be held on June 19th in connection with the Constitutional Amendments, and also for the Presidential election in November?”

“Please also advise me the last day upon which a citizen who has paid his poll taxes and complied with all the requirements of the law may register for either of these elections.”

May 5, 1928, is the last day on which capitation taxes can be paid to entitle one to vote in the November 1928 election and the special election to be held on June 19, 1928.

Any person possessing the other qualifications who has personally paid to the proper officer all State poll taxes assessed or assessable against him, under the Constitution, for the three years next preceding that in which he offers to register; or, if he come of age at such time that no poll tax shall have been assessable against him for the year preceding the year in which he offers to register, has paid one dollar and fifty cents, in satisfaction of the first year's poll tax assessable against him, may register in the city of Norfolk at any time prior to and including the third Tuesday in May, 1928, provided such capitation taxes were paid, except in the case of the young man coming of age on or before May 5, 1928. See section 20 of the Constitution, and section 98 of the Code.

For your information I am enclosing herewith a copy of a letter written by me to-day to Hon. Thomas J. Nottingham, General Registrar of your city.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**ELECTIONS—Registrations to vote in special elections.**

RICHMOND, VA., *March 26, 1928.*

HON. THOMAS J. NOTTINGHAM,  
*General Registrar,*  
*Norfolk, Virginia.*

DEAR COLONEL:

I am in receipt of your letter of the 24th instant, asking my opinion as to what

course you should pursue in the matter of registration of voters desiring to register in time to vote in the special election on the constitutional amendments to be held on the 19th day of next June.

In cities of not less than 100,000 population, the last day of registration is the third Tuesday in May, being the 15th day of that month. This is brought about by the fact that, on account of the municipal election to be held in your city on the 12th day of June, the registration books for that election are closed after the 15th day of May until after the 12th day of June, and the law providing that, in cities having more than 100,000 population and a general registrar, the registration books shall be closed fifteen days preceding the day of any special or primary election, the days upon which the registration books are closed for the special election on the 19th day of June beginning before the 12th day of June, the books cannot be opened for registration in Norfolk after they have closed upon the 15th day of May until after the special June election.

Consequently, no person can register in Norfolk to vote in the special election after the books are closed on the 15th day of May.

Of course, every person offering to register must have paid the capitation tax assessable against him or her for the three years prior to the November, 1928, election six months before such election.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### **ELECTIONS—Qualifications to vote in special election.**

RICHMOND, VA., *March 19, 1928.*

HIS EXCELLANCY, HARRY F. BYRD,  
*Governor of Virginia,*  
*Richmond, Virginia.*

MY DEAR GOVERNOR:

Acknowledgment is made of your request of March 16, 1928, that I give you my opinion as to the matter raised by Hon. G. E. T. Lane, Treasurer of Mathews County, published in the Richmond Times-Dispatch of March 16, 1928.

In this letter Mr. Lane criticizes my opinion given you on March 5, 1928, in which I held that all persons, who would be qualified to vote in the November, 1928, general election, would be entitled to vote in the special election to be held on June 19, 1928, for the purpose of ratifying or rejecting the proposed amendments to the Constitution of Virginia. Mr. Lane takes the position that, under the law, the treasurer has until June 5, to file his list with the clerk; that the clerk has twenty days thereafter in which to deliver his certified list to the sheriff for posting; that, after the list has been posted by the sheriff, any person whose name has been improperly omitted from such list has thirty days in which to have it corrected, and that, until the list is corrected by the clerk, he has no authority to certify the same.

In the first place Mr. Lane is incorrect in his statement that the clerk has twenty days in which to certify the treasurer's list. Section 38 of the Constitution requires the clerk to do this within ten days of the time the list is delivered to him. It is true that section 109 of the Code, as amended in 1926, did attempt to give the clerk twenty days in which to certify the copies of the treasurer's list for posting. This provision, being in conflict with the Constitution, was clearly invalid and, by an emergency act passed at the 1928 session of the General Assembly, It was struck from section 109 of the Code, as amended, and the requirements of the Constitution, namely, ten days, substituted therefor.

As I pointed out to you in my previous opinion above referred to, the election to be held on June 19, 1928, is a special election and not a regular election provided for by the Constitution. This being so, it is my opinion that the treasurer's list will not be conclusive of the facts stated therein, and that persons whose names have been wrongfully omitted therefrom by the treasurer, upon the production of the proper evidence before the election officials, would be entitled to vote. I am supported in this position by opinions heretofore given by Attorney General William A. Anderson and Attorney General Samuel W. Williams.

In his opinion (Report of the Attorney General, 1906, pages 72-73) Attorney General Anderson said:

"In reference to the posting of the list of qualified voters required by section 38 of the Constitution and the statute passed in pursuance thereof, I think their requirements relate to general elections only, as will appear upon examination of the text of the Constitution. It has no application to special elections, except in so far as said list determines who are entitled to vote at the preceding regular election, if that be taken as a test of the qualification of voters at a succeeding special election, as was, I understand, decided by Judge Saunders."

The same ruling was made by Attorney General Williams in a special election for the election of a Senator in 1913 (Report of the Attorney General, 1913, pages 97-98).

The treasurer is a responsible officer of the government and, presumably, he will do his duty and place on the list to be filed in the clerk's office, not later than June 5, 1928, the names of all persons in his county who have paid their State Capitation taxes for the three years, or for any one of the three years, preceding the year 1928 at least six months prior to the day on which the regular November, 1928, election will be held. The clerk within ten days from that time is required to certify copies of this list for posting. Other copies of this list, I am sure, can be made by the clerk in time for use at the special election to be held on June 19, 1928; but, as I have said, this being a special election, this list will not be conclusive evidence of the right of a person to vote in such election. Persons whose names have been improperly omitted from this list, upon producing the proper proof before the judges of election that all the capitation taxes with which they were assessed or assessable have been paid at least six months prior to the day on which the regular November, 1928, election will be held, and have, therefore, been improperly omitted from such list, should be allowed to vote, if otherwise properly qualified.

It, therefore, follows, in my judgment, that the objection to the date set for this special election of June 19, 1928, is poorly taken and captious as applying to the opportunity afforded persons desiring to qualify and vote on the Constitutional amendments. As stated in my former opinion to you "the nineteenth day of June will afford ample time for the making up of the treasurer's list required by section 38 of the Constitution, and the certification and posting of the same, and every person eligible to vote in the November, 1928, election has until May 5, 1928, in which to pay all the capitation taxes assessed or assessable against him during the three years preceding the year 1928."

The Act submitting the Constitutional amendments to be voted upon by the electorate on June 19, 1928, affords ample opportunity to every person entitled to do so to qualify in time to exercise this privilege.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**ELECTIONS—Eligibility to vote in special election.**

RICHMOND, VA., March 5, 1928.

HIS EXCELLENCY, HARRY F. BYRD,  
Governor of Virginia,  
Richmond, Virginia.

MY DEAR GOVERNOR:

Acknowledgment is made of your request of this morning that I advise you as to who, in my opinion, would be eligible to vote in the proposed special election to be held on Tuesday, June 19, 1928, for the purpose of submitting to the voters of the State, for ratification or rejection, the several proposed amendments to the Constitution of Virginia.

Assuming that Senate Bill 382, as amended and passed by the Senate, is passed by the House, the proposed special election will be held on Tuesday, June 19, 1928. If the election is held on that date, it is my opinion that any person who is on that date qualified to vote at the regular election to be held on the Tuesday after the first Monday in November, 1928, will be entitled to vote in special election for the ratification or rejection of the proposed revision, and — or amendments, of the Constitution of Virginia.

The poll tax provision of section 21 of the Constitution, in my opinion, relates to the general elections provided for by the Constitution, and has no application to special elections. This has been the uniform construction placed on this section by the General Assembly of Virginia for more than twenty years, as is evidenced by the provisions of section 83 of the Code and by the officials and those participating in special elections held in this State during the past twenty years.

Section 83 of the Code provides as follows:

"The qualifications of voters at any special election shall be such as are hereinbefore prescribed for voters at general elections, but at any such special election, held before the second Tuesday in June in any year, any person shall be qualified to vote, who was so qualified at the last preceding regular November election, or who is otherwise qualified to vote, and has personally paid, at least six months prior to the second Tuesday in June of that year, all State poll taxes assessed or assessable against him during the three years next preceding that in which such special election is held, *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.* The term 'special election' as used in this section shall be deemed to include such elections as are held in pursuance of any special law, and also such as are held to fill a vacancy in any office, whether the same be filled by the qualified voters of the State, or of any county, city, magisterial district or ward." (Italics supplied.)

This section received the careful consideration of the three distinguished lawyers who revised the Code of 1919 and they made certain material changes therein, but the italicized portion thereof was allowed to remain without change.

Section 83 of the Code was held by the Court of Appeals in *Willis v. Kainbach*, 109 Va. 475 (1909), to be a valid exercise of the legislative power, and the provisions of section 21 of the Constitution was held to be limited to the general elections provided for by the Constitution.

If, for any reason, a member of the General Assembly were to be selected on June 19, 1928, the persons eligible to vote in such election would be those persons who would be qualified to vote in the November, 1928, election, as is provided by section 83 of Code.

The language of section 196 of the Constitution was never intended to limit the time when an election could be held, but clearly refers to those voters who would be qualified to vote for members of the General Assembly, if an election for members of the General Assembly were to be held on the date on which such election is held. This section expressly provides that "it shall be the duty of the General Assembly to submit such pro-



posed amendment or amendments to the people, in such manner and at such times as it shall prescribe."

Moreover, under the Constitution members of the House of Delegates are regularly elected biennially on the Tuesday after the first Monday in November of the odd-numbered years, while members of the Senate are regularly elected quadrennially on the Tuesday after the first Monday in November. If the language of section 196 of the Constitution be construed as referring to persons who would be qualified to vote for members of the General Assembly at a regular November election, if a regular election of such members was held in the year in which the special election submitting the constitutional amendments is held, the result would be the same as hereinbefore stated. It would not, in my opinion, be seriously contended that constitutional amendments cannot be lawfully voted on in any year except a year in which members of the General Assembly are regularly elected.

The 19th day of June will afford ample time for the making up of the treasurer's list required by section 38 of the Constitution, and the certification and posting of the same. As every person eligible to vote in the November, 1928, election has until May 5, 1928, in which to pay all the capitation taxes assessed or assessable against him during the three years preceding the year 1928, the holding of the election on the 19th day of June will afford an opportunity to every person, having the right to qualify to vote either for or against the proposed amendments, to do so.

For your information, I will say that I have discussed this matter with my assistants, Messrs. Leon M. Bazile and Edwin H. Gibson, the lawyers in the Legislative Drafting Bureau, Messrs. Farrier, Johnson and Caldwell, and Hon. C. H. Morrissett, and we are all agreed that the electorate entitled to vote in the election for the ratification or rejection of the proposed amendments to the Constitution will be those persons who will be eligible to vote in the regular 1928 election.

Trusting this will give you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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#### ELECTIONS—Payment of poll tax.

RICHMOND, VA., March 13, 1928.

MR. R. CHESSE MCGHEE, *Chairman,*  
*City Democratic Executive Committee,*  
*Lynchburg, Virginia.*

MY DEAR SIR:

I am in receipt of your letter of March 9th in which you say:

"On April 3rd we have a primary in Lynchburg for the nomination of city council.

"One of the candidates for the council, to be voted on April 3rd, did not pay his poll tax within the required six months prior to the June election. Is this candidate eligible to be a candidate in the primary and in the election."

As the party in question is a candidate for a member of the city council, which is a local office and not a candidate for a State office, I hesitate to express an opinion as Attorney General.

However, in this connection I would call your attention to section 229 of the Election Laws, which provides among other things "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 a candidate, \* \* \*." In view of this provision of the law, I do not see how your committee can print the name of a party on the official ballot to be used in your primary who has not paid his poll tax six months prior to the June election.

I would suggest that this matter be submitted to your Democratic Committee and let the committee pass upon the question. Should the decision of the committee be adverse, of course, the party in question would then have a right to apply to the court and have the matter tested.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### ELECTIONS—Payment of taxes as a prerequisite to vote.

RICHMOND, VA., *April 4, 1928.*

HON. THOMAS J. NOTTINGHAM,  
*General Registrar,*  
*Norfolk, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of March 28, 1928, in which you say in part:

"Section 93 of Virginia Election Laws provides that this office can only register those who have paid their capitation tax on or before December 12, 1927, until after June 19th election.

"Section 83 Virginia Election Laws, qualifies those who have paid their capitation tax on or before May 5th, 1928 to vote in the Special Election, June 19th, 1928.

"As they can not be registered before the third Tuesday in May Section 93 and sections 98 and 98A Virginia Election laws closes the Registration books until after June 19th, 1928, this office is registering only those who have paid on or before December 12th, 1927, and as this has been questioned, I would appreciate your opinion on 'How can those paying capitation tax after December 12th, 1927, register prior to June 20th, 1928?'"

It is true that the language of section 93 of the code is somewhat ambiguous, but this matter is governed by section 20 of the Constitution, and if there is any conflict between the Constitution and the statute, of course the Constitution will prevail.

The first two paragraphs of section 20 of the Constitution provide as follows:

"After the first day of January, nineteen hundred and four, every male citizen of the United States, having the qualifications of age and residence required in section Eighteen, shall be entitled to register, provided;

"That he has personally paid to the proper officer all State poll taxes assessed or assessable against him, under this or the former Constitution, for the three years next preceding that in which he offers to register; or, if he come of age at such time that no poll tax shall have been assessable against him for the year preceding the year in which he offers to register, has paid one dollar and fifty cents, in satisfaction of the first year's poll tax assessable against him."

It is, therefore, my opinion that any person who has paid all of the State Poll taxes assessed or assessable against him for the three years next preceding the year 1928 on or before May 5, 1928, are entitled to register in the City of Norfolk at any time prior to and including the third Tuesday in May. In the case of a young man just coming of age, he may pay his first years tax at any time on or before the third Tuesday in May and register on or before that day, if otherwise entitled to register.

While it is true that section 25 of the Constitution provides that the General Assembly shall provide for the annual registration of voters under section 20, and so forth, which

would possibly give the General Assembly the right to provide for the closing of the books after the date of general registration, I doubt very much whether the General Assembly has the authority to close the books at any other time than for the period before the regular November election, as section 98 provides not only for a date of annual registration, but in cities for a semiannually registration.

In any event, as I have said, I am of the opinion that you must register any person entitled to registration under section 20 of the Constitution up to and including the third Tuesday in May, 1928, provided his capitation taxes have been paid at any time up to and including May 5, 1928. In the case of the man just coming of age, at any time up to and including the third Tuesday in May.

It follows from this that I very seriously doubt the validity of the statute referred to as section 98A of the Election Laws, which attempts to close the books in cities prior to special elections.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### ELECTIONS—Limitation of expenses of candidates.

RICHMOND, VA., April 10, 1928.

CHARLES E. FORD, ESQ.,  
*Chairman of Electoral Board,  
Newport News, Virginia.*

DEAR MR. FORD:

Acknowledgment is made of your letter of April 7, 1928, in which you say:

"I will thank you for your opinion as to the construction of section 234 of the Code, governing the limitation on expenses of candidates, reading as follows:

"EXPENSES OF CANDIDATES LIMITED IN AMOUNT.—No candidate for any office at any primary shall spend for any purpose whatever, a larger sum than an amount equal to fifteen cents for every vote cast for the candidate of his party receiving the largest vote at the last preceding gubernatorial election, within the territory, the qualified voters of which have the right to vote for the office for whose nomination such person is a candidate at such primary; except that in legislative districts where more than six candidates are to be nominated for the General Assembly, a candidate for the General Assembly may spend not more than forty per centum of the salary to be paid him if elected. Any person violating the provisions of this section shall be guilty of a misdemeanor."

"I am interested to know whether a democratic candidate or a municipal office in the primary held in April shall base his expenses on the 'vote cast for the candidate of his party receiving the largest vote at the last preceding gubernatorial election.' The section is differently construed among those who are supposed to know, some saying that the intention of the Legislature was to make the vote of the candidate for governor the basis, while others contend that the words 'gubernatorial election' simply designate the election in which the largest vote is to be the criterion. The words 'the candidate of his party' would indicate the candidate for governor, while the word 'largest,' in the same line, would indicate to the contrary, because there is only one candidate of the party for governor in the election.

"I am persuaded that the basis would be the largest vote received by any candidate of the Democratic Party at the last preceding gubernatorial election and I certainly would appreciate your views on this subject."

After a careful examination of this statute, I am of the opinion that you have correctly construed this section. The basis is unquestionably the largest vote received by any

candidate of his party at the last preceding gubernatorial election, regardless of the office for which such person was a candidate.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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#### ELECTIONS—Qualifications of candidates.

RICHMOND, VA., *April 17, 1928.*

MR. WM. A. RIEDL,  
*Colonial Beach, Virginia.*

DEAR MR. RIEDL:

I am in receipt of your letter of the 12th instant, in which you ask two questions.

“(1) Can a person have his name placed on the ballot for the office of mayor of Colonial Beach who has lived only two years and two months in the above town and State of Virginia?”

All other requirements being met, a person who has lived within the State of Virginia for two years, and the county or town one year, is a qualified voter of the State and town, and eligible to hold any office within the State of Virginia, and the town in which he has lived.

“(2) Can a candidate who is running for office in said town have some one act for him as a watcher at the polls?”

If you mean by watcher, some person within 100 feet of the polls, I would say he cannot. But any elector may challenge any person offering to vote and, of course, when he desires to challenge a vote he is entitled to appear before the judges of election and make his challenge.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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#### ELECTIONS—Who may vote in special election.

RICHMOND, VA., *April 24, 1928.*

W. P. BOGGESS, ESQ.,  
*Justice of the Peace,*  
*Richlands, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of April 23, 1928, in which you say:

“I see you have ruled that any person, who is a legal voter at the next November election, can vote in the special election to be held on June 19, 1928. Now, suppose a person, who wants to vote in the June election, has not lived in Tazewell county the required time to vote in such election but, by the November election, will have been there the required time. Can such person then vote in the June election?”

“I have reference to the election to be held on June 19, 1928, for the purpose of raising the levy for schools in Tazewell county.”

My opinion to which you refer had reference to the payment of State capitation taxes and not to the other qualifications of voters. A person, who will be qualified to

vote in the November election on account of age or residence will not necessarily be qualified to vote in the special election to be held on June 19, 1928. The Constitution requires every person voting in an election, other than a primary, to be twenty-one years of age at the time he votes. The same is true as to residence.

Section 18 of the Constitution requires a residence in the State of two years, of the county, city or town one year, and of the precinct in which the person offers to vote thirty days next preceding the election in which he offers to vote.

Therefore, one might be eligible to vote, so far as residence is concerned, in the November election and not eligible to vote in the special elections held before that time. Exceptions as to primary elections are expressly provided for by section 35 of the Constitution.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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#### ELECTIONS—Qualifications to vote.

RICHMOND, VA., *April 21, 1928.*

MR. H. B. WRENCH,  
*Altavista, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of April 19, 1928, in which you say:

“I will be twenty-one years of age on August 9, 1928, which is next August. If I pay my poll tax prior to May 6 next and register, will I be qualified to vote in the town election of June 5, special election of June 19 and a special district election to be held May 22, all of this year?”

Under the law of this State, inasmuch as you will be twenty-one prior to November 6, 1928, you can pay your capitation tax for the year 1929 at any time prior to May 6, 1928, and register and vote in the regular November election to be held in 1928, and any primary, for the nomination of any candidate for office in such election. See sections 26 and 35 of the Constitution. For your information, the last day on which this capitation tax can be paid will be May 5, 1928.

However, you will not be eligible to vote in the town election of June 5, the special election of June 19 and the special district election of May 22, because you will not be twenty-one years of age on those days as required by section 18 of the Constitution. An exception is made in the case of primaries by section 35 of the Constitution, but no such exception is made with reference to special elections.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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#### ELECTIONS—Registration of voters.

RICHMOND, VA., *April 17, 1928.*

HON. JESSE W. BENTON, *Chairman,*  
*Electoral Board,*  
*Danville, Virginia.*

DEAR SIR:

I am in receipt of your letter of April 13th in which you ask whether or not the

registration books of the city of Danville should be closed by the registrars at any time prior to the June city election.

Section 98 of the Code provides that registrars of cities and towns, shall register annually, on the third Tuesday in May, at his voting place, the names of all qualified voters within his election district \* \* \*.

The registrar shall, at any time previous to the regular days of registration, register any voter entitled to vote at the next succeeding election who may apply to him to be registered \* \*.

This office has held that this section requires registrars of elections in cities and towns to close their registration books after the third Tuesday in May until after the June local elections.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### **ELECTIONS—Time for filing notice of candidacy.**

RICHMOND, VA., *April 19, 1928.*

MR. C. H. EDWARDS,  
*Altavista, Virginia.*

DEAR MR. EDWARDS:

I beg leave to acknowledge receipt of your letter of April 18th, the contents of which I have carefully noted.

In this you ask what is the time limit in filing notice of candidacy in town elections where no primary is held.

Section 154 of the Virginia Election Laws, as amended by the Legislature at its session of 1926, requires that any person who intends to be a candidate for an office in the town must give at least sixty days notice before such election in order that his name may be printed upon the official ballot to be used at said election.

However, the law will permit the voter to either write the name of the party on the official ballot for whom he wishes to vote, or else he may use a rubber stamp and stamp the name on said ballot. The sixty days notice is simply necessary in order to have the name printed on the ballot.

If your town is entitled to six councilmen and only three file their notice in time to have their names printed on the ballot, the other three could still be voted for in the general election by having their names either written or stamped on the official ballot.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### **ELECTIONS—Qualifications to vote.**

RICHMOND, VA., *April 25, 1928.*

MR. R. E. AMIS,  
*Virgilina, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of April 24, 1928, in which you request me to advise you whether a person's capitation taxes must be paid at least six months prior to the regular municipal election to be held in June, 1928, in your town, in order to entitle such person to vote in such election and to hold office.

The Constitution requires all the capitation taxes, which a person has been assessed or is assessable with during the three years next preceding the year in which he offers to vote, to be paid at least six months prior to the date of a regular election. The municipal election held in the cities and towns in June is a regular election, and persons entitled to vote therein must have paid such taxes at least six months prior to the election, which, in this particular instance, was on or before December 13, 1927.

In response to your second question, I call your attention to section 32 of the Constitution, which reads as follows:

"Every person qualified to vote shall be eligible to any office of the State, or of any county, city, town or other sub-division of the State, wherein he resides, except as otherwise provided in this Constitution, and except that this provision as to residence shall not apply to any office elective by the people where the law provides otherwise; any except, further, that the requirements of this section as to residence and voting qualifications shall not apply to the appointment of persons to fill positions under a municipal government requiring special technical or professional training and experience. Men and women eighteen years of age shall be eligible to the office of notary public and qualified to execute the bonds required of them in that capacity."

Trusting this gives you the desired information, I am

Very truly yours,

JNO. R. SAUNDERS,

*Attorney General.*

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#### **ELECTIONS—Members of electoral board holding other office.**

RICHMOND, VA., *April 27, 1928.*

HON. E. F. HARGIS, *Clerk,*  
*Russell County,*  
*Lebanon, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of April 26, 1928, in which you say:

"Kindly give us your opinion on the following:

"Mr. E. B. Mays, Secretary of the Electoral Board of this County has been appointed a Deputy Sheriff by N. C. Cross, Sheriff of this County. We would like for you to advise us whether or not Mr. Mays can hold the position of Secretary or Member of the Electoral and the office of Deputy Sheriff at the same time under Sec. 84 of Virginia Election Laws."

So far as is applicable, section 84 of the Code which provides for the appointment of the members of the Electoral Board, provides:

"\* \* \* 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."

This statute expressly prohibits the deputy of a Federal officer from holding such an office, but does not mention a deputy in the case of a State or local officer.

On principle, however, I would say that the office of member of the Electoral Board is wholly incompatible with that of the office of a deputy of an elective officer. The law contemplates that the members of the Electoral Board shall be without interest in the result of an election in which the Board plays such an important part. Manifestly

this impartiality is destroyed where a member of the Board becomes the deputy of an officer whose continuance in office depends upon the results of a public election.

Therefore, in my opinion, the two offices are wholly incompatible, although not expressly prohibited by statute.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### **ELECTIONS—Time for filing notice of candidacy.**

RICHMOND, VA., *April 30, 1928.*

HON. J. GRAY BEVERLEY, *Clerk,*  
*Corporation Clerk's Office,*  
*Winchester, Virginia.*

MY DEAR MR. BEVERLEY:

Acknowledgment is made of your letter of April 28, 1928, in which you say:

"I am writing to ask your opinion respecting our local election in Winchester on June 12. No candidates for either the city council or mayor filed notice of their candidacy within the time limit, which I understand is sixty days before the election. The Democratic party, however, nominated their candidates by regular primary, and I understand the names of the Democratic candidates so nominated may be printed on the official ballot, but that no other candidates may have their names printed on the ballot. I would appreciate your advising me if this is correct and also whether there is any objection to having a rubber stamp at each precinct bearing the name of a candidate whose name is not on the official ballot, for the convenience of the voters. I understand it is lawful to write on the ballot the name of any candidate, whether he has filed or not. I would like to have your opinion as to whether a rubber stamp may be used instead of writing in the name."

Under section 154 of the Code, as amended by the Acts of 1926, the names of party primary nominees are printed on the ballot whether they file notice of their candidacy or not within the time required by law, but the name of no other person can be printed on the ballot unless he has filed his notice within the time required by law.

The voters, however, under authority of section 28 of the Constitution may erase any name on the ballot and insert another. This insertion may be made by rubber stamp as well as by pen or pencil, in my opinion.

Trusting this gives you the desired information, I am

Sincerely yours,

JNO. R. SAUNDERS,  
*Attorney General.*

#### **ELECTORAL BOARDS—Increase in compensation of.**

RICHMOND, VA., *December 1, 1927.*

HON. S. P. POWELL,  
*Attorney for the Commonwealth,*  
*Spotsylvania, Virginia.*

MY DEAR SIR:

I am in receipt of your letter of the 30th, in reference to the construction of sections 89, 98 and 200 of the Code, as amended.



The proper construction of sections 89 and 200, as amended, is not altogether free from doubt, but I have reached the conclusion that the purpose of the amendment was to increase the compensation of members of the electoral boards and of registrars, and I have given an opinion that members of the board are entitled to \$5.00 a day for the number of days they actually sit without limiting each of the members to \$10 and the secretary to \$25 per year. The \$10 and \$25 limit was fixed at the time when each of the members was entitled to \$2.00 per day and cannot reasonably be held to be applicable as a limit under an amendment which provides \$5.00 per day.

This office gave an opinion in a letter dated December 5, 1921, that registrars in counties could sit only one day in a year and that the provision for a day's sitting in May was for the purpose of registering voters in cities and towns.

In addition to their per diem, registrars are entitled to \$1.00 for posting each notice—section 96; 3 cents for each ten words in their reports of registrations to clerks—section 98; 10 cents each for transfers and 10 cents each for registering voters on other than regular registration days—section 100; certain fees when districts are changed—section 102; certain fees on account of permanent registration roll—section 108; 10 cents for furnishing ballots to absent voters, and \$1.00 for posting notice of list of absent voters—section 216.

My attention has not been called to any court decisions having a bearing upon any of the sections quoted.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**ELECTIONS—Qualifications to vote.**

RICHMOND, VA., *April 17, 1928.*

MR. HARRY HOWARD,  
*Mount Jackson, Virginia.*

DEAR SIR:

I am in receipt of your letter of the 13th instant, in which you state that you paid your capitation tax on the 31st day of December, 1927, and ask whether or not you are entitled to vote in the general election because you did not pay your tax six months prior to the day of election.

The law requires the payment of capitation taxes six months in advance of all regular elections, and that requirement applies to town elections as well as to the general election in November of each year.

You are not qualified to vote in your town election, not having paid your capitation tax six months prior to that election.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**ELECTIONS—Writing names on ballots when not printed.**

RICHMOND, VA., *April 23, 1928.*

L. R. THOMPSON, ESQ.,  
*The Lane Company, Incorporated,*  
*Altavista, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of April 21, 1928, in re: the election to be

held in your town in June. You state that there are more offices to be filled than there are candidates, and request me to advise you what can be done in the matter.

Section 28 of the Constitution provides in part:

“\* \* All ballots shall contain the names of the candidates, and of the offices to be filled, in clear print and in due and orderly succession; but any voter may erase any name and insert another.”

Where there are no candidates for an office, in my opinion only the office should be printed on the ballot with a blank space for the voters to write in the name of some person, if they desire to do so. Of course, the voters in such election would have the right to write on the ballot, at the appropriate place thereon, the name of any person for whom they desired to vote for such office. If desired, rubber stamps could be provided, but the judges would have no authority to stamp such names on the ballots. This would have to be left to each individual voter.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### **ELECTIONS—Cost of.**

RICHMOND, VA., *June 29, 1928.*

HON. B. I. BICKERS, *Clerk,*  
*Standardsville, Virginia.*

MY DEAR MR. BICKERS:

Acknowledgment is made of your letter of June 28, 1928.

From a careful examination of sections 1 and 6 of chapter 25 of the Acts of 1928, it is my opinion that the only costs of the election, which the comptroller is authorized to pay, is the per diem fixed by law for the three judges for holding the election. At the time the Act was approved, the election statutes were examined and it was found that the judge, who carried the returns to the clerk's office, and the commissioners of election were entitled, in addition to their per diem, to mileage.

There was no means by which the costs of the election could be computed because of this, and for that reason it was provided that the per diem of the judges for holding the election should be paid out of the State treasury, this being a fixed and certain amount, and that the other expenses should be defrayed by the locality as provided in section 6 of this Act.

Very truly yours,

JNO. R. SAUNDERS,  
*Attorney General.*

#### **ELECTIONS—Expenses of special election, how defrayed.**

RICHMOND, VA., *June 25, 1928.*

HON. E. R. COMBS, *Comptroller,*  
*Richmond, Virginia.*

MY DEAR MR. COMBS:

Acknowledgment is made of your request of this morning that I advise you just what amount you are authorized to pay from the State treasury to defray the costs of conducting the special election held on June 19, 1928, for the purpose of ratifying or rejecting the amendments to the Constitution.

Under authority of sections 1 and 6 of chapter 205 of the Acts of 1928, I am of the opinion that the only expenses that you are authorized to pay in connection with the holding of the special election on June 19, 1928, for the purpose of ratifying or rejecting the amendments to the Constitution, is the per diem fixed by law for three judges at each precinct in the State. Payment can be made out of the State treasury for no other expense in connection with the holding of this election.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**ELECTIONS—Compensation of judges, etc.**

RICHMOND, VA., June 18, 1928.

HON. W. E. WRIGHT, *Secretary,*  
*Essex County Electoral Board,*  
*Tappahannock, Virginia.*

MY DEAR MR. WRIGHT:

Acknowledgment is made of your letter of June 16, 1928, in which you request me to advise you as to what compensation the judges, clerks, registrars, members of the electoral board and commissioners of election are entitled to receive for their services.

Sections 89 and 200 were amended by chapter 259 of the Acts of 1928, and is now in force and effect. Section 89 of the Code, as last amended, provides that each member of the electoral board shall receive from the county or city, respectively, for each day of actual service the sum of five dollars, and the same mileage as is now paid jurors; provided that no member of such board shall receive more than twenty-five dollars in any one year exclusive of mileage, unless one or more special elections be held in such year, in which event the members of the electoral board shall be paid additional amounts at the same per diem, and mileage. This section further provides that the secretary of the electoral board shall, in addition to the per diem therein provided for, be allowed his expenses not to exceed twenty-five dollars in any one year. Provision for additional compensation is made in cities having a population in excess of fifty thousand inhabitants.

Section 200 of the Code, as last amended, reads as follows:

"The judges, clerks, registrars, and commissioners of any election shall receive as compensation for their services the sum of five (~~\$5.00~~) dollars for each day's service rendered, and the judge carrying the returns and tickets to and from his voting place and to the county clerk's office and the commissioners of election shall receive the pay and mileage now allowed to jurors for each mile necessarily traveled, to be paid out of the treasury of the county, city or town in which the election is held."

The latter part of this section is very badly expressed and its meaning not clear. However, in view of the express declaration by the General Assembly that the judges, clerks, registrars and commissioners of election shall receive for their services the sum of five dollars each for each day's service rendered, I am of the opinion that the words "pay and mileage" are to be construed as meaning the compensation paid for the mileage of the judge carrying the election returns and tickets and the commissioners of election.

The judges, clerks and registrars perform their duties in their precinct, which is generally in the immediate neighborhood of their homes and, therefore, no provision as to mileage is made for them; but, in the case of judges carrying the returns to the clerk's office as required by section 180 of the Code, and in the case of commissioners of election, who are required by section 182 of the Code to meet in the clerk's office, the situation is different, and the General Assembly evidently intended to provide mileage for them in

addition to the per diem fixed by the first part of the section and, in so doing, employed the unfortunate language referred to.

It seems to me that this is the only construction that can be placed on section 200 of the Code which would make it accord with the intention of the General Assembly, as declared by the first part of this section.

Trusting this gives you the desired information, I am

Very truly yours,

JNO. R. SAUNDERS,  
*Attorney General.*

#### **ELECTIONS—Voting for one candidate, when three to be elected.**

RICHMOND, VA., May 14, 1928.

HON. J. STANLEY LIVESAY,  
559 28th Street,  
Newport News, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of May 6, 1928, in which you say in part:

“At the last meeting of the City Democratic Executive Committee, I was instructed to write you for an opinion and ruling upon some of the matters that are confronting the committee at this time.

“Section 179 of the Virginia Election Laws and section 9 of the Charter of the City of Newport News.

“The question before us is ‘Can a voter vote for only one candidate when there are three to be elected, or must he vote for as many as three (that is as many as are to be elected in order for the ballot to be counted).’”

Section 9 of your Charter, Acts 1895-1896, provides that the election of the city officers shall be held under and pursuant to the general laws of the State. Under the general law, section 179 of the Code, it is declared:

“\* \* \* No ballot shall be void for containing a less number of names than is authorized to be inserted therein.”

It is, therefore, my opinion that a voter can vote for less than the number of candidates to be voted for, and the fact that he strikes all of the names except one does not render his ballot void, but should be counted for the candidate for whom he has voted.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### **ELECTIONS—Eligibility to vote.**

RICHMOND, VA., June 14, 1928.

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

MY DEAR SIR:

Acknowledgment is made of your letter of June 13, 1928, in which you say:

“Will you please give us an interpretation as to who is entitled to vote in the election on June 19th submitting the proposed amendments or revisions of the Constitution of Virginia to the people.

"Is anyone who was qualified to vote in November 1927 eligible to vote in this election, or are only those who were eligible to vote in the regular November election of this year?"

It is my opinion that any citizen of the United States, twenty-one years of age on the 19th day of June, 1928, who has resided in this State two years, and the county or city in which he offers to vote, one year, and in the precinct in which he offers to vote thirty days next preceding the 19th day of June, 1928, and who is otherwise qualified, will be entitled to vote in the special election to be held on that day—provided the capitation taxes assessed or assessable against him during the three years preceding the year 1928 have been paid at such a time as will entitle such person to vote in the regular November 1928 election.

This means that those persons who were of age prior to January 1, 1928, must have paid the capitation taxes assessed or assessable against them on or before May 5, 1928, and that young men coming of age on or after January 1, 1928, can pay their capitation taxes for the year 1928 at any time prior to the special election, and if otherwise qualified, register and vote therein.

Persons who were qualified to vote in the regular November 1927 election will not be qualified to vote in the special election to be held on June 19th, unless they are also qualified to vote in the regular election to be held in November, 1928.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### ELECTIONS—Legal residence of voters.

RICHMOND, VA., June 14, 1928.

MR. W. F. AMONETTE, JR.,  
P. O. Box 241,  
Danville, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of June 12, 1928, in which you request me to advise you whether, after removing your residence from the city of Danville to Pittsylvania county, you would be entitled to return to the city of Danville and vote until such time as you were entitled to vote in the county of Pittsylvania on account of having resided there for the length of time required by the Constitution.

In view of the provisions of section 18 of the Constitution, I am inclined to the opinion that once a person has changed his legal residence no right to vote in his former place of residence remains, except when he moves from one precinct to another in the same county. This section of the Constitution reads as follows:

"Every male 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 General 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."

As to what constitutes a change of legal residence, I call your attention to *Williams v Commonwealth*, 116 Va. 272.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**ELECTIONS—How names of candidates may be written on ballot.**RICHMOND, VA., *June 9, 1928.*

MR. C. H. EDWARDS,  
*Altavista, Virginia.*

DEAR MR. EDWARDS:

I am in receipt of your letter of yesterday stating:

“Owing to the change in the law specifying the time limit for filing notice of candidacy in order to have the name appear on the official ballot a number of candidates did not file in time to get names on. Therefore, voters will have to write or stamp additional names on the ballot in order to elect the full number of councilmen.”

You then ask:

“Is it necessary for the full name or initials of a candidate to be written on the ballot or stamped on the ballot for it to count? For example, assuming that John Wiley Jones was the name the voter wished to write or stamp on the ballot, in event only J. W. Jones, or just Jones, was written or stamped on the ballot, would it be proper to count that a vote for Mr. Jones?”

In my opinion, a ballot which is so marked as to express the preference of a voter for a candidate is all that is necessary, and where a ballot shows for whom the voter intended to vote, the ballot should be counted for that person. Where the identity of a person for whom a vote is cast and the intention of the voter may be ascertained from the ballot, it is a good ballot, and an inadvertent substitution of one initial for another or the misspelling of a name, where the identity and intention is ascertained, does not justify a rejection of the ballot.

To use your own illustration, where J. W. Jones or John Wiley Jones is a candidate, a ballot marked for either should be counted for the candidate where there is only one J. W. or John Wiley Jones; but, even though there is only one candidate named Jones, I do not think that a ballot marked Jones should be counted.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**ELECTIONS—Eligibility to vote.**RICHMOND, VA., *June 8, 1928.*

MR. NORWOOD WILSON,  
*Hopewell, Virginia.*

DEAR SIR:

I am in receipt of your letter of yesterday, in which you say:

• “The question has been raised here whether or not parties living outside of the city limits are entitled to vote in city elections.

“While a number of the parties coming under this category do the bulk of their business in Hopewell, the question has been raised and I have been asked to communicate with you for a ruling. Not only have numerous persons been allowed to vote who do not live in Hopewell, but rather in Prince George county, in past elections, but several have been allowed to act as both clerks and judges of elections.”

No person who does not claim a domicile within the city of Hopewell is entitled to vote or to act as judge or clerk of election in that city. Persons who permanently reside outside of the city limits are certainly not entitled to vote in city elections. The

fact that a person does business within the city limits does not entitle him to vote in that city.

In those cases in which a person has once acquired a voting residence in a city and moves outside of its limits, the question then arises as to his intention to retain a voting residence in the city, or to acquire one at the place of his actual residence. Where he has permanently given up his residence in a city, with no intention of returning, he loses his voting residence, but where he retains an intention of returning to a city residence, even at a distant future time, he is entitled to vote in the city elections. *Williams v. Commonwealth*, 116 Va. 272, is the leading case in Virginia upon this subject.

As so many elements enter into a determination of voters' rights, I advise you to consult counsel upon any particular case which may arise.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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#### ELECTIONS—Voting by mail.

RICHMOND, VA., June 7, 1928.

HON. DAVIS BOTTOM,  
*Superintendent of Public Printing,  
Richmond, Virginia.*

MY DEAR MR. BOTTOM:

Acknowledgment is made of your request of today, in which you state that you expect to be absent from the city on Tuesday, the 12th of June, 1928, and that you have procured from the general registrar of this city a ballot to be voted by you as an absent voter. You request me to advise you whether you can lawfully prepare your ballot in the city of Richmond before leaving for your trip, and whether, after so preparing such ballot, you can send it to the general registrar by registered mail, or deliver it to him in person.

In response thereto I call your attention to section 208 of the Code as amended by the Acts of 1924. That section provides that the ballot shall not be opened except in the presence of a notary, or other officer authorized to take acknowledgments to deeds, and then provides what the voter shall do when the ballot is opened in the presence of such officer. The last sentence of that Act reads as follows:

"This envelope, together with the coupon, which must be filled out and signed by a notary public, or other officer as herein provided, shall be enclosed within the envelope directed to the registrar, which shall then and there be sealed, and shall be registered and mailed to the registrar, *or delivered to the registrar in person.*"

The statute clearly authorizes the voter, after having marked and prepared his ballot as provided by section 208, to return it to the registrar either by registered mail, or to deliver it to him in person.

In view of the above, I am of the opinion that you are authorized to mark and prepare your ballot in the city of Richmond before leaving on your journey, and to deliver it to the registrar in person.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**ELECTIONS—Ballots void.**

RICHMOND, VA., June 6, 1928.

MR. H. H. ROBERTS,  
133 25th St.,  
Newport News, Va.

DEAR SIR:

In the absence of the Attorney General, and because of the fact that you request a reply to your letter of the 5th instant by return mail, I am acknowledging receipt thereof for the Attorney General and expressing my view upon the question you ask.

I have been unable to locate the city charter of Newport News, section 9 of which concerning the law governing primaries is quoted:

"In counting the votes any ballot found to contain a greater or less number of names voted for the office of councilman than the number of vacancies in the council to be filled shall be void."

If you are correct in your statement that section 9 of your charter governs primaries, then it can have no reference to elections. An Act was passed by the legislature of 1922, chapter 138, page 219, providing for an election for the purpose of submitting to the people of Newport News the question as to whether or not that city should have a primary election for the nomination of councilmen.

Subsequently, during the session of 1924, an Act was passed, chapter 3, page 4, providing:

"That at the election of councilmen for the city of Newport News, Virginia, to be held on the second Tuesday in June, nineteen hundred and twenty-four, and at all elections for councilmen thereafter, the said councilmen be nominated by a primary election of any political party desiring to so nominate its candidates, and the nomination and election shall be held by, under and in pursuance of the general election laws of the State."

The provision for holding the election of councilmen as distinguished from the nomination may be invalid on account of the fact that the title to the Act is limited to the nomination of candidates for council and does not include the election of councilmen.

Section 179 of the Code provides, among other things:

" \* \* \* but no ballot shall be void for containing a less number of names than is authorized to be inserted therein."

I assisted Colonel Saunders in obtaining the information contained in his letter of May 29 to you, and I concur in his opinion that a citizen may vote for one, two or three candidates for councilman at the election to be held in your city on the 12th of June.

Let me request you to refer me to the Acts, chapter and page, in which I can find the charter of the city of Newport News, which you have mentioned in your letter.

Yours very truly,

EDWIN H. GIBSON,  
*Assistant Attorney General.*

**ELECTIONS—Insertion of names on ballots with rubber stamps.**

RICHMOND, VA., May 31, 1928.

MR. P. L. BARRETT,  
Box 205,  
Altavista, Virginia.

DEAR MR. BARRETT:

I am in receipt of your letters of the 29th and 30th of May.



In your letter of the 29th you ask in reference to rubber stamps, as to whether or not there is any special sized lettering required and also whether or not the names on the stamp should be placed directly on lines.

From your letter of the 30th I infer that a copy of a recent letter to Honorable Boyd Richards, of Winchester, Virginia, which I sent you, did not furnish you the information you desired.

There is no provision of law specifying the size of letters on rubber stamps used in inserting a name upon an official ballot in voting for a candidate for office.

While this office has held that one name can be erased and another inserted by a voter, and that the insertion may be made by the use of a rubber stamp, I have never held and do not now hold that a stamp can be used for the insertion of more than one name at one time upon an official ballot.

Section 28 of the Constitution provides:

“ \* \* but any voter may erase any name and insert another.”

Section 153 of the Code provides:

“ \* \* but any voter may erase any name on the ballot voted by him and insert another.”

Section 162 of the Code provides:

“ \* \* it shall be lawful for any voter to erase any or all names printed upon said official ballot and substitute therein *in writing* the name or names of any person or persons for which he may desire to vote.”

I am of the opinion that no stamp containing more than one name can legally be used in inserting the names of candidates upon an official ballot.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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#### **ELECTIONS—Qualifications of voters in special elections.**

RICHMOND, VA., May 31, 1928.

MR. J. C. WISE,  
*Haymarket, Virginia.*

DEAR MR. WISE:

Governor Byrd has asked me to write you as to the law upon the matter of the qualification of voters at the special election held in your district upon the 29th day of last March, about which you wrote him in your letter of May 26.

Section 83 of the Code, concerning qualifications of voters at special elections, provides:

“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, \* \*.”

In my opinion, all persons who were qualified to vote in the November election of 1927 were qualified to vote in the special election held on the 29th day of March, 1928, provided each had paid capitation taxes six months prior to the second Tuesday in June,

1928. Not only were those persons qualified, but all persons who became qualified by reason of residence in the district and who had registered and had paid capitation taxes six months prior to the second Tuesday in June. The law does not restrict or limit the right to vote to those persons only who are qualified by residence and registration to vote in the preceding November election.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**ELECTIONS—Republican representation at precincts.**

RICHMOND, VA., May 29, 1928.

MR. HARRY HOPEWELL,  
*Mount Solon, Virginia.*

DEAR SIR:

I am in receipt of your letter of May 22, in which you ask if the Republicans of Mount Solon precinct are entitled to one judge and one clerk of election at your precinct, and state that the precinct has a Democratic majority and Augusta county is a Democratic county.

Section 84 of the Code provides that, in appointing judges of election, representation as far as possible should be given to each of the two political parties which, at the general election next preceding their appointment, cast the highest and the next highest number of votes.

This law does not apply to the appointment of clerks, nor does it matter whether or not a precinct is Democratic or Republican, or the county Democratic or Republican.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**ELECTIONS—Eligibility to vote, persons becoming of age.**

RICHMOND, VA., May 29, 1928.

MR. J. H. HURT,  
*Gardners, Virginia.*

DEAR SIR:

I am in receipt of your letter of May 22, in which you say:

“Will you please advise me whether a person becoming of age February 1, and failing to pay his poll tax by May 5, would be entitled to vote in the special election on June 19 by paying his poll tax now?

“Would a person who paid his poll tax before May 5, whose name does not appear on posted voting list, be entitled to vote in the special election June 19 and regular election in November without court order correction or judge in vacation?”

In reply to the inquiry contained in the first paragraph, I will say that a person becoming of age since the first day of January—formerly February—is entitled to have himself assessed by the commissioner of the revenue at any time previous to the 19th day of June, to pay one year's capitation tax and, after registering, to vote in the special election. This payment will be credited to him for the first year's capitation tax due by him, which will be for the year 1929.

In reply to the second paragraph of your letter, I will say that the treasurer of the county should include the name of the person becoming 21 years of age who has paid

his capitation tax in the list made up by him: and furnished to the clerk for the November, 1928, election, provided, of course, that the payment is made before the treasurer's list is certified to the clerk and his attention has been called to the facts in the matter. Should his name have been omitted, and the time allows, he may, after five days notice to the treasurer, apply to the judge and have the list of the treasurer corrected and his name inserted thereon.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**ELECTIONS—Improper conduction of.**

RICHMOND, VA., May 29, 1928.

MR. H. B. MCFALI,  
*Mount Solon, Virginia.*

DEAR SIR:

I am in receipt of your letter of May 28, in which you state that you have been a judge of election for your precinct in Augusta county for a number of years; that recently your attention has been called to the fact that your elections were not properly conducted, due to the fact that you have had two Democratic clerks, and you ask if the law requires the appointment of a Republican clerk.

It does not. Section 84 of the Code, providing for the appointment of judges of election, requires the appointment of judges representing as far as possible each of the two political parties which, at the general election next preceding their appointment, cast the highest and next highest number of votes.

You will notice that this section does not apply to clerks and it is, therefore, not necessary for the electoral board to appoint a member of the Republican party as one of the clerks of election.

The board is required to appoint one Republican judge if that party cast the next highest number of votes at the general election next preceding the appointment of judges.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**GAME AND INLAND FISHERIES—Fishing in waters of Meherrin River and tributaries.**

RICHMOND, VA., July 21, 1927.

HON. E. PEYTON TURNER,  
*Commonwealth's Attorney,  
Emporia, Virginia.*

MY DEAR MR. TURNER:

Acknowledgment is made of your letter of July 19, 1927, in response to my letter to you of the 16th, in which you say in part:

"The point I wished your opinion on was this: Is it unlawful, under the statute aforesaid, to take, kill, or capture fish in the waters of the Meherrin River *with a dip-net or seine*? Of course, I understand that the Act has no application to the waters of the Meherrin River lying east of the dam of the Emporia Hydro-Electric Power Company. This, as I have said, is not the point in dispute. The question that has been raised is as to the lawfulness of catching fish in the Meherrin River with a dip-net or seine."

Chapter 264 of the Acts of 1926, so far as is applicable to the question asked by you, provides as follows:

"It shall not be lawful to take, kill or capture fish in the waters of the Meherrin River and its tributaries within the confines of this State, by means of fykes, traps, fish slides, or in any other manner, except by angling with a hook and line, or to capture with a dip net or seine; provided, that this Act shall not be applied to such waters lying east of Emporia Hydro-Electric Company's dam within the confines of the county of Greenville."

The act is as badly and awkwardly worded as it could be if a deliberate effort had been made to confuse it, but, after carefully considering the same, it is my opinion that it was the intention of the General Assembly to prohibit the capturing of fish in the Meherrin river in any manner, except by angling with a hook and line.

Trusting that this gives you the desired information, I am

Very truly yours,

JNO. R. SAUNDERS,  
*Attorney General.*

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**FIREARMS—Sale of ammunition.**

RICHMOND, VA., July 18, 1927.

HON. WILLIAM T. GRAYBEAL,  
*Commonwealth's Attorney,*  
*Buena Vista, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of July 16, 1927, in which you say:

"Our hardware merchants here desire a ruling from you on selling ammunition for rifles where they use the same ammunition as pistols. They say that boys often come in, and sometimes men, and ask for ammunition for rifles of certain caliber and they sell them. Later we may find them using these cartridges in pistols. How is the hardware man to know for which they are buying, and shall he refuse to sell cartridges for rifles when there is no law against it? More than half of the rifle cartridges can be used in pistols."

In response thereto, I am sending you herewith a copy of an opinion given by me on December 18, 1926, to Mr. Claiborne R. Watkins, of Richmond, Virginia, in which I construed that portion of chapter 158 of the Acts of 1926 about which you inquire.

I will say, however, that it appears from your letter that the hardware merchants in your town are acquainted with the fact that the boys and men referred to use the ammunition obtained for rifles in pistols. I would say that, after obtaining knowledge of this fact, such hardware dealers would not, under the law, be justified in selling rifle ammunition to such persons without the production of a registration card as required by chapter 158 of the Acts of 1926, not because it is unlawful to sell rifle ammunition but because these hardware merchants have been put on notice that the purchasers are actually buying pistol ammunition.

Trusting that this gives you the desired information, I am

Very truly yours,

JNO. R. SAUNDERS,  
*Attorney General.*

**GASOLINE TAX—Accounting for, time and place of.**RICHMOND, VA., *June 11, 1928.*

HON. JAMES M. HAYES, JR., *Director,*  
*Division of Motor Vehicles,*  
*Richmond, Virginia.*

MY DEAR MR. HAYES:

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

"Under sections 2 and 9, chapter 107, Acts 1923, approved March 26, 1923, amended and approved March 21, 1924, and known as the Gasoline Tax Act, section 2 is as follows:

"In addition to the taxes now provided by existing law, every dealer, as herein defined, who is now engaged or may hereafter engage, in his own name, or in the name of others, or in the name of his representatives or agents in this State, in the sale, distribution or use of motor vehicle fuels, as herein defined, shall, not later than the twentieth of each calendar month, render to the motor vehicle commissioner, a statement on forms prepared and furnished by the said commissioner, which shall be sworn to by one of the principal officers, in the case of domestic corporations, or by the resident general agent or attorney in fact, by a chief accountant or officer, in case of foreign corporations, by the managing agent or owner in case of a firm or association of persons, or by the dealer in all other cases, which statement shall show the quantities of motor vehicle fuels sold and delivered, or used, within the State of Virginia during the preceding calendar month, and such dealer shall at the same time pay the tax or taxes hereinafter levied on all motor vehicle fuels sold and delivered, or used, as shown by such statement.

"Bills shall be rendered to all purchasers of motor vehicle fuels by dealers selling the same. The said bills shall contain a statement printed thereon in a conspicuous place that the liability to the State for the tax or taxes hereby imposed has been assumed, and that the dealer will pay the tax or taxes thereon on or before the twentieth day of the following month."

"Section 9 is as follows:

"If any dealer, as herein defined, shall fail to pay the tax or taxes on motor vehicle fuels due by such dealer under the provisions of this Act, *on or before the twentieth day of the month in which said payment is due, there shall be automatically added thereto a penalty equal to twenty-five percentum of the said tax*, to be paid or collected when the said tax is paid or collected. If any such dealer shall fail to pay such tax and penalty, within thirty days after the said tax shall be due, the Attorney General shall bring appropriate action for the recovery of such tax and penalty, and judgment shall be rendered for the amount so found to be due together with costs, and the amount collected shall be paid into the State treasury as hereinbefore provided; provided, however, that if it shall be found as a fact that such failure to pay was wilful on the part of such dealer, judgment shall be rendered for double the amount of the tax found to be due, with costs. All remedies now, or which may hereafter be, given by the laws of this State for the collection or enforcement of taxes are hereby expressly given for the collection and enforcement of judgments recovered under this section."

"There has been some question as to the reports filed with this office by oil companies whether the law is complied with when a dealer deposits his report with a remittance attached in a post office box on the 20th of the month. I am writing this letter for your opinion as to whether or not these reports should be filed with this office on or before the 20th day of the month following the month the gasoline was sold, delivered or used. I also desire to inquire should the 20th of the month fall on Saturday, Sunday or a holiday should not these reports be filed with the office on or before the said date."

"From a careful reading of the sections of the statute quoted in your letter, I am of the opinion that the gasoline tax must be paid by persons owing the same not later than the 20th day of the month in which such payment is due, that is, the money or check in payment of such tax must have been actually received by you not later than the 20th

day of the month in which such tax is due. I do not think that the tax is paid until received by you, and that in all cases in which the payment is not actually made to you on or before the 20th of the month, the penalty of 25 per centum must be collected by you. Where the 20th of the month falls on a Saturday, the tax must be paid before the close of business on that day, and when it falls on a Sunday or a holiday, it must be paid before that day in order to escape the penalty.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

### GASOLINE TAX—Constitutionality of refunds.

RICHMOND, VA., *March 7, 1928.*

HON. GEORGE L. DOUGHTY,  
*Senate Chamber,*  
*Richmond, Virginia.*

MY DEAR SENATOR:

Acknowledgment is made of your letter of this morning, in which you say:

"A substitute has been offered and reported out by the Senate Committee on Roads and Internal Navigation, repealing the present refunds in the Gasoline Tax Bill.

"As some doubt has been expressed as to the effect of such repeal upon the constitutionality of the present Virginia law, I would appreciate it if you would give me a written opinion at once as to whether the present refunds are constitutional and also as to whether the repeal of such refunds will endanger the constitutionality of the present Virginia Gasoline Tax Laws."

In *Standard Oil Company v. Jones*, 205 N. W. (S. D.) 72, 73-74 (1925), in discussing a motor vehicle fuel tax law very similar in its provisions to the Virginia law, it is said:

" \* \* \* A careful study of this Act convinces us that the true object and purpose of this Act is to tax users of gasoline in the State 3 cents per gallon through the agency of a dealer's tax. Every provision is to effect this result, to avoid any interference with interstate commerce, and to permit of no discrimination. The justice of the tax is in its collection for the construction and maintenance of highways, from the users of such highways, in proportion to the use. The only exception to the tax upon the consumer is in favor of those operating or propelling stationary gasoline engines, tractors used for agricultural purposes, motor boats, airplanes or aircraft, or those using gasoline for lighting, heating, cleaning, dyeing, or other commercial use not upon the highways. Such users are exempted by a provision requiring a return of the tax which they have been compelled to pay. If it were not in fact a tax on the consumer, there could be no justification for the State to pay such consumer a tax collected of another. We think there is no doubt as to the constitutionality of this Act in so far as it pertains to the collection of a 3 cents per gallon tax through the agency of dealers. \* \* \*"

This language, in my opinion, is applicable to our statute. If "the justice of the tax is in its collection for the construction and maintenance of highways, from the users of such highways, in proportion to the use," I very seriously doubt the validity of a road use tax statute which compels persons, using motor fuels for other purposes than the operation of motor vehicles on the roads, to pay the tax. I have been unable to find a case which declares such a provision invalid, but it seems to me that the reasoning of the court in *Standard Oil Company v. Jones*, *supra*, would condemn it.

The decision of the Illinois Supreme Court in *Chicago Motor Company v. Treasurer of Illinois*, decided on February 24, 1928, in which the refund clause of that act was held to render the act invalid, has no relation to our statute as our statute permits the refunding

of only the actual tax paid, while the Illinois statute was so drawn as to permit the receipt of money out of the treasury by persons who had not paid the tax, or the receipt of a greater amount than had been paid by the recipient of the refund. This was very properly held the taking of money from one person for the purpose of giving it to another in violation of the due process clause of the Federal and Illinois Constitutions. No such question could possibly arise under our act.

Yours very truly,

LEON M. BAZILE,  
*Assistant Attorney General.*

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**GAME WARDENS—Fees for arrests.**

RICHMOND, VA., February 11, 1928.

HON. JOHN E. REDD,  
*Justice of the Peace,*  
*Martinsville, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of February 9th, in which you ask certain information with reference to whether or not game wardens, or special game wardens, are entitled to any fee for making arrests for the violation of the game and fish laws of this State.

In reply I beg to say under the fish and game laws he is not entitled to any part of the fine, unless his name is on the warrant as instigating the prosecution. If his name is upon the warrant he receives half of the fine, if the accused can pay it, also the \$2.50 fee and \$1.00 for serving the warrant. He will receive nothing in the case of acquittal.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**GASOLINE TAX—United States Government exempt of.**

RICHMOND, VA., April 17, 1928.

HON. JAMES M. HAYES, JR., *Director,*  
*Division of Motor Vehicles,*  
*Richmond, Virginia.*

DEAR MR. HAYES:

I am in receipt of your letter of the 16th instant, in which you make the following statements:

"The United States Government, namely, the Naval Base and the Navy Yards at Norfolk and Portsmouth are purchasing gasoline for use in their equipment within the government reservation. These posts will not accept bids on gasoline with any tax added and, of course, dealers in the State of Virginia cannot bid on this gasoline unless the tax is included and it seems that oil companies outside of the State of Virginia are making bids on this gasoline and, of course, the deliveries are made from some point outside of the State and the gasoline is bought less the 5 cent tax per gallon.

"I am writing you to inquire if I have authority to authorize oil companies within the State to sell this gasoline to the government less the tax and thereby giving our home companies advantage of the sale of the gasoline and, of course, the State would not be out of this tax on such sales and, too, the State would profit by such authorization as the oil companies pay their license tax on their purchases and, of course, these sales made to the government would have to be included in

their purchases. If I should have such authority to authorize the oil companies to sell this gas less the tax, this authorization would only be on tank car quantities."

You ask for my opinion as to your authority to authorize oil companies doing business in this State to bid for the sale of gasoline to the United States Government for use at the Naval Base and Navy Yards at Norfolk and Portsmouth in their equipment within the government reservation, upon a basis of a price which would not include the Virginia gas tax of 5 cents per gallon.

There is no provision of law by which you are authorized to allow a sale, use or distribution of gasoline within the State of Virginia, without requiring the dealer to account for and pay the State gasoline tax.

From your statement, gasoline sold by Virginia dealers to the United States Government is to be delivered in bulk to the government on Federal reservations and is to be delivered to the government in competition with gasoline sold by dealers outside of the State for delivery upon such reservations and for the exclusive use of the Federal government.

The practical question, therefore, is as to the construction of the language of the act of 1926, pp. 237-8, which defines the term "dealer" as "one who imports, or causes to be imported, in the State of Virginia, the motor vehicle fuels as herein defined for use, distribution or sale and delivery in and after the same reach the State of Virginia \* \* \*."

In section 23 the same language is used in speaking of the report required of dealers and provides for a statement of "\* \* motor vehicle fuels sold and delivered or used within the State of Virginia \* \*."

The following section (24) levying the tax, as amended by section 3 of House Bill 114 of the Acts of 1928, contains the same language: "\* \* sold and delivered or used in this State \* \*."

You will also notice that, in addition to the language used in the several quotations, each one of them contains the provision: "\* \* and are not under the protection of the Interstate Commerce Clause of the Constitution of the United States."

In my opinion, gasoline sold by Virginia dealers to the United States Government and delivered at the Naval Base and the Navy Yards at Norfolk and Portsmouth is not sold and delivered in Virginia, or used in Virginia, within the meaning of the gasoline tax law and is not subject to the State tax of 5 cents per gallon.

The language of the gasoline tax bill includes dealers outside of the State, as well as dealers within the State, who import gasoline into the State and sell and deliver or use such gasoline within the State. Certainly, if dealers outside of the State who sell gasoline to the Federal Government and deliver the same on Federal territory are exempt from the payment of the State gasoline tax, dealers doing business in the State of Virginia should not be required to include gasoline so sold in their monthly reports to you, nor be called upon to pay the State gasoline tax.

Yours very truly,

JNO. R. SAUNDERS,

*Attorney General.*

#### GAME AND INLAND FISHERIES—License for fish pots, etc.

RICHMOND, VA., April 17, 1928.

HON. HARRY R. HOUSTON,  
*Commissioner of Fisheries,  
Hampton, Virginia.*

MY DEAR HARRY:

Colonel Saunders has handed me for investigation and reply your letter of March 20,



for a ruling on the question of a license for fish pots, eel traps and wire crab traps, all of which you state are now escaping license tax.

You also state that the Commissioner of Fisheries wishes to place a license tax of \$2.00 for every four of these devices, and the point is raised that no court would pay attention to a violation of a rule made by the Commissioner and not written in the statutes.

You also call attention to section 3166 and state that you take it that the words "or other devices" would cover the traps mentioned above.

In my opinion, it is not necessary for the Commission to undertake to prescribe a license tax for fish pots, eel traps or wire crab traps, or any other device which is used for catching fish for market or profit. I agree with you that the words "or other devices" in section 3166 fully cover those devices.

The difficulty of locating the license required for these devices has been the trouble. While 3166 undoubtedly requires a license, it was necessary to refer to section 3168 in order to ascertain the classification under which they would come in order to obtain a license. So far as I have been able to ascertain, and I have talked with several persons conversant with fishermen, all three of the devices enumerated—fish pots, eel traps and crab traps—are of a similar character to a fyke net, and you will notice that for each fyke net a license fee of \$1.00 is required.

Yours very truly,

EDWIN H. GIBSON,

*Assistant Attorney General.*

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**GAME AND INLAND FISHERIES—Fowls killed by dogs, compensation for.**

RICHMOND, VA., February 6, 1928.

HON. CHARLES H. FUNK,

*Commonwealths Attorney,*

*Marion, Virginia.*

DEAR MR. FUNK:

I am in receipt of your letter of February 3rd. In this you request an opinion, or construction, of section 2323 of the Code of Virginia, which section provides for compensation for stock or fowls killed or injured by dogs.

You further state in your letter that this section provides that payment shall be made of the assessed value of the stock or a fair value of the fowls, and that it frequently happens in your county claims are presented to the board of supervisors where lambs have been killed by dogs, which lambs were not assessed, as they were not in being when assessments of other stock were made.

Like yourself, I am of the opinion that a strict construction of this section does not authorize the board of supervisors to pay a fair value for lambs which were not born at the time of the assessment of stock.

However, if in the judgment of your board of supervisors they should see fit to do this, I can see no objection or reason why it should not be done. It is certainly a fair thing to do, and now that all tangible personal property is assessed by the county and the State does not take any part of taxes from this class of property, it is more than reasonable why it should be done. Of course, this should not be done where the owner of the flock of sheep has failed to give in his flock for assessment at the time personal property is assessed.

Yours very truly,

JNO. R. SAUNDERS,

*Attorney General.*

**GAME WARDENS—Reporting dogs illegally licensed.**RICHMOND, VA., *June 14, 1928.*

MR. W. P. BLANKENBECKER,  
*Justice of the Peace,*  
*Nickelsville, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of June 11, 1928, in which you say:

“Please give me your opinion and advice on the following case:

“Dougherty has an unspayed female dog, and at the age of four months he takes out spayed licenses on the dog with the intention of having her spayed when she is old enough to have the operation performed, but before she is pronounced old enough to be spayed the Game Warden reports the dog as being illegally licensed. If Dougherty carries out his intentions and has the dog spayed when old enough, should he be considered a violator of the intentions of the law and be fined? The dog is about eight months old now. I have a case of this kind on hand and would like an early reply. We also have a case of where an owner of dogs residing in Scott County, paid his license tax in, and got his tags and receipt from the treasurer of Wise County. Are his dogs legally licensed?”

From an examination of the dog law, I do not think the dog first referred to has been properly licensed. The law never intended a license tag for a spayed female dog to be worn by one that was unspayed.

As to the second case, the dog license is a State license tax, and even though the tax has been paid by the Scott County man to the wrong treasurer, I am of the opinion that his dogs are properly licensed if he paid the proper tax and obtained the proper tags.

Of course, the treasurer of Wise County ought not to sell dog license tags to persons living in another county, but the fact that the treasurer acted improperly in the matter will not subject the purchaser of the license to prosecution.

Trusting this gives you the desired information, I am

Very truly yours,

JNO. R. SAUNDERS,  
*Attorney General.*

**GAME AND INLAND FISHERIES—Game club to obtain license to hunt.**RICHMOND, VA., *June 18, 1928.*

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

MY DEAR MR. HART:

I am in receipt of your letter of the 31st of May, from which I quote:

“We would like to be advised if, under the provisions of chapter 149, Acts 1928, a member of a fishing club in the Tidewater sections of Virginia is required to obtain the combined hunting, trapping and fishing licenses, if said person fishes with rod and reel.

“Your particular attention is called to the language in section 3327, paragraph (1): ‘provided however that nothing *herein* shall be construed as authorizing any person to hunt, trap or *fish* upon the lands or waters of any public or private gun club, association or preserve of *any description* as a member thereof or as a land-owner, tenant, renter or lessee without having procured a license in the proper manner.”

In reply I will say that I am of the opinion that any person **may** fish without license

upon all of the waters of Tidewater, Virginia, including fresh water streams and ponds within that section.

Subsection 1 of section 3327 of the Code, providing:

“ \* \* that nothing herein shall be construed as authorizing any person to hunt, trap, or fish upon the lands or waters of any public or private gun club, association, or preserve of any description as a member thereof or as a land owner, tenant, renter or lessee without having procured a license in the proper manner”

can only apply to members of public or private gun clubs, associations or preserves outside of Tidewater Virginia, the general purpose of the law evidently intending to require a license for fishing with rod and reel in waters outside of Tidewater, and to allow fishing in waters within Tidewater by rod and reel without a fishing license.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**GAME AND INLAND FISHERIES—Compensation for deputy oyster inspectors.**

RICHMOND, VA., May 29, 1928.

HON. J. H. BRADFORD, *Director,*  
*Division of the Budget,*  
*Richmond, Virginia.*

MY DEAR MR. BRADFORD:

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

“The Governor has been asked by the Commissioner of Fisheries to approve for payment out of the appropriation for the Commission of Fisheries for the current year payrolls for March and April, 1928, amounting to \$595, representing compensation for services rendered by the deputy oyster inspectors in connection with the collection of the so-called bushel tax on oysters levied under chapter 387 of the Acts of Assembly of 1926. These deputies were employed to assist the oyster inspectors engaged in the collection of this tax, who receive 10 per cent of such collections, as provided by section 4 of the Act referred to above.

“It is proposed by the Commissioner of Fisheries to reimburse his appropriation for this proposed expenditure out of the taxes to be collected under an Act approved March 26th, 1928, amendatory of the Act of 1926. A copy of the Commissioner's letter is enclosed.

“Will you kindly advise me for the Governor's information whether these deputies can be legally paid for the months of March and April, 1928, from the appropriation for the Commission of Fisheries, and in the event such payments are made whether the Commissioner of Fisheries can be legally reimbursed for such payments out of the amounts collected from the so-called bushel tax under the Act of March 26th, 1928, which becomes effective in June 1928.”

The deputy inspectors mentioned in your letter were employed under authority of section 3, chapter 118 of the Acts of 1927. The last sentence provides:

“The inspector and his deputies shall be allowed for their services ten per centum on all sums collected for tax.”

In section 6 it is provided:

“That if it should develop that the compensation herein before allowed for inspectors and their deputies is not sufficient, such compensation may be increased by the Commission of Fisheries, subject to the direction and with the consent of the Governor.”

Therefore, unless the Commissioner of Fisheries, subject to the direction and with the consent of the Governor, agreed to pay these deputy inspectors compensation in excess

of the ten per centum of the tax fixed by section 3 of the Act, there would be no authority for paying them.

Assuming, however, that the Commissioner of Fisheries, subject to the direction and with the consent of the Governor, did agree to pay these inspectors and their deputies amounts in excess of the ten per centum fixed by law, I am of the opinion that the Governor under authority of section 19 of the Appropriation Bill, Acts of 1928, page 514, would have the power to authorize the payment of the same from the funds appropriated to the Commissioner of Fisheries.

I have also examined chapter 489 of the Acts of 1928, which amends and re-enacts chapter 387 of the Acts of 1926, which in turn had been amended and re-enacted by chapter 118 of the Acts of 1927. This Act also provides that the compensation of the inspectors and their deputies shall be ten per centum of the taxes collected, unless such compensation is not sufficient, in which event it may be increased by the Commission of Fisheries, subject to the direction and with the consent of the Governor. See sections 4 and 5.

It is, therefore, my opinion that the compensation authorized to be paid the inspectors and their deputies is a charge on the fund collected, and this being so, the Governor would have the authority to order a transfer out of the oyster tax fund appropriated for the Department of Fisheries when collected to replace that portion of the funds of the Commission of Fisheries transferred to pay the deputy inspectors at this time if he thought proper.

Trusting this gives you the desired information, I am

Very truly yours,

JNO. R. SAUNDERS,  
*Attorney General.*

#### **GAMBLING—Disposition of money taken by officer.**

RICHMOND, VA., November 5, 1927.

CAPTAIN C. H. HOWELL,  
*Chief of Police,*  
*East Radford, Virginia.*

DEAR SIR:

I am in receipt of your letter of the 1st instant, in which you ask me:

"Please advise, when pulling poker game in rooming house, whether officers are due any of the money that is caught on table. If so, how much?"

In reply I will say that there is no provision of law for any part of the money seized upon a raid on a poker game in a rooming house being paid to persons making the raid.

The only section under which officers would be entitled to any part of the money is section 4676 of the Code and that section applies to gaming tables or banks, wheels of fortune, slot machines, etc., and does not apply to an ordinary game of poker.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### **GAME AND INLAND FISHERIES—Oyster lease, in Chesapeake Bay.**

RICHMOND, VA., July 22, 1927.

HON. HARRY R. HOUSTON,  
*Commissioner of Fisheries,*  
*Hampton, Virginia.*

DEAR SIR:

Acknowledgment is made of yours of the 13th, enclosing form of special oyster lease

contract for leasing oyster bottoms on Horn Harbor Bar in Chesapeake Bay. You say that you have decided to lease, not under the statutes, but because of peculiar circumstances under a special contract setting forth certain conditions, and you wish my opinion as to whether or not such a special contract can lawfully be made by your Commission.

I have given this matter very careful consideration and am constrained to hold that chapter 128 of the Code, setting forth the conditions under which leases of oyster ground may be made by the Commission, provides the only lawful manner in which such leases may be executed, and that any other mode of lease is beyond the power of the Commission to execute. Such leases, as you know, are in derogation of the right of the public, and the right to make them cannot be extended beyond that which the statutes authorize. It may be true, as you say, that the Commission should have authority in certain cases to make special contracts, but, if so, it will be necessary to amend sections 3225 and 3227 of the Code; for, if the Commission may vary the contract in some cases, it may do so in all and so nullify these statutory provisions.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### INTOXICATING LIQUORS—Sale of malt syrup.

RICHMOND, VA., *December 29, 1927.*

HON. J. TAYLOR THOMPSON,  
*Attorney at Law,*  
*Farmville, Virginia.*

MY DEAR SIR:

I have your letter of December 16 in further reference to the sale of malt syrup prepared by the Reisch Food Products Company, of Springfield, Illinois, advertised for food purposes only. I also note your references to sections 16 and 91 of the prohibition law, and especially your view of the latitude allowed the Attorney General authorizing him to permit the sale of non-intoxicating food products. You can understand that I would be assuming a very serious responsibility were I to construe section 91 as permitting me to determine upon the propriety and legality of sales of the great number of flavoring extracts and food preparations containing excessive quantities of alcohol.

It is not the purpose of this Department to unduly restrict the reasonable sale and use of flavoring extracts for cooking purposes, and even if it were, I take it that the law permits such use. However, I find that on December 9, 1926, I had some correspondence with the Reisch Food Products Company, relative to the sale of the article in question. I am enclosing a copy of my letter to them of that date. I am still of the opinion that it is illegal to sell this article in Virginia, and I would suggest that you so advise your clients. While, perhaps, this company could not be reached criminally, still it would be the duty of the Commonwealth's Attorneys to prosecute merchants should they begin to handle this extract.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### INTOXICATING LIQUORS—Advertising malt syrup.

RICHMOND, VA., *January 28, 1928.*

RICHMOND TIMES-DISPATCH,  
*Richmond, Virginia.*

GENTLEMEN:

*Attention Mr. H. R. Weaver.*

I am just in receipt of your letter of yesterday enclosing a letter dated the 23rd

instant to you from the John Budd Company, of Chicago, Illinois, and I note what they have to say concerning the advertising of Schlitz hop flavored malt syrup, and that you ask as to the legality of an advertisement of that product in the Times-Dispatch.

In my opinion, an advertisement of malt syrup is unlawful. Section 1 of the Layman Prohibition Law defines ardent spirits, in which is included, "\* \* \* all malt liquors, all malt beverages, absinthe and all compounds or mixtures of any of them; \* \* \*." Section 3 makes it an offense to "\* \* \* manufacture, transport, sell, keep or store for sale, offer, *advertise*, or expose for sale \* \* \*." Section 86 makes it unlawful for any person to "advertise \* \* \* ardent spirits in any \* \* \* newspaper \* \* \* and circulate or publish any written or printed matter, in which any advertisement in this section shall appear, \* \* \*."

The propriety of the law is a subject for the attention of the Legislature. I think the law prohibits newspapers from publishing all kinds of advertisement of ardent spirits as defined in section 1 of the Layman Law and that that section includes all malt preparations.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### INTOXICATING LIQUORS—Seizure of still, taxation of costs, officers fee.

RICHMOND, VA., *October 14, 1927.*

HON. WILL H. COOKE,  
*Attorney at Law,*  
*Madison, Virginia.*

MY DEAR MR. COOKE:

Colonel Saunders has handed me your letter of the 11th and asked me to reply to it.

Section 20, under which a fee or reward of \$50 is given an officer who seizes a still upon the arrest and conviction of the person *owning* or *operating* it, is, in my judgment, a reward for the capture of a still and the consequent destruction of a plant for the manufacture of ardent spirits.

It is my opinion that where one party seizes a still and a person is indicted, tried and convicted, an assessment of \$50 by way of costs is taxable against the person convicted; that the officer seizing the still should be entitled to \$40 thereof, and the officer making the arrest to \$10, basing this division, which I think is fair, upon the fact that \$50 is offered as a reward for the seizure of a still and the arrest of the person owning or operating it, while in practically all other cases a fee of \$10 is allowed an officer for a prohibition arrest.

Yours very truly,

EDWIN H. GIBSON,  
*Assistant Attorney General.*

#### INTOXICATING LIQUORS—What constitutes second offense.

RICHMOND, VA., *November 1, 1927.*

HON. A. D. WATKINS,  
*Commonwealth's Attorney,*  
*Farmville, Virginia.*

DEAR SIR:

Attorney General has handed me for attention your letter of the 28th of October, in which you say:

"Some time ago a man named Aliff was arrested in Lunenburg charged with violation of the prohibition law and received a fine and imprisonment, which he has paid and served. A short time ago this same man was found drunk in a public place and inasmuch as the statute made a statement in one portion that second offenses were punishable by fine and imprisonment, I filed information in my court against this man for second offense.

"Both the judge and myself have some little doubt as to whether drunkenness constituted such a second offense as was contemplated under the statute. As you recall, there is a particular statute for second offenses in being convicted of drunkenness. I am rather inclined to think that I should have simply had him convicted of drunkenness and not bring the charge of the general violation of the prohibition law."

I think that you take the right view of the matter, as I do not believe that it was the intention of the Legislature to apply the severe penalties of a second offense to cases in which the second violation consisted in drunkenness or taking a drink in a public place, and, while a strict construction of the law might include offenses under sections 17 and 18, I do not think a liberal construction would do so, and, while this office is making every effort to enforce the prohibition law, it is not disposed to endeavor to inflict unusual or unreasonable penalties for minor offenses.

Yours very truly,

EDWIN H. GIBSON,  
*Assistant Attorney General.*

#### INTOXICATING LIQUOR—Jurisdiction of Justice upon plea of guilty.

RICHMOND, VA., October 4, 1927.

MR. T. C. TAYLOR,  
*Madison, Va.*

MY DEAR SIR:

Your letter of Saturday has been received. I note you say:

"I had two cases yesterday, caught with two stills and fifty gallons of corn whiskey. They both plead guilty of the charge. I could have disposed of the cases and closed it up.

"Norman Payne seemed to think they should be sent on to the grand jury. Now, will you please let me know if I can dispose of these cases and save time and expense?"

I recall our conversation in which I advised you that you could, in misdemeanor cases, in the presence of the Commonwealth's Attorney and with his consent endorsed on the warrant of the arrest, accept a plea of guilty to the highest offense charged in the warrant, and you could in your own discretion fix the punishment for the offense to which the accused pleads guilty within the limits prescribed by law for that offense. This opinion is based upon the second paragraph of section 33 of the Layman Act, which is as follows:

"Provided that whenever the charge against any person is a misdemeanor, the accused may, in the presence of the attorney for the Commonwealth, and with his consent, endorsed on the warrant of arrest, enter a plea of guilty to that offense charged in said warrant carrying the maximum punishment for any offense charged therein, the plea of guilty specifying the offense to which the accused pleads, in which event the justice, judge or other officer having criminal jurisdiction before whom the accused is brought shall have jurisdiction to enter a judgment of guilty and to fix the punishment but no judge, justice, or other officer shall suspend sentence in any case heard under the provisions of this section. In entering such judgments the trial justice shall tax in the cost against the defendant the same fees and awards in favor of those charged with the enforcement of this Act as is elsewhere herein provided for prosecutions in courts of record."

There is absolutely no possible doubt of your authority, and you will see that you allow and tax as costs for all of the officers concerned in the prosecution against the defendant the same as would be taxed against him in a circuit court, with the exception of the fee of the attorney for the Commonwealth, who, under section 46 of the Layman Law, as amended by the Acts of 1926, page 424, is entitled to a fee of only \$10.00 in cases decided before a magistrate, while he is entitled to a fee of \$25.00 in a case decided by the court.

I will send you a copy of the Prohibition Law, to which there have been several amendments in the Acts of 1926, beginning on page 417.

Yours very truly,

EDWIN H. GIBSON,  
*Assistant Attorney General.*

### INTOXICATING LIQUORS—Fee of Commonwealth's Attorney.

RICHMOND, VA., October 3, 1927.

HON. G. A. BROWN, *Mayor,*  
*Martinsville, Virginia.*

DEAR MR. BROWN:

This is to acknowledge receipt of your letter of Sept. 30, 1927, in which you ask for my opinion upon the following state of facts:

"Where a party is found to have one pint of ardent spirits in his possession and the Commonwealth's Attorney appears in the case, just how much fee would the Commonwealth's Attorney be entitled to?"

His fee in no wise depends upon the quantity of ardent spirits found in the possession of the accused.

Having written on the letterhead paper of the Town of Martinsville and signed your name with your title of Mayor affixed thereto, I assume that Martinsville has a town prohibition ordinance and that the accused was being tried under such ordinance. Section 37 of the Layman Prohibition Law provides:

"Upon final conviction under any of such ordinances, the same fees for services rendered by any of said officers shall be taxed against the defendant as would be taxed upon final conviction in a prosecution had by the Commonwealth for a similar violation of the prohibition laws of this State, \* \* \* ."

This section includes fees of attorneys for the Commonwealth, the amount thereof being regulated by section 46 of the Layman Law, as amended by the Acts of 1926, page 426, and depending upon—

- 1—the character of the violation;
- 2—whether the accused pleads guilty, or
- 3—pleads not guilty, is tried and convicted.

First, upon a plea of guilty to all charges, except under sections 17 and 18, under section 46 of the Layman Law, as amended, attorneys for the Commonwealth are allowed a fee of \$10.00 in each case, to be taxed against the accused as a part of the costs. In prosecutions, under sections 17 and 18, attorneys for the Commonwealth are not required to attend the trial and, upon a plea of guilty, are not entitled to any fee.

Second—Where the accused defends the charge against him, is tried and convicted on a final hearing, the fee of the attorney is \$25.00, to be taxed against the accused; his fee in cases arising under sections 17 and 18 upon conviction being only \$5.00 in each case, to be taxed as part of the costs.



In no cases prosecuted for violations of a city or town ordinance are fees of officers or costs of any kind paid by the Commonwealth.

Trusting I have fully answered your inquiry, I am

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**INTOXICATING LIQUORS—Operating automobile while under influence of.**

RICHMOND, VA., May 16, 1928.

MR. HENRY M. BANDY,  
*Attorney at Law,*  
*Norton, Virginia.*

MY DEAR MR. BANDY:

Acknowledgment is made of your letter of recent date, in which you state that you have a client who was charged with operating an automobile while under the influence of intoxicating liquors, and that on the trial of his case before three justices of the peace he was acquitted. You request me to advise you whether he can now be indicted for the offense charged in the warrant, which was tried before the three justices.

If you will examine section 35 of the Virginia Prohibition Law you will see that it is there provided that the circuit court of a county "shall have exclusive original jurisdiction except as herein otherwise provided, for the trial of all cases arising under this act "

Under section 33 of the Virginia Prohibition Law, justices are permitted to try offenses on a plea of guilty in misdemeanor cases, and under sections 17 and 18 of the Virginia Prohibition Law they are given jurisdiction for the trial and disposition of certain petty misdemeanor cases such as drunkenness and drinking in public places. However, I do not find anywhere in the law that a justice has been given jurisdiction for the trial of the offense of operating an automobile under the influence of intoxicating liquors.

It, therefore, follows that the justices in the case referred to were without jurisdiction to try and dispose of the case, as your client did not plead guilty. This being so, I am of the opinion that the action of the justices could not be plead as former jeopardy on a subsequent indictment by the grand jury for the offense charged in the warrant tried before the justices.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**INTOXICATING LIQUOR—Driving automobile while under influence of liquor.**

RICHMOND, VA., August 26, 1927.

HON. R. A. BICKER,  
*Commonwealth's Attorney,*  
*Culpeper, Virginia.*

MY DEAR MR. BICKER:

My attention has just been called to the fact that in a letter to you under date of November 18, 1926, in which I gave you certain information relative to the enforcement of section 25 of the Virginia Prohibition Law concerning the punishment of persons driving automobiles while under the influence of intoxicants, I inadvertently included in my reply that I thought where a person was being tried for the violation of a town ordinance

the mayor would have the authority to permit the accused to continue to operate the machine. This opinion, I am candid enough to say, is not a correct exposition of the law. I did not have the provision of the ordinance of the town of Culpeper before me when I wrote that letter, and I am now informed that it contains *in haec verbis* the language of section 25 of the Prohibition Law.

I desire to give as my opinion the conclusion that the mayor of the town of Culpeper has jurisdiction to try a person upon the merits of the case for all offenses included in the ordinance of your town, and that upon conviction he is limited to, and should inflict, the punishments provided in the ordinance, the ordinance paralleling the State Law.

The punishment for the offense of driving a vehicle, while under the influence of intoxicants, is a fine of not less than one hundred dollars, nor more than one thousand dollars, and by confinement in jail not less than thirty days nor more than one year. Super-added to that punishment should be an additional sentence, provided the fine and costs are not paid, of not less than three nor more than six months, and, as an additional punishment, section 25 provides that the judgment of conviction shall deprive him of the right to drive an automobile for a period of one year.

For the first offense, the mayor may suspend the jail sentence, but under no circumstances can he suspend or excuse the payment of the fine, or in any way relieve the person of the provision as to his right to drive an automobile within the year provided by law.

I will add that a justice has no jurisdiction to try such a charge upon its merits and that he cannot even fix the punishment, unless you are present and consent to his accepting a plea of guilty, in which event, within the limits prescribed by law, he has full discretion as to the amount of fine, the limit of jail sentence and the additional term of confinement for the non-payment of fine and costs.

Sincerely yours,

JNO. R. SAUNDERS,  
*Attorney General.*

#### INTOXICATING LIQUORS—Bond required after discharge from confinement.

RICHMOND, VA., August 9, 1927.

MAJOR R. M. YOEELL, *Superintendent,*  
*The State Penitentiary,*  
*Richmond, Virginia.*

MY DEAR MAJOR YOEELL:

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

"In all of the cases which we have recently received from Richmond city for violating the prohibition law and who have received jail sentences on the roads, the following clause has appeared in the court order:

"The Court doth also require the defendant to furnish security in the sum of .....dollars for his good behavior for 12 months from the expiration of said term of confinement."

"The amount of money, of course, is filled in the blank space shown above. In talking with Judge Mathews of the Hustling Court of the city of Richmond, he stated he wanted these men held 12 months from the expiration of their sentences if they fail to furnish satisfactory security. He also stated we could allow them the usual ten days a month good conduct on this time, which would make a total of 8 months they would have to serve for failing to give bond. From time to time we have to transfer some of these men to the State Farm for defective misdemeanants and Mr. R. R. Penn, the superintendent, states he has a ruling from you that they can only be held 6 months.

"In order to be absolutely accurate in handling these cases, I would be glad if you would give me a written opinion as to how long these cases are to be held for

failure to give bond and whether we should allow them good conduct credit on the time they are serving for failure to give said bond."

I tried to see Judge Mathews, but found him out of town and, therefore, have not had an opportunity to talk with him about this matter.

Section 41 of the prohibition law, which authorizes the several courts to require the giving of a bond, expressly provides:

"\* \* \* And 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 do not understand how Judge Mathews has reached the conclusion that a person who fails to give a bond required by a court when convicted of a violation of the prohibition law is to be held 12 months, less good behavior, for the failure to give such bond. However, the duty of the Superintendent of the Penitentiary, in my opinion, is to obey the orders of the court certified to him and, therefore, my advice is that you hold such prisoners in accordance with the terms of the court's order and allow the prisoners to apply for a habeas corpus. In those cases where a bond is required and the court order makes no provision for the length of time for which he can be held you should discharge him at the end of 6 months from the time his confinement for failure to give the bond commenced, less the time allowed for good behavior, as provided by sections 5017 and 2094 of the Code. It is further my opinion that one held in confinement for failure to give a bond is entitled to the good conduct allowance provided by these two sections.

Trusting this will give you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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#### INTOXICATING LIQUOR—Fine and imprisonment for violation of prohibition law.

RICHMOND, VA., August 8, 1927.

HON. WILLIAM STANLEY BURT,  
*Commonwealth's Attorney,  
Claremont, Virginia.*

MY DEAR MR. BURT:

Acknowledgment is made of your letter of July 23, 1927, in reply to my letter to you of July 21, with reference to Joe Council.

It appears from the statement furnished me by you that Council was sentenced to imprisonment and the payment of a fine for a violation of the prohibition law and that the judge entered an order directing him to be imprisoned for an additional period of six months, in the event that the fine and costs were not paid. You state that the fine was \$50.00 and the costs \$105.20, making a total of \$155.20. You further state that Council paid \$108.00 to the sheriff to apply on account of the fine and costs, but was never able to pay the balance, and was accordingly held on the convict road force for a period of six months after he had served his flat time. You then state that on his return from the convict road force Council has demanded that the money paid by him to the sheriff be returned to him, in view of the fact that he served his full time on the convict road force.

You are, of course, familiar with the provisions of section 2095 of the Code. You will see from an examination of this section that it is entirely possible for a man sentenced to the convict road force to serve the full time for which he may be held on the road force and still be indebted to the Commonwealth for a large part of the fine and costs. In this case I am advised by the Superintendent of the Penitentiary that Council earned

only \$56.00 to apply on the fine and costs and for that reason he is still due the Commonwealth the sum of \$99.20. This being so, it will appear that the sheriff now has in hand the sum of \$8.80 which belongs to Council and which, in my opinion, the money not having as yet been paid into the treasury, should be returned to him by the sheriff. The remainder of the money held by the sheriff, to wit, \$99.20, should be paid by him into the treasury in full settlement of the balance due on the fine and costs in this case.

I have talked with Honorable C. Lee Moore, Auditor of Public Accounts, and he concurs in this opinion.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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### INTOXICATING LIQUORS—Driving under influence of.

RICHMOND, VA., August 26, 1927.

HON. PEMBROKE PETTIT,  
*Commonwealth's Attorney,  
Palmyra, Virginia.*

MY DEAR MR. PETTIT:

Acknowledgment is made of your letter of August 15, 1927, in which you say in part:

"Will you give me a little information on the following: Three colored men were arrested on the charge of driving an automobile while under the influence of intoxicants. The driver admitted the charge and was fined \$100.00 and costs. The other two occupants denied the charge, but were contradicted by four or five witnesses and, as they were not driving, were fined by the justices \$20.00 each and discharged."

You then request me to advise you what fees you should have been allowed for representing the Commonwealth in the cases referred to, and whether I think the cases should have been sent on to the grand jury.

The opinions following are predicated upon the facts that one of the three persons about whose case you are inquiring was charged with driving an automobile while under the influence of intoxicants, and that such persons pleaded guilty before the magistrate, while the other two persons were charged with being drunk in a public place, denied the charge and were tried by the magistrate on the merits, convicted and punished with a fine of \$20.00 in each case.

Under section 33 of the Layman Prohibition Law, Justices of the Peace have no jurisdiction to try, upon the merits, charges or violations of any provisions of that law, with the exception of offenses of drinking in public places under section 17 and of appearing in public places while intoxicated under section 18 of this law.

No Justice can do anything in the matter of a charge except under sections 17 and 18, other than examine the charge, and in such cases their jurisdiction is limited:

1—Where there is probable cause to believe the accused guilty; (a) to send the accused on to the grand jury, or (b) to dismiss the accused.

2—He may "in the presence of the attorney for the Commonwealth, and with his consent, endorsed on the warrant of arrest" and not otherwise, accept a plea of guilty to the offense charged in the warrant carrying the maximum punishment for any of the offenses charged in the warrant, the plea of guilty specifying the offense to which the accused pleads.

3—The Justice in such cases has absolute discretion to fix the punishment for the offense to which the accused pleads guilty, within the limits prescribed by law.

4—The Justice cannot suspend execution of sentence, or any part of the punishment imposed.

5—Upon a plea of guilty the Justice must tax as costs against the accused the same fees and awards as are allowed under the prohibition law in cases heard in courts of record with the exception of the fees allowed the attorney for the Commonwealth, his fee, except in cases arising under sections 17 and 18, upon a plea of guilty to misdemeanor cases, being limited by sections 33 and 46, to ten dollars for each accused, his fee in contested cases under sections 17 and 18 being five dollars to be taxed as costs against each person connected, no fee being allowed him as against those who plead guilty.

Applying the law to the case you quote with the understanding that one party was charged with driving an automobile while under the influence of intoxicants, and that the other two were charged with appearing in a public place under the influence of intoxicants, I will say:

A—The person charged with driving while under the influence of intoxicants could in no case be tried on the merits before the Justice. If he denied the charge, he was entitled to an examination upon the hearing of which, if there was probable cause to believe him guilty, he should have been sent on to the grand jury to answer an indictment for the charge lodged against him; otherwise, to be dismissed by the magistrate.

Upon a plea of guilty the Justice had no jurisdiction to hear and determine the question of his punishment, unless you were present at the examination and consented by an endorsement upon the warrant to the hearing, in which event the only matter for the consideration of the Justice would have been the extent of the punishment of the accused. This punishment, you will observe from an examination of section 25, is by a fine of not less than one hundred dollars nor more than one thousand dollars, and imprisonment for not less than thirty days nor more than one year. Under section 8, it is provided that unless the fine and costs are paid the accused shall be sentenced for an additional period to the State Convict Road Force for not less than three months, nor more than six months, and the Justice should fix the period of his further confinement under this section at the time of his other judgment. In addition to the punishment by way of fine and confinement, there is super-added the provision that the judgment of conviction shall operate to deprive the person convicted of his right to drive the automobile for a period of one year from the day of the judgment of conviction.

In the matter of the other two who were charged with being drunk in a public place, the Justice had jurisdiction to try them for that offense, even without your consent and the fine of \$20.00 imposed on each was within the jurisdiction provided by law and is a valid sentence.

If you will examine my letter of July 3, 1924, to Mr. Thomas H. Wilcox, Jr., Commonwealth's Attorney, Norfolk, Virginia, and I hope you have a copy of my report for the years 1923-1925, you will see what I have to say in reference to fees allowed attorneys for the Commonwealth.

Undoubtedly the provisions of the Prohibition law as to fees of officers and especially of the fees of attorneys for the Commonwealth are greatly complicated, and the provisions of section 46 as to the fees to be taxed against accused in hearings before the Justice when the case goes to the higher court is absolutely meaningless. The accused does not pay when he is sent on, no fee is taxed against him upon his acquittal and the fee of twenty-five dollars taxed against him upon his conviction expressly includes the fee suppose to have been allowed the attorney by the Justice.

Should a Justice without your consent undertake to try and dispose of a case upon its merits, or accept a plea of guilty and undertake to fix the punishment, except as to cases arising under sections 17 and 18, you would have the undoubted right, and it is your duty, to proceed against such accused before the judge of your circuit court and the accused could not in such event avail himself of the plea of *autrefois acquit* or *convict*.

Likewise, upon an examination of the accused before a Justice for violations of law, other than those covered by sections 17 and 18, the discharge of the accused does not prevent proceedings against him for information or indictment in the circuit court.

Trusting that I have answered the inquiries contained in your letter and assuring you that I am ever at your command, I am

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**INTOXICATING LIQUORS—Confiscation of automobile. Fee of Commonwealth's attorney.**

RICHMOND, VA., July 6, 1927.

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

MY DEAR MR. AUDITOR:

Acknowledgment is made of your communication of recent date in which you transmit to me the account of Hon. Charles E. Pollard, Attorney for the Commonwealth, City of Petersburg, for my opinion.

It appears from the account that two automobiles were confiscated on May 5th, 1927 under forfeiture proceedings instituted by the Attorney for the Commonwealth. It further appears that these automobiles were sold and did not bring a sufficient price to pay the fees of the Attorney for the Commonwealth. He has, therefore, filed his account for \$10.00 in each case, requesting payment out of the treasury.

I have examined the very confused provisions of section 28 of the prohibition law as amended by the Acts of 1926, and from an examination of the same I find that in the third paragraph thereto that a fee of twenty-five dollars is provided for the Attorney for the Commonwealth to be taxed as cost and paid out of the proceeds of same. The Act then provides; "In the event such seized automobile or other vehicle is not confiscated, the fees to the officer making such seizure and the attorney for the Commonwealth, \* \* \* shall be one-half of the amounts herein stated, which fees shall be taxed against the Commonwealth, and paid in the manner now provided by law."

It is further provided by the seventh and eighth paragraphs of this section that in the event the car is not forfeited on account of being returned to an innocent owner or leinor such owner or leinor shall pay as a part of the costs to the Attorney for the Commonwealth a fee of \$10.00, except in those cases where the automobile is not forfeited for the reason it had been stolen from the owner, then such fee of \$10.00 is to be paid by the Commonwealth.

These are the only instances in which provision is made for paying the fees of the Attorney for the Commonwealth. It is, therefore, my opinion that the Attorney for the Commonwealth is not entitled to a fee out of the public treasury where an automobile is forfeited and sold, and fails to bring enough to pay his fee.

I know of no reason, however, why he should not collect his fee in such a case from the owner of the forfeited automobile as his fee is clearly a part of the costs to be taxed as provided by the third paragraph of section 28 of the prohibition law.

Trusting this gives you the desired information, I am

Very truly yours,

JNO. R. SAUNDERS,  
*Attorney General.*

**INTOXICATING LIQUORS—What constitutes being drunk in public place.**RICHMOND, VA., *July 5, 1927.*

E. FRANK DOTSON, Esq.,  
*Box 224,*  
*Galax, Virginia.*

DEAR SIR:

I beg to acknowledge receipt of yours of June 27, in which you ask me whether a person found lying about thirty feet from the public road and in plain sight so drunk that he could not walk could be said to be drunk in a public place.

In reply I beg to say that there are a great many statutes in different states prohibiting the doing of certain things in a public place. These statutes have been construed in hundreds of cases, and may be found in Vol. 6 of the publication known as "Words and Phrases." Under the gaming statute of Virginia in the case of *Farmer v. Commonwealth*, 8 Leigh, 741, a barn 200 yards distant from a tavern was said to be a public place. Several cases in other states hold that a place so near and so open that persons traveling the highway can see cards or dice played thereat is a public place. *Lee v. State* (Ala.), 33 So. 894; *Franklin v. State*, 8 So. 678, 91 Ala. 23; *Henderson v. State*, 59 Ala. 89; *White v. State*, 45 S. W. 702, 39 Tex. Cr. R. 269.

According to the reasoning of these cases, it is clear to my mind that anyone who appears in a drunken condition so near a public highway that he causes annoyance to the traveling public is violating the Virginia statute against being drunk in a public place.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**INTOXICATING LIQUORS—Sale of malt.**RICHMOND, VA., *July 20, 1927.*

MR. W. H. WARNER,  
*Attorney at Law,*  
*299 Madison Avenue,*  
*New York City.*

MY DEAR SIR:

Acknowledgment is made of your letter of recent date, in which you request me to advise you whether it is lawful to sell malt in this State.

The sale or possession of malt is declared to be an offense against the prohibition law of this State by sections 15 and 16 thereof. For your information I am sending you copies of these sections.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**JUSTICE OF THE PEACE—Jurisdiction and practice.**RICHMOND, VA., *November 26, 1927.*

PROFESSOR JULIUS F. PRUFER,  
*Roanoke College,*  
*Salem, Virginia.*

DEAR SIR:

I am in receipt of your letter of the 21st instant, asking for certain information concerning the jurisdiction and practices of justices of the peace in Augusta County.

In reply to your first question, what is that constitutional justification for the practice in Augusta County, there is no general provision of law having to do with that practice. The ordinary practice is for justices of the peace to issue his warrant returnable before him or some other justice in his magisterial district. Should a defendant in either a civil or criminal case desire it, the justice who issued the warrant is compelled to associate two other justices with him, the opinion of the majority of the justices in such cases to prevail.

Second, I have no information as to the practice in any other counties, but, of course, the same law prevails all over the State.

Third, I can give you no additional information on the collective functioning of justices as a trial court, nor can I inform you where such information is obtainable, if any such be obtainable.

The law concerning justices of the peace and their jurisdiction is found in chapter 250 of the Code of 1924.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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#### **JUSTICE—Authority to suspend sentence driving automobile while intoxicated.**

RICHMOND, VA., *November 17, 1927.*

HON. E. PEYTON TURNER,  
*Commonwealth's Attorney,  
Emporia, Virginia.*

MY DEAR MR. TURNER:

Your letter of November 16 as to my opinion in regard to the authority of a justice to suspend a jail sentence of one pleading guilty before him of driving an automobile while under the influence of intoxicants, has been received.

Your opinion that a justice has no such authority is entirely correct. As I wrote Mr. Pettit in the letter to which you refer, a justice has no jurisdiction to try prohibition misdemeanants except under sections 17 and 18 of the prohibition law. His authority to hear a charge of driving while drunk is under section 33, and his authority under such section is coupled with the proviso that "no judge, justice or other officer shall suspend sentence in any case heard upon the provisions of this section."

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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#### **JUSTICE OF PEACE—Jurisdiction in cities.**

RICHMOND, VA., *May 4, 1928.*

J. C. STAPLES, ESQ.,  
*Justice of the Peace,  
Harrisonburg, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of May 3, 1928, in re: the jurisdiction of justices elected in a city of the second class.

If you will examine section 3092 of the Code, you will see that the jurisdiction of the several justices is there provided for as follows:



“\* \* The said justices shall be conservators of the peace within the corporate limits of the cities for which they are respectively elected, and within one mile beyond the corporate limits thereof, and within such limits shall possess the jurisdiction and exercise the powers conferred upon justices of the peace under the laws of this Commonwealth, except that nothing herein contained shall be construed as vesting in such justices any portion of the jurisdiction given by law to police justices or civil and police justices of the cities of this Commonwealth. \* \*”

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### JUSTICE OF THE PEACE—Failures to grant appeal.

RICHMOND, VA., March 2, 1928.

HON. LEWIS W. TYUS,  
*Commission of Game and Inland Fisheries,  
Richmond, Virginia.*

MY DEAR MR. TYUS:

You have handed me a letter from Mr. J. R. Hunnicutt, dated March 1, 1928, to you in which he states that in a case heard by Mr. J. T. Knight, a justice of the peace of Sussex county, a certain person was prosecuted for unlawful trapping without first having obtained a hunter's license, as required by section 3348 of the Code of Virginia. In this letter Mr. Hunnicutt also states that the accused was dismissed, that he requested an appeal upon the part of the Commonwealth and that the appeal was refused.

From Mr. Hunnicutt's statement I take it that the accused was being prosecuted for a violation of the State revenue law. In such cases, and in such cases only, the Commonwealth is entitled to appeal upon an acquittal or dismissal of a complaint, and I cannot understand why the justice refused to allow the appeal.

That there may be no misunderstanding of the fact that an appeal was prayed for, I suggest that Mr. Hunnicutt make application in writing for an appeal. If Mr. Knight still refuses to allow it, the attention of the judge of the Circuit Court should be called to the matter and he should be asked to have the clerk put the appeal upon the docket of the court.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### JUSTICE OF THE PEACE—Jurisdiction, prohibition cases.

RICHMOND, VA., April 9, 1928.

HON. L. R. R. CURTIS,  
*Commonwealth's Attorney,  
Falmouth, Virginia.*

MY DEAR MR. CURTIS:

Acknowledgment is made of your letter of March 29, 1928, in which you say:

“I would like to have your opinion as to the jurisdiction of a Justice of the Peace in cases arising under the Layman Act.

“Am I correct in the opinion that he can only discharge the accused or send him to the grand jury upon a plea of not guilty, except that upon a plea of guilty with the consent of the Commonwealth's Attorney he may sentence the accused. Of course I know that cannot try a felony in any case.”

From an examination of sections 33-35 of the Virginia Prohibition Law, I am of the opinion that your interpretation of the law is correct, except that under sections 17 and 18 of the Prohibition Law, justices of the peace have jurisdiction to try persons charged with drinking in public places, and being drunk in public places.

Only in such counties having trial justices, under a provision of the law relating to the establishment of such courts, they have jurisdiction to try and dispose of misdemeanor prohibition cases. See section 4988, paragraph 5 (d) of the Code of 1919, as amended by chapter 511 of the Acts of 1926.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

### JUVENILE JUSTICE—Authority and jurisdiction.

RICHMOND, VA., May 1, 1928.

HON. J. B. BOYER,  
*Justice of the Juvenile & Domestic Relations Court,  
Tazewell, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of April 29, 1928, in which you say:

"The Rotary Club of Tazewell is getting financially and morally behind a movement to give crippled children (club-footed and hair-lipped) medical and surgical treatment. We find that many ignorant parents object to having this done even though the expense of such treatment will be borne by the Club. Would I, as justice of the Juvenile and Domestic Relations Court, have authority to bring the parents of such children in court, when brought before me under section 1906 of the Juvenile Welfare laws referring to 'neglected children,' and require them to allow, or have such operations and corrections made as is for the best interests and welfare of such child or children?"

"Judge Ricks, of the Richmond Juvenile Court, told me at Lynchburg recently that he thought the 'neglected children' clause under section 1906, Acts of the General Assembly of Virginia, 1922, undoubtedly gave the Juvenile Court such authority when legally and properly brought before it. However, I would very greatly appreciate an authoritative opinion from you."

Section 1906 of the Code provides in part:

"The words 'neglected child' shall mean a child under eighteen years of age: \* \* \*

"Whose parents or guardian neglect or refuse, when able to do so, to provide medical, surgical or other remedial care necessary for its health or well-being; \* \* \*."

In my opinion, children whose parents, when able, fail or refuse to provide the necessary medical or surgical treatment ought to be deemed "neglected children" within the meaning of chapter 78 of the Code, and may be proceeded against as such. I think that even in those cases where the parents are unable to furnish such medical or surgical treatment for their children, when they refuse the offer of some one else to provide such necessary medical or surgical treatment for their children, such children may be proceeded against as "neglected children."

Trusting this gives you the desired information, I am

Very truly yours

JNO. R. SAUNDERS,  
*Attorney General.*

**JUDGMENTS—Suit to subject real property in satisfaction of.**RICHMOND, VA., *January 12, 1928.*

HON. L. R. R. CURTIS,  
*Commonwealth's Attorney,  
Stafford, Virginia.*

DEAR SIR:

Your letter of the 10th instant, in reference to the enforcement of the judgment obtained by the Commonwealth against W. O. Rose and Mrs. Elizabeth O. Rose, has been received.

You ask my opinion as to the advisability of bringing suit to subject a tract of land lately owned by Mrs. Rose to the payment of the judgment, and you state that the judgment against Mr. and Mrs. Rose was obtained December 16, 1927, upon a forfeited bond, in which Rose was principal and Mrs. Rose security. You also state that on September 15, 1927, Mrs. Rose conveyed a tract of land to E. W. Humphrey, trustee, to secure an aggregate indebtedness of \$3,000, evidenced by a number of notes and that the deed of trust was recorded on the next day.

In my opinion, your chance of success depends upon the character of the deed of trust. Provided it was given to secure *bona fide* indebtedness, it having been given and recorded before judgment was obtained by the Commonwealth, it would take precedence. If, however, you can establish the fact that it was given to secure a pretended indebtedness, or with an intent to hinder, delay or defraud the Commonwealth in its effort to enforce the collection of a forfeited bond, you should succeed in setting aside the September deed.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**JUSTICE OF THE PEACE—Receiving claims for collection.**RICHMOND, VA., *June 26, 1928.*

BRYAN GORDON, ESQ.,  
*Attorney at Law,  
Clarendon, Virginia.*

MY DEAR MR. GORDON:

Acknowledgment is made of your letter of June 21, 1928, in which you call attention to section 6019 of the Code of Virginia, as amended by the Acts of 1928, page 1294, and then say:

"The question which I wish to ask is this: Can a person, who is a justice of the peace and also an attorney, take claims for collection if he has all warrants in which he is attorney issued by some other justice?"

As this section read in the Code of 1919, it provided as follows:

" \* \* Nothing in this section shall be construed as permitting or authorizing justices of the peace to receive claims or evidences of debt for collection."

As amended by chapter 497 of the Acts of 1928, this section now provides:

" \* \* \* Nothing in this section shall be construed as permitting or authorizing justices of the peace to receive claims or evidences of debt for collection; and it shall be unlawful for any such justice to receive claims of any kind for collection, or to accept or receive money or any other thing of value by way of commission

*or compensation for or on account of any collection made by or through him on any such claim, either before or after judgment.*

*"Any justice violating this provision shall be guilty of a misdemeanor." (Italics supplied.)*

It is my opinion that the act is open to no other construction than that it is unlawful for a justice of the peace to receive claims of any kind for collection, or to accept or receive money or any other thing of value by way of commission or compensation for or on account of any collection made by or through him on any such claim.

It is true that the language employed by the General Assembly could be much clearer to convey this purpose, but you will observe that the words "such justice" unquestionably when followed by the Prohibition, refer to justices of the peace generally as used in the preceding part of the sentence, and, against receiving claims of any kind for collection, or commissions, etc., I am of the opinion that it was the intention of the General Assembly to prohibit justices from handling claims for collection.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### JUSTICE OF THE PEACE—Fee in violation of dog laws.

RICHMOND, VA., June 7, 1928.

MR. J. A. WOLFARTH,  
*Justice of the Peace,*  
*Clifton Forge, Virginia.*

DEAR SIR:

I am just in receipt of your letter of June 6, in which you state:

"Several weeks ago I had occasion to try several cases of violation of the dog laws, and among them several cases were dismissed or acquitted with no costs against the defendants.

"I am advised that a recent act of the legislature provides that justices shall be paid such costs in event of acquittal of defendant, and before I make my report I would like to know just what course to pursue in making settlement with the State. Should I make a report showing all fines collected and deduct what is due by the Commonwealth, or should a separate statement be made to the Commonwealth to recover my costs?"

There is no law allowing you to deduct from the amount paid by defendants in other cases the costs due you by the Commonwealth in prosecutions which have been dismissed, and you should settle in full for all fines collected by you and make out your bill against the Commonwealth for the amount due you by the Commonwealth. Your account should be presented to the circuit court and, when allowed and certified by such court as proper, will be paid by the State Comptroller.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### JUSTICE OF THE PEACE—Jurisdiction of.

RICHMOND, VA., May 29, 1928.

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

MY DEAR MR. HALL:

Acknowledgment is made of your letter of May 22, 1928, in which you request my opinion on the following statement of facts:

"The town of Leesburg is located within Leesburg Magisterial District. I want to know if a justice of the peace for Leesburg District, in which the town is located, can legally and lawfully try a criminal case arising in the town of Leesburg, where the charter of the town does not deal with the subject but merely says that the mayor shall be a conservator of the peace, and ex-officio justice of the peace. My general understanding all along has been that they have concurrent jurisdiction with the mayors of towns."

I would have answered your letter earlier, but I have been engaged in court almost continuously since the receipt of it.

A town is, of course, a part of the county in which it is located, and a justice elected for the district in which the town is located, in my opinion, would have the authority to try and to hold all preliminary hearings in criminal cases arising within the limits of the town. In this connection, see sections 4824, 4826 and 4987 of the Code. These sections unquestionably confer jurisdiction upon justices of the peace in criminal cases, and the mere fact that the mayor of a town, under section 3011 of the Code of 1919, as amended, is given jurisdiction in civil and criminal matters arising within the town, would not have the effect of excluding a justice from exercising the powers conferred upon him by law. Indeed, you will see that section 3011 of the Code, as amended, does not attempt in any way to confer exclusive jurisdiction in such cases upon a mayor.

Trusting this gives you the desired information, I am

Sincerely yours,

LEON M. BAZILE,  
*Assistant Attorney General.*

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#### JUSTICE OF THE PEACE—Fee, holding commission of lunacy.

RICHMOND, VA., *September 20, 1927.*

MR. W. W. HASKINS,  
*Prospect, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your undated letter, in which you request me to advise you whether or not a justice of the peace is entitled to a fee for his services in a lunacy commission.

The fees of a justice in such a case are fixed by section 1021 of the Code of 1919, as amended by the Acts of 1926. As amended, this section provides in part as follows:

"The two physicians shall receive a fee of five dollars each for their services. The justice of the peace shall receive a fee of two dollars for his services, and all witnesses regularly summoned before such commission shall receive such compensation for their attendance and mileage as is allowed witnesses summoned to testify before grand juries. The justice and each physician shall receive like mileage. \* \*"

You will see from this that all a justice is entitled to for his services in connection with such a proceeding is a fee of \$2.00 and the mileage allowed by law. These fees are paid by the county or city, except in those cases where the party proceeded against is a non-resident of the State of Virginia.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**JUSTICE OF THE PEACE—Fee in cases where Commonwealth is plaintiff.**RICHMOND, VA., *June 23, 1928.*

HON. JAMES M. SETTLE,  
*Clerk of Courts,*  
*Washington, Virginia.*

DEAR SIR:

I am in receipt of your letter of yesterday, in which you write:

“Will you kindly advise me what fee is payable to an associate justice in cases where the Commonwealth is plaintiff. I note under section 3481 of the Code that an associate justice is allowed a fee of \$1.00 and, as I understand it, this is in civil cases. I would like to know if the fee is the same in criminal cases.”

Section 6022 of the Code authorizes the justice of the peace who issued the warrant, on application of the defendant, to associate with himself two other justices of the peace of the county in the trial of any criminal warrant.

Section 3507 of the Code provides the fees of a justice of the peace in criminal cases, the allowance being \$1.00 for issuing warrants of arrests, \$2.00 for trying a case of misdemeanor, and \$2.00 for examining a charge of felony.

Section 6022 of the Code authorizes the associate justices to participate in the trial of such cases. When they do so they are acting as justices of the peace in the trial of a criminal case and, in my opinion, are entitled to the fees fixed by section 3507 of the Code.

These fees were recoverable in full only from the prosecutor in case of an acquittal (other than an officer), or the accused upon his conviction, only one-half being payable by the Commonwealth in those cases in which the fees were properly chargeable to the Commonwealth. This last limitation is now abolished, as you will see by reference to pages 528-529 of the Acts of 1928, amending this section, and full fees are now payable by the Commonwealth to justices of the peace.

Section 3481, to which you refer, provides for fees in civil cases.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**JUVENILE AND DOMESTIC RELATIONS—Judge of, jurisdiction only in misdemeanor cases.**RICHMOND, VA., *August 19, 1927.*

HON. J. E. BURWELL,  
*Commonwealth's Attorney,*  
*Floyd C. H., Virginia.*

MY DEAR SIR:

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

“Stanley Lawrence was indicted for a felony in the Circuit Court of Floyd County at its July term, 1927, at that time the said Lawrence was under the age of 18 years. His case has been continued from time to time until the July term, 1927, of said court, at which time counsel for the accused moved that the case be certified to the Judge of the Juvenile and Domestic Relations Court of Floyd County, which was accordingly done and said case is now before Judge Agnew for trial. The accused is now 18 years of age.

“Please advise me if the Judge of the Juvenile and Domestic Relations Court has jurisdiction of this case, as the accused is 18 years of age.”

If you will examine section 1953e (4) of the Virginia Code, 1924, you will see that the jurisdiction of the Juvenile Judge is limited to that of an examining magistrate in

the case of felony. This being true, after the boy was indicted it was error to transfer the case to the Juvenile Judge. I would suggest that it be certified back to the Circuit Court for trial.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**JUVENILE AND DOMESTIC RELATIONS COURT—Jurisdiction.**

RICHMOND, VA., *August 3, 1927.*

HON. S. P. POWELL,  
*Commonwealth's Attorney,  
Spotsylvania, Virginia.*

MY DEAR MR. POWELL:

Acknowledgment is made of your letter of August 2, 1927, in which you say:

"Question has arisen as to whether or not under the law establishing Juvenile and Domestic Relations Courts in counties an offense like wife-beating in the misdemeanor class between members of the same family would come under the jurisdiction of the Judge of the Juvenile and Domestic Relations or the ordinary misdemeanor laws under the regular justices of the peace of the magisterial districts. Would be glad to have your opinion in this matter."

Juvenile Justices in counties are provided for by section 1953a of the Virginia Code of 1924, and their jurisdiction is provided for by section 1953e of said Code. This section provides that within the boundaries of their respective counties they shall have exclusive original jurisdiction, except as to that territory in which special justices of cities have concurrent jurisdiction over all cases, matters and proceedings involving:

"All offenses, except murder and manslaughter and rape, committed by one member of a family against another member of said family, and the trial of all criminal warrants in which one member of a family is complainant against another member of said family; provided, however, that in prosecutions for felonies other than murder and manslaughter and rape the jurisdiction of said special justice shall be limited to that of an examining magistrate. The word 'family' as used herein shall be construed to include husband and wife, parent and child, brother and sister, grandparent and grandchild;"

It would appear from this that the Juvenile and Domestic Relations Courts of a county has exclusive jurisdiction of a misdemeanor committed by husband against his wife, or a misdemeanor committed by one member of a family against another member of said family.

Trusting this gives you the desired information, I am

Very truly yours,

JNO. R. SAUNDERS,  
*Attorney General.*

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**JUSTICE OF THE PEACE—Jurisdiction in matters of prohibition.**

RICHMOND, VA., *August 3, 1927.*

HON. CROSBY THOMPSON, *Mayor,  
Port Richmond, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your request that I advise you whether a Justice of the

Peace in your county has a right to assume jurisdiction over a criminal prosecution for a violation of the prohibition law after you have taken jurisdiction of the case, and started criminal proceedings against such person under your town prohibition ordinance, or for violation of the State law.

In response thereto, I call your attention to section 3011 of the Code of 1919, as amended, which provides in part:

“The mayors of towns shall be clothed with all the powers and authority of a justice in civil and criminal matters within such town, \* \* \*.”

Therefore, whenever a crime is committed in a town the mayor of the town has concurrent jurisdiction with the county justice for the trial of that case, and if the mayor's court obtains jurisdiction of the prosecution before the justice does, the justice has no right to proceed. On the other hand, where the Justice's court first obtains jurisdiction in the case, the mayor would have no right to proceed for a violation of the State law.

I also call your attention to sections 34-37 of the prohibition law.

I am advised by you that your town has passed a prohibition ordinance, which contains the provisions found in the State prohibition law. Of course, the mayor, in the absence of a contrary provision in the ordinance, would have exclusive jurisdiction for the trial of violations of the town ordinance. In this connection, I call your attention to the case of *Bryan v. Commonwealth*, 126 Va. 749, in which the Court of Appeals held that where one had been prosecuted under a town ordinance for violation of the prohibition he could not be subsequently prosecuted for a violation of the State prohibition law.

I am sending you herewith a copy of the Layman Prohibition Law, calling your attention to section 34 thereof, which provides that the jurisdiction of a mayor or police justice of a town shall extend over the territory contiguous to the town within three miles of the town limits, with certain exceptions where two or more towns are closely adjacent. Several sections of the 1924 prohibition law have been amended, but this section is not one of those which was amended.

Trusting this gives you the desired information, I am

Very truly yours,

LEON M. BAZILE,  
*Assistant Attorney General.*

#### JUDGES—APPOINTMENT OF, Increase of Salary.

RICHMOND, VA., July 13, 1927.

HON. JOHN W. CARTER,  
*Commonwealth's Attorney,  
Danville, Virginia.*

MY DEAR MR. CARTER:

Acknowledgment is made of your letter of July 13, 1927, in which you say:

“Hon. D. Price Withers, late judge of the Corporation Court of the city of Danville, recently died while serving a term which would expire on February 1, 1929. This term, of course, began February 1, 1921. The Governor of Virginia has designated as his successor Mr. Henry C. Leigh, of Danville, Virginia. Mr. Leigh has not yet accepted the appointment, and of course has not qualified.

“Judge Withers was originally appointed in November, 1920, to fill an unexpired term ending February 1, 1921. Before he accepted the office, Council of the city of Danville, acting under authority conferred under section 103 of the Constitution and section 3469 of the Code, increased the allowance made by the city of Danville, supplementing the salary provided by general law so as to make



Judge Withers' compensation \$6000.00 per annum. This action was taken after Judge Withers' appointment and before his qualification.

"It is now the purpose and desire of the City Council to increase the allowance made to the judge of the corporation court of the city of Danville so as to make the total compensation for such judge \$7500.00 per annum. It has been suggested to the council that, if such action be taken, it cannot be effective until after February 1, 1929. The chairman of the Finance Committee of the City Council recently requested my opinion as to the validity of such action, and I have advised him that, under section 103 of the Constitution and section 3469 of the Code, the City Council clearly has the power to make such increase prior to the qualification of Mr. Leigh as judge, and to make such increase effective as of the date of his qualification.

"I would like very much to have an opinion from you on the question involved."

Section 103 of the Constitution, so far as is applicable to the question here under consideration, reads as follows:

"\* \* Any city may, by an ordinance, increase the salaries of its city or circuit judges, or any one or more of them as it may deem proper, and the *increase* shall be paid wholly by the city, but shall not be enlarged or diminished during the term of office of the judge. \* \* " (Italics supplied.)

Section 3469 of the Code provides as follows:

"Any city may, by an ordinance, increase the salaries of its city or circuit court judges, or any one or more of them, as it may deem proper, but the *increase* shall be paid wholly by the city. Said *increase*, however, shall not be enlarged or diminished during the term of office." (Italics supplied.)

From an examination of the above quoted provision of section 103 of the Constitution you will see that that part of the section, which reads "but shall not be enlarged or diminished during the term of office of the judge," refers to the increase provided for immediately prior to the prohibition last quoted. In other words, it is my opinion that this section of the Constitution authorizes a city, by an ordinance, at any time to increase the salaries of its city or circuit judges, or any one or more of them as it may deem proper, which increase shall be paid wholly by the city, but that, when once made during a term, such increase cannot be either enlarged or diminished until the expiration of the term during which it is made.

The General Assembly has placed the same construction on section 103 of the Constitution by its enactment of section 3469 of the Code quoted above. You will observe that this section provides that any city may increase the salaries of its city or circuit court judges as may be deemed proper, without any limitation as to the time when this may be done, and the last sentence provides "said increase, however, shall not be enlarged or diminished during the term of office."

This, in my opinion, conclusively shows that, under the provisions of section 103 of the Constitution and section 3469 of the Code, the salary of a city judge may be increased at any time by the authorities of the city, but, having once been increased during a term, it cannot be thereafter enlarged or diminished until the expiration of the term during which it is made.

I, therefore, fully concur in the conclusion reached by you as stated in your letter.

Yours very truly,

JNO. R. SAUNDERS,

*Attorney General.*

**LIEUTENANT-GOVERNOR—Right to accept increased compensation.**RICHMOND, VA., *January 24, 1928.*

HON. JUNIUS E. WEST,  
*Lieutenant-Governor,*  
*Senate Chamber,*  
*Richmond, Virginia.*

MY DEAR LIEUTENANT-GOVERNOR:

Acknowledgment is made of your request that I advise you as to whether you are legally entitled to accept the increased compensation provided for you by the amendment to section 3454 of the Code.

You were elected Lieutenant-Governor in November, 1925, and your present term of office commenced on the first day of February, 1926 (Code, section 118). Section 3454 of the Code of 1919 provided a compensation of \$720.00 for the president of the Senate and the speaker of the House of Delegates. By chapter 567 of the Acts of 1926, approved March 29, 1926 this compensation was increased for each of the above named officers to the sum of \$920.00. Section 2 of this act provided that it should be in force "on and after the second Wednesday in January, nineteen hundred and twenty-eight."

Section 85 of the Constitution 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."

The Lieutenant-Governor is, of course, one of the officers of the Executive Department and the question to be determined is whether the salary of the Lieutenant-Governor has been determined by the Constitution, because, unless it has been determined by the Constitution, section 83 thereof would unquestionably prevent you from accepting an increase in compensation during your term of office. The answer to this question is found in section 79 of the Constitution, which reads as follows:

"The Lieutenant-Governor shall be president of the Senate, but shall have no vote except in case of an equal division; and while acting as such, shall receive a compensation equal to that allowed to the Speaker of the House of Delegates. (*Italics supplied*)"

It is my opinion that the Constitution has determined the salary of the Lieutenant-Governor, and has required it to be at all times equal to that allowed to the speaker of the House of Delegates. It is, therefore, my opinion that you are legally entitled to receive the salary fixed for the Lieutenant-Governor and the speaker of the House of Delegates by section 3454 of the Code, as amended by the Acts of 1926.

Very truly yours,

LEON M. BAZILE,  
*Assistant Attorney General.*

**LICENSE—Ardent spirits for medicinal purposes.**RICHMOND, VA., *February 6, 1928.*

HON. CHARLES H. FUNK,  
*Commonwealth's Attorney,*  
*Marion, Virginia.*

DEAR MR. FUNK:

I am in receipt of your letter of February 3, 1928. In this you state that a local

reputable druggist in Marion is contemplating making an application to the circuit court for a permit, or license, to dispense ardent spirits for medicinal purposes on a prescription given by a physician.

You further state that the druggist is under the impression that he cannot obtain such a permit for the reason for a number of years previous to the passage of the State and National prohibition law ardent spirits had not been sold in Marion.

You then desire to be advised whether or not this fact would effect his right to make such an application. I am of the opinion that it does not. Section 72 of the prohibition law, which contains the conditions and provisions applicable to the case in question, among other things provides:

"That the applicant has presented satisfactory proof that there is a necessity existing for the granting of such license, and that the sale of ardent spirits at that place and by the applicant will not be contrary to sound public policy or injurious to the moral or material interests of the community. And, provided, further, that in no case shall a license be granted if a majority of the voters qualified to vote at the last preceding election petition the court not to grant any such license in the following cases, namely: \* \* \*"

You will therefore see that to a very great extent the matter is largely within the discretion of the judge. However, as stated above, I do not think the fact that ardent spirits have not been sold in Marion for a number of years would in any manner effect the right of the party in question to make application for the permit.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### LICENSE—Tax on Light and Power Companys.

RICHMOND, VA., February 15, 1928.

MR. C. H. HARDY,  
*Manager,*  
*Town of Blackstone, Virginia.*

DEAR MR. HARDY:

Your letter of the 13th instant has been received.

You inform me that the ordinance of your town fixes a specific license of \$100 on every person, firm or corporation engaged in the business of furnishing light and power for profit; that the Virginia Public Service Company refuses to pay the tax, claiming that the full amount of tax which can be provided by law for the town of Blackstone is one-half of one per cent on their gross earnings.

The position of the company is correct. Section 36½ of chapter 576 of the Tax Laws of Virginia, to be found on page 990 of the Acts of 1926, provides:

" \* \* \* provided, that any city or town may impose a license tax upon such corporation for the privilege of doing business therein, which shall not exceed one-half of one per centum or the gross receipts of such business accruing to such corporation from said business in such city or town; and, further provided, that from the amount of any such license tax there shall be deducted any sum or sums paid by such corporations to such city or town as a merchant's license tax, and license taxes; \* \* \*"

Under the law you are not allowed to collect in any way from the Virginia Public Service Company more than one-half of one per cent on their gross earnings.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**LICENSE—Trucks selling and delivering goods.**RICHMOND, VA., *February 28, 1928.*MR. C. C. BOYER,  
*Woodstock, Virginia.*

MY DEAR MR. BOYER:

Acknowledgment is made of your personal inquiry of this morning as to whether or not a town can impose a license tax on you or your truck for selling and delivering goods in towns other than in Woodstock, which is the place of your business. I understand that you are a wholesale merchant, that you sell goods to various towns in the Valley and deliver them by truck to the merchants to whom you sell.

The Legislature of Virginia, at its session of 1926, passed an Act that is found on page 874 of the Acts of 1926, which reads as follows:

"\* \* That any person, firm or corporation licensed to manufacture in any city, town, or county in this State shall be entitled to sell and deliver in any manner the goods so manufactured to any licensed dealer anywhere in this State without the payment of any additional tax in any form to any city, town or county."

The Auditor of Public Accounts has construed this statute in the following language, which is found in the footnote on page 165 of the Virginia Tax Laws:

"A manufacturer, who has been taxed by the State on capital employed in business (county, town or city not authorized to tax the capital of a manufacturer employed in business); or a merchant who has been duly licensed by the State, and duly licensed by the town or city, or in lieu of license tax to the town or city, has been taxed on the capital employed in business by the town or city, can sell and deliver at the same time to licensed dealers or retailers but not to consumers, anywhere in the State, without payment of an additional tax, in any form, to the State, city, town or county."

This means that a merchant, who has been licensed to do business anywhere in this State and has paid the proper amount of taxes to the State, as is required by this section, and to the town, if his place of business be in a town, cannot be required to pay an additional tax, either to the State, city, town, or county in which he delivers his goods. I would further add that, under the Virginia Tax Code which has just passed the present Legislature, this language has been embodied as a part of the statute law of this State.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.***LIVE STOCK—Killing of, Owner's Compensation.**RICHMOND, VA., *March 1, 1928.*HON. CLAUDE R. WOOD,  
*Commonwealth's Attorney,  
Dillwyn, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of February 28th, in which you ask my interpretation of section 2323e of the Code of Virginia, which deals with fowls or stock killed by dogs. I think in your first supposititious case section 2323e is very clear, wherein it states as follows:

"Any person, firm or stock company taxed by the State who shall have any stock or fowl killed or injured by any dog shall be entitled to receive compensation therefor at the assessed value of such stock and the fair value of such fowl out of

the fund derived from dog licenses, and in addition thereto he shall recover from the owner of such dog or the person having such dog under his control at the time the damage is done, in an appropriate action at law, the difference between the assessed value and the full value of such stock or fowl, and in case of any person being bitten by a mad-dog he shall recover from such fund the costs of necessary treatment, not to exceed two hundred dollars."

In view of the above section, I am of the opinion that the party who has been injured is entitled to recover from the county the cost so expended by her not to exceed the sum of two hundred dollars.

In your second case you state that the board of supervisors has a rule when a dog gets into a flock of sheep and kills two or three of them they pay the assessed value of the sheep, and also allow the same party in the aggregate of \$50 to \$100.

It is my opinion unless the sheep are injured in some way other than by fright, the party is not entitled to any damage. I think it is clearly the law that unless such dogs bite the sheep and injure them, no damage should be recovered by the parties.

Hoping this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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#### LAW LIBRARIES—Furnishing same for various courts.

RICHMOND, VA., July 13, 1928.

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

MY DEAR MR. LACY:

Since the receipt of your letter of some weeks ago, I have examined section 5933-a of the Code of Virginia, 1924, sub-section 13 thereof providing:

"The city of Richmond shall provide such room or rooms, and such books, stationery, supplies and equipment as may be requisite for the said court and the clerk's office."

In your conversation with me you stated that you had reached the conclusion that this section did not authorize or require the city of Richmond to furnish law books to the Law and Equity Court, Part Two.

It has not been the policy of the General Assembly to require the several counties and municipalities to furnish law libraries for their courts, but it has been the policy of the General Assembly to require the localities to furnish the necessary order books, stationery, supplies, etc. This policy is illustrated by sections 2767, 2854, 5980, 5981 and 5982 of the Code.

It is my opinion that the word "books" used in sub-section 13 of section 5933-a of the Code of 1924 refers to minute or order books and not to law books. I, therefore, agree with the opinion heretofore expressed by you.

Very truly yours,

LEON M. BAZILE,  
*Assistant Attorney General.*

## REPORT OF THE ATTORNEY GENERAL

**LAWYERS—License to practice.**RICHMOND, VA., *August 1, 1927.*

J. SEYBERT HANSEL, ESQ.,  
*Attorney at Law,*  
*Monterey, Virginia.*

DEAR SIR:

Acknowledgment is made of yours of July 29, in which you say:

"At the request of our Mayor and for my own information I wish to request your opinion on two of our statutes which seem to be in conflict with our town ordinance.

"In Virginia Tax Laws 1924, section 115, page 228, and section 120, pages 230-231, we find the following language: '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.*' Section 120—'Every person who shall sell any patent medicine, etc. \* \* \* shall pay a license tax of \$125.00 for each wagon used, *which shall be the only license required of such person for such privilege;* \* \* \*"

"We have a town ordinance authorizing the collection of an additional license tax in each of the above cases.

"Will you kindly advise us whether the language underlined above means what it says, or whether the towns in which these professions are practiced can collect an additional tax? The section as to practicing law seems to be found in Acts of 1915, chapter 148, page 260, and that as to selling medicines is in Acts of 1926, chapter 523, page 949."

In reply I beg to say that, in my judgment, sections 115 and 120 of the tax laws of Virginia apply only to State licenses and do not prohibit the imposition of additional licenses by municipalities. Whether any town or city is authorized to impose such a license would depend, of course, upon the terms of its charter. So far as I know, all cities impose a municipal license upon lawyers in addition to the State license.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**MOTOR TRUCKS—License fees.**RICHMOND, VA., *December 12, 1927.*

HON. JAS. M. HAYES, JR., *Director,*  
*Motor Vehicle Commission,*  
*Richmond, Virginia.*

MY DEAR MR. HAYES:

I am this morning in receipt of a letter from Hon. Wyndham R. Meredith, counsel for the American Railway Express Company of this city, which letter deals with the question of license fees to be paid by the American Railway Express Company on certain motor trucks used in this State by them in their business.

I have before me, also, a letter from The White Company, the manufacturer of these trucks, addressed to Mr. R. E. Lee, who is superintendent of the Motor Equipment for the American Railway Express Company. This letter states that the Model 20 truck, manufactured by this company, was rated, prior to the year 1918, as one and one-half tons capacity. That during the latter part of that year, up to February 24, 1927, this model carried a rating of two tons capacity. That effective February 25, 1927, this model is rated as a one and one-half ton capacity unit, and they, therefore, request that he obtain license on these trucks, which were formerly rated at two tons capacity, but now rated at one and one-half tons capacity, at the rate fixed by statute, namely, \$20.00 per truck.

I am further advised that the American Railway Express Company have recently purchased some new trucks from The White Company of the same character, same dimension, and same capacity, which said trucks have been classified as one and one-half tons capacity in rating, and license issued therefore at \$20.00 per truck.

With these facts before me, I am of the opinion that if the new trucks and the old trucks are of the same capacity, namely, one and one-half tons, that the license fee for both the new and old trucks should be \$20.00 for each truck. To be frank with you, I do not see how your office can make any distinction, or difference, as to the amount of license required for each truck. Of course, you have a perfect right to require the old trucks to be re-registered as one and one-half ton capacity.

Mr. Meredith states in his letter to me that the reason assigned by you for requiring the \$30.00 license fee on the old trucks, though you had issued a license for the new ones for \$20.00, is due to the fact that you did not wish to change your records. I can appreciate the trouble which this may necessitate, at the same time it does not justify, in my judgment, the charging of a different license fee on trucks which have been rated as of the same capacity, namely, one and one-half tons.

I would further add that I have discussed this matter with both of my assistants, and we all concur in this view.

Yours very sincerely,

JNO. R. SAUNDERS,  
*Attorney General.*

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**MARRIAGE—Status between white and Chinese persons.**

RICHMOND, VA., November 16, 1927.

MISS HELEN P. STORY, *Director,*  
*Norfolk United Charities, Inc.,*  
415 E. Freemason St.,  
*Norfolk, Virginia.*

DEAR MADAM:

In your letter of November 9 you write:

"I am very anxious to have authoritative legal opinion concerning the status of marriage between white and Chinese persons in the State of Virginia. Does the Virginia Code prohibit such marriages anywhere in the State of Virginia, and should such a marriage have taken place in another state, is the union considered illegal in Virginia? What is the status of children born in the State of Virginia of such a union?"

Until the passage of the Racial Integrity Act at the 1924 session of the Legislature, there was no law prohibiting the marriage of white persons with any race except that of the negro. By that Act, which is carried into section 5099-a of the Code of 1924, the marriage of white persons with non-white persons was enlarged to include all persons not of Caucasian blood, except with persons having one-sixteenth or less of American Indian blood, and providing that laws relating to the marriage of white and colored persons should apply to marriages of white and non-white persons.

Under this law, the marriage of a white person with a Chinese, since June 18, 1924, anywhere in the State of Virginia, is absolutely void. The marriage of a white person and a Chinese, citizens of other states who married in such other state and came to Virginia to live, is valid. However, if they are residents of Virginia, go out of the State for the purpose of being married, with the intention of returning, are married outside of the State and return to reside in the State, that marriage is void, and each is subject to a penalty of confinement in the penitentiary for not less than two years nor more than five

years. Penalties are also provided for clerks for issuing licenses, and upon persons performing ceremonies of marriage of white and non-white persons.

It would seem from the decision by a divided court in *Greenhow v. James*, 80 Va. 636, that, notwithstanding section 5270 of the Code, providing that the issue of marriages deemed null in law or dissolved by a court shall, nevertheless, be legitimate, the children of an unlawful marriage between a white and a Chinese would be illegitimate.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**MALICIOUS PROSECUTION—Heard before full magistrate's court.**

RICHMOND, VA., *January 23, 1928.*

HON. H. L. HARTLEY,  
*Justice of the Peace,*  
*Jonesville, Virginia.*

DEAR MR. HARTLEY:

Acknowledgment is made of your letter of January 17th, in which you ask for certain information with reference to pending suit for malicious wounding to be tried by full court by demand of the defendant.

I beg to advise that section 6022 of the Code provides as follows:

"In the trial of all warrants, both civil and criminal, upon application of the defendant, at any time before trial, to the justice of the peace, who issued said warrant and before whom it is returnable, such justice shall associate with himself two other justices of the peace of the county, who shall try said warrant, and in case of disagreement in opinion, the opinion of the majority shall prevail, \* \* \*."

I think this statute states clearly the law on this subject.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**MEDICAL COLLEGE OF VIRGINIA—Resident and non-resident students.**

RICHMOND, VA., *March 3, 1928.*

DR. W. T. SANGER, *President,*  
*Medical College of Virginia,*  
*Richmond, Virginia.*

DEAR DR. SANGER:

I am in receipt of your letter of the 28th ultimo, in which you state:

"In the application of this rule we are a bit puzzled with regard to students who reside in Washington but who hold their residence in Virginia, because, more than anything else, it is impossible to vote in Washington. For example, we have a student this year whose father is a preacher and who lived in Arlington county before moving to Washington six years ago. The father retained his residence in Virginia and the son, when becoming of age, also registered in Virginia. The boy was educated in Washington and there prepared for the study of medicine at our college. He has come here for the specific purpose of securing a medical education and would be counted as a non-Virginian except perhaps for the fact that he votes or can vote in this State. I am inclined to think that he ought to be regarded as a non-Virginian, but I would rather have you pass on it."



You ask my opinion as to whether or not the young man to whom you refer is a resident of Virginia within the meaning of law which would entitle him to tuition in your college as a resident of Virginia.

The question of residence is a mixed question of law and fact, and is one which should not be so strictly construed as to deprive a person of rights to which he is equitably entitled. On the other hand, no one should be encouraged to claim a resident, nor the right of a resident stretched to such an extent as to allow privileges to a person to which they are not entitled.

If the father of the young man to whom you refer gave up his actual residence in Virginia, without an intention of returning, I do not think that the son can be considered a resident of Virginia, so as to entitle him to register as a Virginian. If, however, the father is only temporarily absent, has had his home in Virginia, and is only living for the time being in the City of Washington, the father and the entire family should be considered as having maintained their status as citizens of Virginia and may be entitled to every privilege appertaining to such status.

Under these circumstances, it is entirely up to you and the officers of your institution to decide upon the question of the citizen's right as a resident or non-resident student.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**MAGISTRATES—Authority to suspend sentence in prohibition cases.**

RICHMOND, VA., *February 9, 1928.*

MR. WILLIAM H. GAINES,  
*Attorney at Law,*  
*Warrenton, Virginia.*

DEAR MR. GAINES:

I am in receipt of your letter of the 7th instant, in reference to the suspension of sentence of a person operating an automobile while under intoxicants, and I note that, in your opinion, no magistrate can suspend such sentence. You are entirely correct in your opinion.

Justices have only such authority as is conferred upon them by section 33 of the Layman Prohibition Law. They have jurisdiction to try offenses coming within the provisions of sections 17 and 18 of that law. In all other cases they can only act as an examining court and they may then (a) send the accused on to the grand jury, or (b) dismiss the warrant.

However, in any other cases of misdemeanor, with the consent of the Attorney for the Commonwealth and in his presence, his consent being endorsed on the warrant, the justice may accept a plea of guilty and fix the punishment. He cannot suspend sentence in any case.

You also refer to the matter of the jurisdiction of mayors in prohibition cases. In a letter to Honorable R. A. Bickers, Attorney for the Commonwealth of Culpeper County, written August 26, 1927, I expressed the opinion that in trials had under town ordinances the mayor, upon a conviction for a first offense, may suspend the jail sentence, but that under no circumstances can he suspend or relieve from the payment of the fine imposed, or in any way grant a person, convicted of driving a car while under the influence of intoxicants, any relief from the provision of law automatically depriving the convicted party of the right to drive any motor vehicle within a year from the date of his conviction.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**MANUFACTURERS—License of.**RICHMOND, VA., *March 30, 1928.*MR. J. HURT WHITEHEAD,  
*Chatham, Virginia.*

MY DEAR MR. WHITEHEAD:

I am just in receipt of your letter of March 29th, to which I will reply at once.

In this you state your firm is manufacturing a line of cigars and it is the custom to have salesmen sell, deliver, and collect for these cigars when sold. You ask me to advise you whether or not, as manufacturers, you have a right to do this in Virginia and other States. I regret I cannot give you the law so far as other States are concerned. In 1926 the Legislature passed an Act, which is chapter 525, page 874, also found on page 165 of the Virginia Tax Laws, which reads as follows:

"That any person, firm or corporation licensed to manufacture in any city, town or county in this State shall be entitled to sell and deliver in any manner the goods so manufactured to any licensed dealer anywhere in this State without the payment of any additional tax in any form to any city, town or county."

I also quote you a ruling made by the Auditor of Public Accounts in reference to this Act:

"A manufacturer, who has been taxed by the State on capital employed in business (county, town or city not authorized to tax the capital of a manufacturer employed in business); or a merchant who has been duly licensed by the State, and duly licensed by the town or city, or in lieu of license tax to the town or city, has been taxed on the capital employed in business by the town or city, can sell and deliver at the same time to licensed dealers or retailers, but not to consumers, anywhere in the State, without payment of an additional tax, in any form, to the State, city, town or county."

This statute, I am sure, gives you the information you desire.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**MONTGOMERY COUNTY—Special road law.**RICHMOND, VA., *June 25, 1928.*HON. CHARLES W. CRUSH,  
*Commonwealth's Attorney,*  
*Christiansburg, Virginia.*

MY DEAR MR. CRUSH:

Acknowledgment is made of your letter of June 20, 1928, in which you request me to advise you whether the special road law for Montgomery county, being chapter 173 of the Acts of 1910, as amended by chapter 283 of the Acts of 1920, has been repealed by chapter 159 of the Acts of 1928.

Section 46 of chapter 159 of the Acts of 1928 provides in part:

" \* \* \* all special road laws heretofore enacted for the roads of any county or district in this State be and they are hereby repealed, except such acts providing for a county road board or county road commission for any county now operating under a county road board or county road commission; \* \* \* "

The special road act for Montgomery county does not create a county road board, or county road commission. On the contrary, it creates a district road commission, and, therefore, in my opinion has been repealed by chapter 159 of the Acts of 1928.

Sincerely yours,

JNO. R. SAUNDERS,  
*Attorney General.*

**MARRIAGE LICENSE—Affidavit for.**

RICHMOND, VA., June 12, 1928.

HON. F. W. RICHARDSON, *Clerk,*  
*Fairfax Circuit Court,*  
*Fairfax, Virginia.*

MY DEAR MR. RICHARDSON:

Acknowledgment is made of your letter of June 11, 1928, in which you say:

“Under the new law as to issuing marriage licenses, it looks like *both* the man and the woman must make (separately) the required affidavit to procure a marriage license, as the man could not make affidavit as to the woman’s statement and the woman could not make affidavit as to the man’s statement. Am I correct?”

I have examined section 5074 of the Code of 1919, as amended by the Acts of 1928, with care, and, in my opinion, you have correctly construed this statute.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**MOTOR VEHICLE LAWS—To protect pedestrians while on public highways.**

RICHMOND, VA., June 2, 1928.

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

MY DEAR GOVERNOR:

Acknowledgment is made of your letter of recent date, in which you request me to advise you whether section 56½ attempted to be added to chapter 474 of the Acts of 1926 by amendment by chapter 399 of the Acts of 1928, has been validly added thereto.

The title to chapter 399 of the Acts of 1928 reads as follows:

“An Act to amend and re-enact sections 17, 18, 21, 25, 34, 39, 42, 56½, and 73 of chapter 474 of the Acts of 1926, entitled an Act to regulate the operation of vehicles on public highways, to govern and protect pedestrians while using such highways, to provide penalties for violating the provisions of this act and the disposition of fines and forfeitures collected hereunder, to make uniform the law relating to the subject matter of this act, and to repeal all acts or parts of acts inconsistent with the provisions of this act, approved March 25, 1926, and to repeal section 57 of said chapter 474 of the acts of 1926, approved March 25, 1926.”

The figures 56½ were inserted by way of amendment, and were not found in the original draft of the bill. No mention is made of this section in the enacting clause of the bill.

The section numbered 56½ is found on pages 1024-1025 of the Acts of 1928, and prohibits the operation of motor vehicles on the public roads “unless equipped with some device, if obtainable, which will effectively prevent glare.” It further requires such devices to be approved by the Director of the Division of Motor Vehicles, and prescribes his duties in connection therewith. There is no such section as 56½ in chapter 474 of the Acts of 1926, and, therefore, no such section existed for the purpose of amendment. Section 56½ is an entirely new section, and in no sense an amendment as its title would indicate.

Section 52 of the Constitution reads 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.”

This section has been construed a number of times by the Court of Appeals, in all of which cases it has been given a liberal construction. *Southern Railway Co. v. Russell*, 133 Va. 292, 298-299 (1922). As was pointed out in that case, however, 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.

The law is well settled that, when an act attempts to amend certain sections of a prior act, additional sections cannot be amended or added to the act without some indication thereof being inserted in the title. *Alabama v. Southern Railway Co.*, 115 Ala. 250, 256 (1896); *Kafka v. Wilkinson*, 99 Md. 238, 242 (1904).

Our court in *Beale v. Pankey*, 107 Va. 215 (1907), held that, where the title of an act declared it to be an act to amend and re-enact a prior statute, it was invalid unless the enacting clause made reference to the act which was referred to in the title, and the act purported to re-enact and publish at length the sections amended.

In view of the fact that there was no such section in chapter 474 of the Acts of 1926 as 56½, there was no such section to be amended and, inasmuch as the enacting clause does not refer to section 56½, it is my opinion that this section has not been validly enacted into law and is, therefore, invalid.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### MAYOR'S—Who eligible for office of.

RICHMOND, VA., May 29, 1928.

MR. JAMES W. BLANKS,  
*Attorney at Law,*  
*Clarksville, Virginia.*

DEAR SIR:

I am in receipt of your letter of the 22nd of May, and have since that time received letters from Dr. M. M. Fitzgerald and Mr. F. A. Burton concerning the same matter. I am answering your letter and enclosing copies to each of the gentlemen named. I quote your letter in full:

"Some few days ago the Mayor of this town departed this life, and it is now before the Town Council, under section 2983 of the Code, to fill the vacancy caused by his death. The former mayor took office on September 1, 1927, and his term expires on the 1st day of September, 1929.

"There are two candidates for this office, with the following qualifications, and for the benefit of the council, we would appreciate it very much if you would advise me if either or both of these parties are disqualified for election, under section 2982 of the Code.

"1. This party was on the Town Council prior to September 1, 1927, and did not offer himself for re-election, but ran for Mayor. He was defeated by some three or four votes by the deceased mayor, and is now a candidate for the vacancy.

"2. This party is now serving on the Council and his term of office expires on September 1, 1929. He was, of course, elected at the same time as the past mayor."

To Mr. Tisdale called in person just as one of my assistants was looking into the matter and stated that your charter provides that, in the absence of the mayor, the president of the Council fills his position and performs his duties.

Mr. Tisdale also stated that he was president of the Council and was perfectly willing to resign that position.

You mention section 2983 of the Code providing for the filling of vacancies caused by

death, etc. for the unexpired term. You will notice that that section applies in terms to a city. Section 2982 provides:

"No member of any council shall be eligible, during his tenure of office as such member, or for one year thereafter, to any office to be filled by the council—by election or by appointment."

Whether the section quoted applies to a town is doubtful, coming as it does after a number of sections applying solely to the number of wards in a city (sec. 2978), the composition and number of members (sec. 2979), and the reapportionment of representation among wards in cities (secs. 2980-2981).

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**MAYOR—Authority to require bond of person found guilty of misdemeanor.**

RICHMOND, VA., *October 4, 1927.*

HON. CLAUDE R. WOOD,  
*Attorney at Law,*  
*Dillwyn, Virginia.*

DEAR MR. WOOD:

Your letter of September 29 was inadvertently mislaid on account of the upset condition of the office. I note that you ask for my construction of the following:

Whether under

"Section 4675, sub-section 41, of the Code of Virginia, a justice of the peace or mayor of a small town can put a man under bond as per the above section for the second violation of section 4675, sub-section 18, of the Code of Virginia.

"That is, has a justice of the peace or mayor any jurisdiction to enforce section 4675, sub-section 41, or is the enforcement of the same left entirely with a court of record."

Section 18 is silent as to the matter of bond which may be required of an accused by a Justice of the Peace, and section 41 does not seem to have a Justice in mind when it makes provision for a bond being required of an accused by a Judge of a Court.

Because of this fact and having in mind the opinion of the Court of Appeals in the case of *Snarr v. Commonwealth*, in which the Judge delivering the opinion held that the statute did not contemplate requiring bond of a person charged with a minor violation of the prohibition law, I would advise that no bond be required of the accused convicted under either section 17 or 18.

Regretting that I have not answered you sooner and trusting that I have not delayed reply so that it will be of no benefit to you, I am

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**MOTOR VEHICLES—License in interstate transportation.**

RICHMOND, VA., *November 2, 1927.*

PINNER & CO., INC.,  
*Suffolk, Virginia.*

GENTLEMEN:

I am in receipt of your letter of October 29, in which you say:

"John Doe, a resident of Gates County, N. C., owns a motor truck duly licensed in every respect in the State of North Carolina and the said John Doe agrees to haul cotton for various ginnermen from their gins in North Carolina and deliver same at Norfolk, Virginia. This operator does not run on any schedule, but makes trips only when wanted; under these circumstances, is this operator required to take out any form of license in the State of Virginia? We have in mind particularly the license of \$50 charged class E motor vehicle operators in this State.

"Understand John Doe's hauling is strictly interstate and in no instance does he engage in intrastate hauling in Virginia, although on occasions he may haul back merchandise from Norfolk to various parties in North Carolina."

I have gotten in touch both with the Corporation Commission and the Director of the Division of Motor Vehicles, and they are both of the opinion that the John Doe of your inquiry is required to secure permit E from the State Corporation Commission and to pay to the Division of Motor Vehicles a license tax of \$50.

Until recently there had been a question of the right of a state to tax a truck being used as the one about which you write. That uncertainty has been removed by a recent unanimous decision of the Supreme Court of the United States in the case of *Clark, et al v. Public Utilities Commission of Ohio*, handed down on May 30 last, a copy of which I enclose for your information.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**MAYOR—Jurisdiction to try violations of town ordinances.**

RICHMOND, VA., *November 3, 1927.*

MR. WILLIAM OLD,  
*Attorney at Law,*  
*Petersburg, Virginia.*

DEAR SIR:

Acknowledgment is made of your letter of the 2nd instant, with reference to the authority of Colonial Heights, a town recently incorporated in the County of Chesterfield, to pass ordinances governing the general safety, peace and morals of the town, and as to the jurisdiction of the mayor to try violations of such ordinances.

I confirm your opinion that the town has such general power and that the mayor is authorized, under section 3011 of the Code, to try all prosecutions arising under the ordinances of the town. Such is the express authority of mayors of towns given under the trial justice act approved March 25, 1926, page 862, appearing at the bottom of page 864, and I see nothing in the act approved February 8, 1926, applying to the trial justice of Chesterfield County which changes the general law in this respect.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**MARRIAGE LICENSE—Within degree of consanguinity.**

RICHMOND, VA., *October 4, 1927.*

MR. M. L. FAISON,  
*Box 1999,*  
*Richmond, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of October 3, 1927.

The only statutes that I have been able to find in our Code prohibiting marriages

on account of the relationship of the parties are sections 5084 and 5085 of the Code. The prohibitions contained in section 5084 of the Code are as follows:

"No man shall marry his mother, grandmother, stepmother, sister, daughter, granddaughter, half-sister, aunt, son's widow, wife's daughter or her granddaughter, or step-daughter, brother's daughter, or sister's daughter."

The same prohibitions with reference to a woman are contained in section 5085. Trusting this gives you the desired information, I am

Very truly yours,

LEON M. BAZILE,  
*Assistant Attorney General.*

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**MARRIAGE—Persons performing ceremony without license, how punished.**

RICHMOND, VA., *August 11, 1927.*

REV. EDGAR I. McCULLY,  
219 Inwood Avenue,  
Upper Montclair, N. J.

DEAR SIR:

Your letter of the 2nd, addressed to the State Board of Health, has been referred to this office.

I take pleasure in quoting sections 4542 and 5079 of the Code, which I trust will give you the desired information.

"If any person knowingly perform the ceremony of marriage without lawful license, or officiate in celebrating the rites of marriage without being authorized by law to do so, he shall be confined in jail not exceeding one year, and fined not exceeding five hundred dollars."

"When a minister of any religious denomination shall produce before the circuit court of any county or city or before the corporation court of any city in this State, or before the judge of either of said courts in vacation, proof of his ordination and of his being in regular communion with the religious society of which he is a reputed member, such court, or the judge thereof in vacation, may make an order authorizing such minister to celebrate the rites of matrimony in this State, upon the execution by such minister of a bond in the penalty of five hundred dollars with surety, conditioned according to law, before either of such courts, or before the judge of either of such courts in vacation, or before the clerk of either of such courts."

I would suggest that you communicate with the clerk of the court at Accomac upon your arrival in the county and have him issue the license and accept your bond.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**MOTOR VEHICLE LAW—Construction of, Gas Tax.**

RICHMOND, VA., *August 10, 1927.*

ATMOSPHERIC NITROGEN CORPORATION,  
*Syracuse, New York.*

GENTLEMEN:

Acknowledgment is made of your letter of August 3, 1927, in which you state that you have acquired three hundred acres of land in Hopewell, Virginia, for the establishment of a plant. You say that in the operation activities of the plant you will use a great many

gasoline driven stationary machines and engines, as well as a number of gasoline driven motor vehicles for intra-plant transportation, "none of which will be operated outside the company's property limits and hence will not be on the highways of the State." On this premise you request my opinion on the following questions:

"1. Are stationary engines or machines, which are operated by motors burning gasoline, deemed to be motor vehicles? None of these engines or machines are in fact automotive but are in one sense self-propelled.

"2. Is gasoline used in motor vehicles operated wholly within the limits of private property by its owner and never operated or so constructed as not to be feasible of operations on public highways, such as cranes, shovels, etc., taxable under the act?

"3. Would our company by purchasing gasoline and bringing it into the State of Virginia for use in its operations on its property at Hopewell be a dealer and hence liable to pay a tax thereon? If so, is not such taxation a violation of the Interstate Commerce clause of the United States Constitution?"

I have examined chapter 107 of the Acts of 1923, as amended (sections 2154 (22) and 2154 (31) of the Code of Virginia, 1924, as amended), with care and have also conferred with Hon. James M. Hayes, Jr., Motor Vehicle Commissioner, and we are of the opinion, that if your gasoline is bought outside of Virginia and brought into this State for use in your plant, and used in the manner stated in your letter as above quoted, your company will not be subject to tax on the use of said gasoline. We are further of the opinion that, in the event you bought your gasoline in Virginia from an oil company which had assumed the State gas tax, you would be entitled to reimbursement under section 7 of the act for the tax paid by you to such oil company. Of course, if the gasoline brought by you into Virginia is used in motor vehicles operated upon the highways of the State, then you would be subject to the gas tax on gasoline so used.

Answering specifically the questions submitted by you, your first and second questions should be answered in the negative, and your third question should also be answered in the negative, unless some part of that gasoline is used in the operation of a motor vehicle off of your property and on the public highways of this State, in which event the tax would be due on so much gasoline as is thus used.

For your further information I am sending you a copy of the gasoline tax act, as amended by the Acts of 1926. There were no amendments to this law in 1927.

Trusting that this gives you the desired information, and assuring you that the Commonwealth of Virginia is glad to have so valuable a manufacturing plant located in this State, I am

Very truly yours,

JNO. R. SAUNDERS,  
*Attorney General.*

#### **MOTOR VEHICLE COMMISSION—Chauffeur's license.**

RICHMOND, VA., July 15, 1927.

MR. STUART ELLIS,  
% Metal Egg Crate Company,  
Fredericksburg, Virginia.

MY DEAR MR. ELLIS:

Acknowledgment is made of your letter of July 14th, 1927, in which you say:

"Will you please advise us if we are liable for the new license tags for the driver of our truck after considering the following explanation:

"The boy who drives our truck is employed in our factory 50 hours per week. During this time this boy may make a trip to Washington one day possibly every



two or three weeks for delivery of our product to Washington merchants. The rest of the time the boy is employed in our factory and it seems to us an unjust tax to pay \$5.00 per year in this case.

"Our case has not been presented to any judge or court, as our boy has not been molested, though we thought we would like to have your opinion should any difficulty arise."

Section 19½ of chapter 149 of the Acts of 1926, so far as is applicable to the question here under consideration, provides 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 will see from the above quoted statute that a chauffeur's license is only required of a person whose principal duty or occupation is the driving of a motor vehicle for compensation, or of a person who drives a motor vehicle while in use as a public or common carrier of persons or property.

From the facts stated in your letter it would appear that the principal duty or occupation of the boy referred to is not the driving of a motor vehicle, and would therefore not be required to obtain a chauffeur's license, assuming, of course, that the truck driven by him, when driven, is not engaged in use as a public or common carrier of persons or property, but is the privately owned truck of his employer and used solely for the purpose of transporting employer's goods.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### MOTOR VEHICLE COMMISSION—Gas tax.

RICHMOND, VA., July 14, 1927.

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

MY DEAR MR. HAYES:

It has recently come to my attention, in connection with the suits brought by me for the enforcement of the collection of gas taxes, that it has been the practice of your employees to collect these gas taxes by taking checks in their own names and later remitting to you with their personal checks, in two instances at least, after you had instructed this office to bring suit and suits had been instituted. I am writing to state that, in my opinion, it is grossly improper for your agents to accept payment of gas taxes by checks payable personally to themselves. The checks for gas tax money collected by your agents should be made payable to the Commonwealth or to your department.

It is conceivable that the Commonwealth might sustain loss if this practice is continued, and, in addition to this, it causes the tax payer to become indignant with this office and with you, when a suit is filed against him for an account for which he has already settled. I would, therefore, suggest that you positively instruct your employees that, whenever a gas tax or other money due your department is collected from a tax payer, the check must be made payable to the Commonwealth or to your department, and that in no instance must the officer deposit the check in his own account.

Very truly yours,

LEON M. BAZILE,  
*Assistant Attorney General.*

**NOTARIES PUBLIC—Change of name by marriage.**

RICHMOND, VA., November 14, 1927.

MISS EVELYN STROUD,  
713 Citizens Bank Building,  
Norfolk, Virginia.

MY DEAR MISS STROUD:

In response to your letter of November 11, 1927, it is my opinion that the provisions of section 5210 of the Code of Virginia, 1919, are mandatory and that where a notary changes her name by marriage or otherwise she must comply with the second paragraph of this section. Of course, you will observe from the last paragraph of this section that the acknowledgment is not invalidated by the notary's failure to comply with the provisions of this statute, but the notary subjects herself to a forfeiture for each certificate of acknowledgment.

I am returning the correspondence sent with your letter.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**NOTARIES PUBLIC—Annexation of seal.**

RICHMOND, VA., March 15, 1928.

COLONEL JOHN A. CUTCHINS, *General Counsel,*  
*Grace Securities Corporation,*  
*Grace and Third Streets,*  
*Richmond, Virginia.*

MY DEAR COLONEL CUTCHINS:

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

"Will you be kind enough to tell me whether or not you have had occasion to give an opinion as to the requirements of placing the state seal on notary certificates on papers going out of the State?"

"In the course of our business, we have many releases and other papers which are to be recorded in other states. Under the laws of Virginia, these would not require the notary to affix his seal, and, of course, it would follow that it would not require him to put his stamp on the deeds in question. In practically all cases, however, all states require the notary's seal, and it seems to me that under our statute, where the seal is required to be affixed, that the state seal or wafer is necessary.

"As there is considerable confusion among the mortgage companies on this point, I would appreciate very much if you would clarify it for us."

In reply thereto I would state that you are entirely correct in your construction of the law relative to this matter.

Section 16 of the Virginia Tax Laws, which relates to the tax on seals, provides:

"When the seal of the State, of a court, or notary public is affixed to any paper, except in the cases exempted by law, the tax shall be as follows: For the seal of the State, two dollars, and for the seal of a court or notary, one dollar, \* \* \*

The cases exempted by law are provided for in section 2402 of the Code of Virginia.

It, therefore, follows that whenever under our statute a notary is required to affix his seal, then the State seal or wafer is necessary. I would add further that I understand that this statute was amended in the last session of the Legislature, though it is not now in effect.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**NOTARIES PUBLIC—Use of seal.**RICHMOND, VA., *August 1, 1927.*

MR. GEORGE L. KAY, JR.,  
*Southern Biscuit Works,*  
*Richmond, Virginia.*

DEAR SIR:

Acknowledgment is made of yours of the 29th, in which you ask me when a notary's seal should be used and when not.

In reply I beg to say that section 2402 of the Code provides when a tax shall not be charged upon a seal. It is as follows:

"No tax shall be charged when a seal is annexed to any paper or document to be used in obtaining the benefit of a pension, revolutionary claim, money due on account of military services or land bounty, under any act of Congress, or under a law of this or any other State, or when a seal is annexed by a notary or clerk of court to an affidavit or deposition."

Section 16 of the tax law is in part as follows:

"When the seal of the State, of a court, or notary public is affixed to any paper except in the cases exempted by law, the tax shall be as follows: For the seal of the State, two dollars, and for the seal of a court or notary, one dollar, and herein shall be included a tax on a scroll or any impression on paper in the place of a seal, or having the force and effect of a seal, and the said tax, except in the case of the seal of the State, shall be collected and paid in the following manner:

"All seals taxable under this Act, except the seal of the State, are hereby declared illegal and of no effect, and shall not be received or accepted as a legal notarial or court seal in any court of the State, unless the same shall be superimposed upon an adhesive stamp in such manner as to cancel said stamp which adhesive stamp shall be supplied in the manner and form hereinafter provided for.

"In any case in which a tax is required upon a seal, and the officer affixing the same shall fail to use the adhesive stamp herein provided for, or shall make a false certificate that no tax is required, he shall be guilty of a misdemeanor, and shall be punished by a fine of twenty dollars for each offense, which shall be recovered and paid as are other fines due the Commonwealth; \* \* \* ."

From the above, it is clear that a tax is necessary and consequently an adhesive stamp is used in every case in which a seal is employed, whether it be necessarily employed or not. Any use of the seal without using the adhesive stamp constitutes a misdemeanor.

Trusting this will give you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**NOTARIES PUBLIC—Duties as conservator of the peace.**RICHMOND, VA., *July 21, 1927.*

MR. TOM DOBYNS,  
*Stuart, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of July 19, 1927, in which you say:

"I have just received commission as notary, Would I be considered a special officer?"

A notary public is by section 4789 of the Code made a conservator of the peace. This and the succeeding sections confer certain powers upon conservators of the peace, but conservators of the peace are not special policemen.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**OFFICERS—County and State, authority to carry concealed weapons.**RICHMOND, VA., *April 13, 1928.*

HON. E. A. HICKS,  
- *Evington, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of April 12, 1928, in which you say:

“Have county and state officers the right to carry concealed weapons, during their terms of office, without obtaining a license or permit from the court?”

Section 4534 of the Code prohibits, generally, the carrying of concealed weapons but it contains this proviso:

“\* \* \* this section shall not apply to any police officer, town or city sergeant, constable, sheriff, conservator of the peace, or to carriers of United States mail in the rural districts, or collecting officer while in the discharge of his official duty: provided, the circuit court of any county in term time, and any corporation court in term time, upon a written application and satisfactory proof of the good character and necessity of the applicant to carry concealed weapons, may grant such permission for one year \* \* \* .”

The following persons are made conservators of the peace by section 4789 of the Code: judges of courts, justices, commissioners in chancery, notaries public and county surveyors while in the performance of the duties of their office within their county or corporation.

Only the officers and persons mentioned in the two above named sections of the Code are permitted to carry concealed weapons.

Trusting this gives you the desired information, I am

Very truly yours,

JNO. R. SAUNDERS,  
*Attorney General.*

**OFFICERS—Fee for arrest of persons operating still.**RICHMOND, VA., *December 29, 1927.*

HON. C. W. EMBREY, *Clerk,*  
*Circuit Court Nelson County,*  
*Lovington, Virginia.*

MY DEAR SIR:

This is to acknowledge receipt of your letter of the 21st inst., in which you ask my opinion as to the proper amount of fee to be taxed against a person upon his arrest and conviction for the ownership, or operation, of a still.

Previous to the amendment of section 20 of the Layman Prohibition Law, section 4675 in the supplement to the Code—1926—there was a difference of opinion as to the amount allowable to officers upon such a conviction.

It was evidently the intention of the Legislature to limit the fee, or reward, allowed an officer for the arrest and conviction of the party owning, or operating, a still to the sum of \$50.00. You will notice that such a fee is based upon both the arrest and conviction of the owner or operator, and being based, in part, upon his arrest, and the amendment specifically providing that the fee or reward of \$50.00 shall be all that the officer, or officers, making such seizure shall receive on account of one still, whether one or more persons are convicted of owning the same, the officer is limited to the amount provided for in that paragraph, and I do not think that he should have the amount therein pro-

vided and an additional \$10.00 fee elsewhere provided for the arrest and conviction for most of the violations of the prohibition law.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**OFFICERS—Annual allowance of.**

RICHMOND, VA., June 9, 1928.

HON. E. R. COMBS, *Comptroller,*  
*Richmond, Virginia.*

DEAR SIR:

I am in receipt of your letter of the 5th instant, in which you state:

"The Act of March 18, 1926, amending Code, section 3516, in sub-section (8) fixes the annual allowance of officers coming within the provisions of the law with respect to population according to the last United States census. It is provided among other things that in cities or counties with a population between 15,000 and 25,000 the annual allowance shall not exceed \$5,500.00 per annum, but the act does not fix the annual allowance of officers in cities or counties with population of less than 15,000. Please advise what annual allowance, if any, an officer of a city or county with a population of less than 15,000 is authorized to retain, or if the failure of the act to fix the annual allowance takes the officer out of the provisions of the law, and the officer would not have to pay into the treasury any excess regardless of the amount of receipts over and above expenses authorized in conducting the office.

"Also please advise, if the officer of a city or county with population of less than 15,000 comes within the provisions of the act, how much is he entitled to receive from the city or county, which amount is not to be included in determining excess, if any, to be paid into the State treasury by him. (See latter part of second paragraph (8) of Code, section 3516, as amended by Acts of 1926)."

An examination of the act to which you refer, subsection (8) of section 3516 of the Code, limiting fees of officers and providing for recapture by the State of all excess commissions, reveals that reference to fees of officers enumerated in that section in cities and towns of less than 15,000 population was omitted. This was evidently an oversight, but, whether so or not, it limits officers in cities and towns of less than 15,000 population upon the operation of subsection (8) of section 3516 of the Code, and the effect of the passage of the act of March 18, 1926, is to remove the limit upon their maximum allowance, so that, whatever may be the aggregate of their commission, they are entitled to the whole thereof without accounting to the State.

The second paragraph of your letter, referring to the amounts to which officers are entitled from cities or counties as being exempt from the operation of the law providing for payment to the State of excess commissions, necessarily fails of operation and is ineffective in counties and cities of less than 15,000 population.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**PRISONERS—Illness of.**

RICHMOND, VA., March 2, 1928.

HON. JOHN H. DOWNING,  
*Commonwealth's Attorney,*  
*Front Royal, Virginia.*

MY DEAR MR. DOWNING:

I am in receipt of your letter of February 28, in which you say in part:

"At the September term of our circuit court last, I convicted one Wines of unlawful possession of ardent spirits. He received a sentence of thirty days and \$50.00 fine and costs. He paid his fine and, before the expiration of his sentence, had an acute attack of appendicitis which required him to be taken to the hospital at Winchester, Virginia, for an immediate operation.

"The county of Warren has been sent a bill by Winchester Memorial Hospital covering this operation and the necessary and incidental costs."

You then ask me how the bill to which you refer in your letter should be paid.

There is no provision by statute covering your case. My understanding is that physicians are appointed by local Boards of Supervisors for professional attendance upon jail inmates, and that the boards also provide for incidentals.

The man to whom you refer, while he had been convicted of an offense, evidently was a prisoner in the local jail, and I conclude that the expense of the operation, if payable at all, is a charge upon your county.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### PRISONERS—Conditional pardons.

RICHMOND, VA., April 9, 1928.

HIS EXCELLENCY, HARRY F. BYRD,  
*Governor of Virginia,*  
*Richmond, Virginia.*

MY DEAR GOVERNOR:

Acknowledgment is made of your letter of April 6, 1928, with which you send me your file in re the application of Floyd W. Puffenburger for a conditional pardon.

It appears from the file that this man was convicted of bigamy, and on a plea of guilty sentenced to three years confinement in the penitentiary. You request me to advise you whether or not the trial judge had the authority to suspend this sentence. Section 2 of chapter 349 of the Acts of 1918, so far as applicable to the question here under consideration, provides as follows:

"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 and may also place the defendant on probation under the supervision of a probation officer, during good behavior, for such time and under such conditions of probation as the court shall determine. The court may subsequently increase or decrease the probation period and may revoke or modify any condition of probation. While on probation the defendant may be required to pay in one or several sums a fine imposed at the time of being placed on probation, or may be required to make restitution or reparation to the aggrieved party or parties for actual damages or loss caused by the offense for which conviction was had, or may be required to provide for the support of his wife or others for whose support he may be legally responsible.

"The court may revoke the suspension of sentence and cause the defendant to be arrested and brought before the court at any time within the probation period, or within the maximum period for which the defendant might originally have been sentenced to be imprisoned, whereupon, in case the imposition of sentence has been suspended, the court may pronounce whatever sentence might have been originally imposed; and in case the execution of the sentence has been suspended, the original sentence shall be in full force and effect, and the time of probation shall not be taken into account to diminish the original sentence. In the event that any person placed on probation shall leave the jurisdiction of the court without the consent of the judge, or having obtained leave to remove to another

locality violates any of the terms of his probation, he may be apprehended and returned to said court and dealt with as provided above." (*Italics supplied.*)

This section was construed by the court in *Richardson v. Commonwealth*, 131 Va. 802.

In my opinion this section is broad enough to authorize the trial judge in this case to suspend Mr. Puffenburger's sentence.

Trusting this gives you the desired information, I am

Very truly yours,

JNO. R. SAUNDERS,  
*Attorney General.*

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**PHYSICIANS—Fee for examination of prisoners.**

RICHMOND, VA., *March 19, 1928.*

HON. N. CLARENCE SMITH,  
*Commonwealth's Attorney,  
Tazewell, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of March 15th, in which you ask information in reference to fees allowed to jail physicians for their examination of men prior to their being sent to the State road force, also for examination of boys coming under the Juvenile Court prior to their admission to a reformatory.

I think section 4956 of the Code sets out clearly the fees which are to be paid in such cases, namely, 75c to a jail physician for his first visit and 50c for each additional visit on that day. I think under this statute the jail physician would only be entitled to 50c for each of these examinations after the first one.

Section 4960 provides for compensation to officers for services in certain cases. This section, in my opinion, when taking into consideration the surrounding circumstances, might, in the discretion of the court, allow a physician an amount in excess of that set out in section 4956 of the Code. Of course, this section would only apply where the court in which such case is will allow it.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**PENSIONS—Eligibility of public school teachers.**

RICHMOND, VA., *February 24, 1928.*

HON. DABNEY S. LANCASTER,  
*Secretary State Board of Education,  
Richmond, Virginia.*

MY DEAR MR. LANCASTER:

Your letter of January 18, in reference to the status of a teacher of the public schools who taught during the session ending in 1909, relative to the right of this teacher to a pension, has been received. The letter was inadvertently overlooked.

A careful examination of chapter 36 of the Code, having reference to pensions for retired school teachers, has been carefully examined. I can see no provision of law by which the teacher to whom you refer can be put upon the retired teachers' pension list. I think it very doubtful, after a careful consideration of section 796, that a teacher who

had retired between July 1, 1902, and July 1, 1908, can now be put upon the pension list. Section 797 was passed in 1908 along with other sections of the pension act, and it undertook to take care of, as of that date, teachers who had retired between 1902 and 1908. It cannot reasonably be construed as allowing teachers who were eligible under the act of 1908 an indefinite time in which to apply for and be put upon that list.

At any rate, section 976, providing that no person shall be placed upon the pension list after January 1, 1914, who shall not have taught at least five sessions since July 1, 1908, controls as to a teacher who ceased to teach at the end of 1909 school session.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### **PRISONERS—Time allowed for good behavior.**

RICHMOND, VA., *February 23, 1928.*

MR. F. J. HARRIS,  
*Civil and Police Justice,  
Radford, Virginia.*

DEAR SIR:

I am in receipt of your letter of the 3rd instant, in which you say that you have quite a number of violators of law in your jail and that you tell them that they will get one-third of their time off if they work and are of good behavior, and you state that some of your prisoners prefer to serve flat time rather than to work on the streets. You ask what you should do in a case of this kind and whether or not work constitutes good behavior.

Prisoners confined in the penitentiary are allowed ten days per month for good behavior. The provision of law to which you refer gives those persons who are sentenced to the roads or public quarries the same allowance. Therefore, all of the prisoners who work are entitled to one-third of their time off. I do not understand that it is optional with a prisoner to work, but that he must work if he is physically able to do so.

Work may constitute good behavior, but a prisoner may work and not properly behave and, if he doesn't behave and obey the rules and regulations in addition to working, I do not think that he is entitled to the time off. I understand that is the regulation of the penitentiary.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### **PUBLIC SCHOOLS—Financing.**

RICHMOND, VA., *February 17, 1928.*

MR. FLETCHER KEMP, *Superintendent,  
Arlington County Public Schools,  
Rosslyn, Virginia.*

DEAR SIR:

Your letter of the 3rd instant was duly received. You ask my opinion upon a number of questions, all of which have to do with orderly financing of the public schools and of school indebtedness of your county.

While I will endeavor to answer your questions seriatim, I have in mind the Act of the General Assembly of 1922, approved March 24, 1922, page 737, the Act approved February 26, 1926, page 59, and the Act approved March 26, 1926, page 902.



The first Act requires county school boards, in conjunction with the superintendents, to furnish the boards of supervisors an itemized estimate of the school necessities for the ensuing scholastic year. Should the boards of supervisors refuse to lay a levy to raise the estimated amount, the judge of the proper court may, in his discretion, order an election held during the month of June to take the sense of the voters of the county on the question of levy based upon the estimate of the school board.

The second Act limits the authority of school boards as to the amount they borrow, and the circumstances under which the loan may be contracted.

The third Act requires a public hearing by the board of supervisors, after thirty days' notice, before an increase may be made in the levy over that for the preceding year.

The evident combined purpose of the three Acts is to limit rigidly school indebtedness and to restrict school boards in incurring future indebtedness, to secure the adoption of a carefully considered, practical school budget, and to afford the tax-paying public an opportunity to express its wishes upon the question of increased taxation for school purposes before a levy is imposed upon public property.

First: You state that your school board now owes a past due obligation of \$20,000 to one of its creditors, and ask if the board has authority to borrow an amount sufficient to pay that obligation.

The school board has full authority to complete such a transaction. It would not contravene the Act prohibiting an increased indebtedness without the approval of the board of supervisors and would be a perfectly legitimate business transaction.

Second: You ask if the school board, during the latter part of the scholastic year, may borrow without incurring new indebtedness, for use during such year in anticipation of and payable out of the levy for the next school year.

Such a loan would be creating an indebtedness and should be made under the provisions of section 2 of the Act approved February 26, 1926, provided the amount borrowed was not in excess of the aggregate school tax for the year in which the money was borrowed.

Third: You state that your school board is indebted for a large amount legally borrowed prior to the enactment fixing the limit of short time loans at one-half of the current year levy, and ask if these Acts apply to the indebtedness you have mentioned.

In my opinion, none of the provisions of the Acts applies to indebtedness existing at the date those Acts take effect.

Fourth: This inquiry is largely a repetition of the first and third questions, except for the fact that you coupled school operation and liquidation of existing indebtedness, and seem also to inquire as to the authority of the school board to borrow, with the question as to the year in which the loan is payable.

I should say that the answer to the first and third questions covers this one.

Neither section of the 1926 Act refers to existing indebtedness. Unfortunately, that Act makes no provision for the orderly retirement of existing obligations, and I take it that that problem must be worked out with due regard for the amount of the debt and the capacity of local taxpayers to meet taxation burdens. The 50 per cent provision is inapplicable to other than current debts, and if, as you state, the school levy is not increased, the board can approve a loan without a public hearing on any question affecting the loan, such as is provided in section 1, sub-section 2½, of the Act of March 26, 1926, page 902. However, the levy to provide for the repayment of the loan must necessarily be contained in the budget, and the budget must be submitted to the public as provided in section 2 of that Act.

Fifth: You state that Arlington county has a school indebtedness of \$200,000, that your total yearly school income is \$250,000, that your total annual school expense is \$230,000, that you desire to pay off \$50,000, which will create a deficit of \$30,000 in

the current year's budget, that, if you can borrow \$30,000 this fall, you can pay off \$50,000 at the present time and save interest on \$30,000 until that amount is needed during the fall months, that this arrangement will not necessitate a tax increase and that it is approved of by the board of supervisors.

You ask if this arrangement can be made, with the approval of your board of supervisors, without a public hearing. This proposal is entirely within the authority of the school board.

To summarize, I am of the opinion that the school board is authorized to handle its finances in any way so that its indebtedness is not increased, and I believe that this can be done without the consent of the board of supervisors. In its financial operations, where it is found necessary to borrow, it will be best to have the consent of the board of supervisors, although I do not think it necessary where there is no increase of indebtedness, and it is only a matter of renewing existing obligations.

The board may borrow, with the consent of the board of supervisors, without a public hearing, as much as 50 per cent of the year's school income from taxes upon loans which are not repayable within that year, but which are repayable within five years.

The school board may, with the consent of the board of supervisors, after a public hearing, borrow the full amount of the year's revenue, such indebtedness to be repaid during the year out of the revenue which has been anticipated by the loan.

Should I have inadvertently omitted a satisfactory answer concerning any matter about which you wrote, I shall be pleased to have you call upon me for further services.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### POLICE JUSTICE—Power and jurisdiction of.

RICHMOND, VA., April 10, 1928.

HON. F. J. HARRIS,  
*Police Justice,*  
*Radford, Virginia.*

DEAR SIR:

I am in receipt of your letter of the 2nd instant, in which you state that a man who is convicted of operating a car while under the influence of liquor is deprived of his permit for a period of twelve months, under section 25 of the prohibition law, and ask whether this provision applies to first or second convictions. It applies to either or both.

You further state that, in suspending sentence in some cases that come before you, you put offender under a bond for a given length of time, and ask, if such a person is convicted during the period in which the bond is in effect, whether the bond may be collected and the person punished for the offense he has committed. You can both forfeit the bond and cause the arrest of the person and commit him to serve the unexpired portion of the term which was suspended.

I should like, however, to have you extend to me the manner of cases and your authority for suspending sentence. If your inquiry applies to prohibition cases, I do not understand that a police justice has authority to suspend sentence. Upon the other hand, there is a large latitude allowed a judge of juvenile and domestic relations courts in handling violators of all laws under 18 years of age.

You ask if a bond taken on Sunday of a person violating the law for appearance on the following day is legal. No case in Virginia has decided this question. In 25 R. C. L., page 1448, section 47, under the title "Bail and Bonds," it is said:

"The authorities seem to agree that it is lawful to take a bond on Sunday admitting a prisoner to bail, it being declared that such an act is in the nature of a work of charity."

Taking this to be sound principle of law and it often being the proper and charitable thing to do to admit a prisoner to bail on Sunday, I am of the opinion that, if the matter was ever tested, such a bond would be held valid and enforceable.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**PRISONERS—Funds of deceased convicts, disposition of.**

RICHMOND, VA., April 13, 1928.

MR. R. E. MARABLE, *Clerk,*  
*Corporation and Circuit Courts,*  
*Newport News, Virginia.*

DEAR MR. MARABLE:

I am in receipt of your letter of the 9th instant, enclosing copy of a letter written by you to Captain R. R. Penn, Superintendent of the State Farm concerning the handling of a check for \$121.07 for the balance due James Caruthers, No. 15538, deceased. You ask my opinion as to the handling of this matter.

I assume that Caruthers was a resident of Newport News. If so, his estate will be settled in your court and an administrator should be appointed for him who would collect his assets, pay his debts and distribute any balance, according to law.

In the absence of the application of any person to qualify upon his estate, it should be committed to the sergeant of your city. After paying the cost of administration and expenses attending his last sickness and the funeral, if any, the amount due the State on account of the costs taxed against him in his prosecution would be a preferred debt.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**POLICE OFFICER—Reward for seizure of stills.**

RICHMOND, VA., November 17, 1927.

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

DEAR COLONEL SPILLER:

I am in receipt of your letter of the 14th instant, in reference to the matter of rewards to city policemen for the seizure of certain copper stills, and I note the facts contained therein and have referred to the opinion of my former assistant, the late J. D. Hank, Jr., found on page 268 of the Report of the Attorney General for the years 1922-23, under date of December 6, 1922.

Although the law of rewards applicable to all officers is the same now as it was at that time, it is my opinion that city police are entitled to receive the fees and rewards provided for by the Layman law of 1924, as amended and re-enacted, and after careful consideration of section 2991 and 3511 of the Code of 1924, as applicable to the payment of rewards to city policemen, I am of the opinion that these sections do not prevent

the payment to city policemen of the rewards for the capture of stills, as provided for in section 20 of the Layman law.

Section 3511 does not include policemen in the class of officers prohibited from receiving from the State treasury fees or other compensation for services in a criminal case, though it provides that a city or corporation court may make an allowance to each of two constables, sergeants or policemen in lieu of all fees for serving criminal process of any kind. The capture of a still is neither service in a criminal case nor the serving of criminal process.

Section 2991 prohibits a policeman from receiving out of the State treasury fees or other compensation for services under the chapter in which that section appears. The prohibition laws have never been included in that chapter.

The payment of fees and rewards to city police is authorized and provided for under sections 20 and 46 of the Layman law. Section 46 of that law specifically charges a large class of officers, including police of cities and towns, with the duty of enforcing the prohibition laws of the State, and makes neglect, failure or refusal of such officers misfeasance in office, for which under the law they are liable to ouster from office; and it further provides that for every official service rendered in connection with the violations of the Act all such officers, "including police officers of cities and towns —" shall be entitled to and shall be paid the same fees as are now allowed by law in felony cases said fees to be paid as are now or may hereafter be prescribed by law in felony cases.

My opinion is strengthened, rather than weakened, by that provision of section 46 to the effect that, where the costs in misdemeanor cases are paid by the defendant or the prosecutor, the clerk shall pay the amounts due to officers and which they have not already received out of the treasury, directed to the officers entitled thereto. The provision for the repayment into the State treasury for payments already made to the officers named, including police officers, is a recognition of a lawful prepayment of fees in misdemeanor cases to all of the officers enumerated, and the fact that it does so recognize payment into the State treasury conclusively presumes the allowance and payment by the State treasury to such officers. You will also notice, under section 20, that rewards for the capture of stills are provided for by the provision requiring a report of seizures to be made by sheriffs to the circuit or corporation court and the payment, upon the certificate of such court, by the Auditor of Public Accounts, as other criminal expenses are paid.

Of course, where the possession of a still is an offense under city or town ordinances, provided for in section 37 of the Layman law, fines go to the city or town and no costs are chargeable to the Commonwealth and none is payable out of the State treasury.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**POLICE JUSTICE—Who may appear in prosecutions, cases of prohibition.**

RICHMOND, VA., *January 23, 1928.*

HON. W. W. G. DOTSON,  
*Commonwealth's Attorney,  
Wise, Virginia.*

DEAR MR. DOTSON:

I am in receipt of your letter of January 20th.

In reply thereto I call your attention to the second paragraph of section 34 of the prohibition law, which contains the following provision:

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

I also call your attention to the third paragraph of section 46 of the prohibition law, which provides:

"The Commonwealth's Attorney of the county or city in which preliminary hearings are to be had for the violation of this law, shall be notified by the trial officer a reasonable time before such hearings, in order that he may attend, \* \* \*."

In my judgment it is clearly the duty of the mayor, and this office has so ruled a number of times, to notify the Commonwealth's Attorney of the county in which the town is located of the time of hearing of all cases for violations of the prohibition law.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**PUBLIC PRINTER—Inferior grade paper for tax interrogatories.**

RICHMOND, VA., November 14, 1927.

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

MY DEAR GOVERNOR:

Acknowledgment is made of your request of recent date that I advise you as to the law with reference to the appeal by A. C. Goolsby, Esq., from the decision of the Public Printer accepting paper of an inferior grade to that bought for the Commonwealth to be used in the printing of tax interrogatories for the year 1928.

It appears that, pursuant to the provisions of sections 383 and 382 of the Code, Hon. Davis Bottom, the Public Printer, called for bids for certain paper stock to be bought for the Commonwealth for the above mentioned purpose. There were a number of bidders, all bids being under seal. Among these bidders were R. A. Cauthorne Paper Company and A. C. Goolsby Paper Company, both of this city. It appears that the Cauthorne bid was a little higher than the Goolsby bid, but that the sample of paper submitted by the Cauthorne Paper Company was much superior to the sample submitted by the Goolsby Paper Company and, therefore, pursuant to the powers conferred upon him by section 383, which provides that the Public Printer "shall purchase from the lowest responsible bidder, quality and price considered," the Public Printer awarded the contract to the Cauthorne Paper Company. It also appears that there was one other bidder lower than the Goolsby Company, but that the sample submitted by Cauthorne was also superior to the sample submitted by the lowest bidder.

No objection was made to the awarding of the contract to the Cauthorne Paper Company. It appears, however, that Cauthorne delivered the order for the paper to the Albemarle Paper Manufacturing Company and that company proceeded to manufacture the paper. Due to some defect in the manufacture of the paper, the paper delivered was of an inferior grade to that bought by the Public Printer from the Cauthorne Paper Company. Goolsby called the attention of the Public Printer to this fact, and, after investigating the matter, the Public Printer finally decided to accept the paper upon a reduction in the price of the same on account of the inferior quality of the paper delivered. From this action on the part of the Public Printer the Goolsby Paper Com-

pany has appealed in accordance with the provisions of the **last sentence** of section 382 of the Code, as amended. This section provides in part:

§“\* \* Any bidder feeling himself aggrieved by an award made by the superintendent of public printing may \* \* appeal \* \* to a board composed of the governor, auditor of public accounts, and secretary of the Commonwealth, which shall hear and determine the matters in said appeal; \* \*.”

I have had some doubt in my mind as to whether the matter here under consideration is strictly an appealable one, but, inasmuch as the public interest is involved, I am of the opinion that the statute should be broadly interpreted for the benefit of the public and, therefore, that the appeal board should consider and pass upon it.

It is my opinion, after a careful consideration of section 383 of the Code, that when the Public Printer awarded the contract to the Cauthorne Paper Company as being “the lowest responsible bidder, quality and price considered,” a contract was made between the Commonwealth and the Cauthorne Paper Company by which the Cauthorne Paper Company agreed and undertook to deliver to the Commonwealth, for the agreed price, paper in accordance with the sample submitted and the specification of the contract. When the Cauthorne Paper Company, or its sub-contractor, the Albemarle Paper Manufacturing Company, delivered to the Commonwealth an inferior grade of paper to that which the Cauthorne Paper Company had contracted to deliver, one of several courses was open to the Commonwealth acting through the Public Printer or the appeal board. First, the paper delivered could be rejected and the contractor required to deliver paper in accordance with the terms of his contract. If the contractor refused to do this, then I think that the Public Printer would be authorized to award the contract to the next lowest responsible bidder, quality and price considered, or, if it were deemed proper, new bids could be called for as if no award had been made.

I am further of the opinion, however, that in those cases, where the quality of the paper delivered was not very much inferior to the article contracted for, it would not be in excess of the authority of the Public Printer, or of the appeal board, to accept it at a reduction in price. This latter rule seems to be employed in the paper trade, and is provided for in the contract specifications of paper bought by the Federal Government. I am advised, however, that paper is accepted on a price adjustment basis only in those cases where the inferiority of the paper delivered is not very great.

I am frank to say that in matters where the Commonwealth is involved it is a dangerous practice to permit a contractor to deliver goods to the Commonwealth inferior to the article contracted to be delivered on an adjustment of the price on account of such inferiority, especially where the article can be contracted for only by means of sealed bids. There are cases unquestionably in which it would work a great and unjust hardship upon a contractor to decline to adjust the price where the inferiority of the article delivered was small, but the policy of the law would prevent the acceptance of an article greatly inferior to that contracted to be delivered upon any adjustment of price. I am unadvised, of course, as to whether the inferiority of the paper delivered in this case was great or small. This is a question to be determined in the first instance by the Public Printer and on appeal by the board.

Trusting this gives you the desired information, I am

Yours very truly,

LEON. M. BAZILE,  
*Assistant Attorney General.*

**POLICE JUSTICES—Authority to release prisoners after conviction.**

RICHMOND, VA., July 18, 1927.

HON. JOHN B. SPIERS,  
Commonwealth's Attorney,  
East Radford, Virginia.

MY DEAR MR. SPIERS:

Acknowledgment is made of your letter of July 16, 1927, in which you call my attention to the fact that the civil and police justice court of your city is in the habit of releasing prisoners from jail, after they have been convicted and sentenced, before the sentences have expired. You request my opinion as to the authority of the court to do this.

In response to your inquiry, I call your attention to the case of *Ex Parte Hazel Smith*, 124 Va. 791, 794 (1918), in which the court held that, after the expiration of the day on which an order of conviction was entered, the justice no longer had jurisdiction of the case for any purpose, except that of the entry of an allowance of an appeal at any time within ten days from the date of the last named order, and that, where the justice entered an order after the date on which sentence was entered, purporting to discharge such person from custody, the order was void.

You also call attention to the fact that the civil and police justice of your city is in the habit of discharging all persons against whom warrants have been issued for giving bad checks, provided such checks are made good and the costs paid.

I have read chapter 373 of the Acts of 1920 and chapter 292 of the Acts of 1926 with care and it seems to me, from my examination of them, that the police justice has not misconstrued the law in permitting this to be done. You will observe that chapter 373 of the Acts of 1920 provides that, if such check is paid upon notice or at any time previous to the trial or examination of such person before a justice of the peace, or if it is paid at any time before indictment by a grand jury, no presumption of a fraudulent intent shall arise; while it is provided by section 3 of chapter 292 of the Acts of 1926 that no such presumption shall arise, if the maker or drawer pays the drawee the amount due on the check, with interest and protest fees, within five days after receiving notice that such check, draft or order has not been paid to the drawee.

With these provisions in the statutes referred to, I cannot say that the construction placed thereon by the civil and police justice of your city is incorrect.

Sincerely yours,

JNO. R. SAUNDERS,  
*Attorney General.*

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**REGISTRARS—Appointment of.**

RICHMOND, VA., May 25, 1928.

MR. THOMAS W. BLACKSTONE,  
Secretary of Electoral Board,  
Accomac Courthouse, Va.

DEAR MR. BLACKSTONE:

I am in receipt of your letter of the 22nd, in which you ask for certain information concerning the appointment of registrars, judges and clerks for town elections and concerning the printing of official ballots for town elections.

Sections 84 and 86 are somewhat in conflict with section 2995 concerning the appointment of registrars and judges for towns. In consideration of the fact that section 2995 is included in chapter 121 of the Code, making general provisions for government

of cities and towns, and has to do directly with the appointment of registrars and judges of elections for towns, I should say that that section should govern wherever it is in conflict with sections 84 and 86 of the Code.

However, it is not in such direct conflict provided that registrars and judges are appointed prior to the first day of April, because, as you will notice, section 2995 provides that they shall be appointed not less than fifteen days before a town election and consequently may be appointed before the first day of April, as is provided in section 86, and the action of your board in appointing judges and registrars on the 14th day of March complies with the provisions of both sections 86 and 2995. Therefore, there can be no question of the legality of the appointment of the registrars and judges made by your board in March of this year.

I should say that the omission of a provision for the appointment of clerks in section 2995 was unintentional and that clerks should be appointed for town elections, as well as other elections, and that the authority of the board to do so under section 84 is ample.

Printing of ballots should be done by your board and can be done on Tuesday, the 29th day of May, as it is provided by section 155 of the Code that ballots shall be printed at the direction of the electoral board within thirty days preceding each election.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**REGISTRARS—Duty to post registration list.**

RICHMOND, VA., November 14, 1927.

HON. T. E. BRANNOCK, *Clerk,*  
*Circuit Court of Grayson County,*  
*Independence, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of November 10, 1927.

In response to your first question, the list to be posted by the registrar on the morning of the day of election, under authority of section 212, is a true copy of the list required by sections 205 and 211 of the Code as amended. This list should contain the names of every applicant, as provided by section 205, and the information as to whether the ballot has been returned, as provided by section 211.

In response to your second question, section 213 of the Code, as amended, does not provide when the ballot box containing the absent voters' ballots shall be delivered to the judges other than that it shall be delivered on the day of election. Under section 214 of the Code, as amended, the box is not to be opened until the close of the balloting. While, in view of the provisions of section 212 of the Code, it is not definitely clear whether ballots may be received and deposited in the box on the day of election, I am inclined to the opinion that, under authority of section 218 of the Code, the ballots should be received at any time during the day of election prior to the opening of the ballot box.

In response to your third question, in my judgment, the list which the registrar is required to keep, as provided for by sections 205 and 211 of the Code, is an official public document and, as such, open to the inspection of the public at all reasonable times.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*



**REGISTRARS—Duties of.**

RICHMOND, VA., May 7, 1928.

MISS VINNIE CALDWELL,  
Galax, Virginia.

DEAR MISS CALDWELL:

I am in receipt of your telegram of today, which I quote in full:

“Please mail me opinion on duties of town registrar in case where town poll books have been lost for six years. Are citizens who are qualified voters required to register before him, or is he required to secure complete and accurate list of such voters?”

The poll books of a town registrar having been lost, it becomes the duty of the registrar to secure another book and to proceed to make a new registration for such town.

There is apparent conflict between section 98 of chapter 10, providing for the registration of voters, and section 2995 of chapter 121, providing for general provisions for government of cities and towns.

Section 98 of the Code provides that

“Registrars in the 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 said district.”

This provision would seem to provide for the annual registration of voters by town registrars.

Section 2995, which pertains more particularly to the duties of registrars in cities and towns, provides:

“\* \* \* not less than fifteen days before any town election therein, appoint one registrar \* \* \*. The said registrars shall, before any election in said town, register all voters who are residents of the respective precincts of such town, and who shall have *previously registered as voters in the county, or either of them in which said town is situated, and none others.*” (*Italics mine.*)

The clerk of the Circuit Court should have a permanent roll of voters who were registered by the boards of registration appointed by the Constitutional Convention, together with a list of all voters who have registered in the precinct in which a town is located up to the present time.

The clerk of the court should certify to the town registrar a list of all of the voters of the precinct in which the town is located, containing the names of all of the voters of the precinct known to him to be residents of the town whose books have been lost.

Any person whose name is omitted from the list furnished by the clerk may appear before the clerk and examine his records to see whether or not his or her name appears upon the roll books which the clerk is required to keep of all voters of his county, and, if his or her name should appear upon the clerk's books, the clerk is to furnish the voter with a certificate to that effect.

Having the certificate of the clerk, the registrar should copy that name upon the new registration books. If there are any qualified persons residing in a town whose names do not appear upon the list furnished by the clerk, they should go to the registrar of the precinct in which the town is situated, and, if his or her name appears upon the books of the precinct registrar, his certificate to that effect will warrant the town registrar placing the name or names upon the town registration book.

If the name of any qualified voter who is a resident of a town appears on neither of these books, I am of the opinion that section 90 warrants the registrar placing his or

her name upon the town book, upon an affidavit of the voter that his or her name was on the old registration books.

If none of the above circumstances occur a qualified voter should register upon the precinct books on or before the 15th day of May and, having registered upon the precinct registration books, the registrar of the town should place his or her name upon the town registration books.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### REGISTRARS—Opening and closing of books.

RICHMOND, VA., *April 27, 1928.*

HON. P. A. JORDAN, *Registrar,*  
*Suffolk, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of April 26, 1928, in which you say:

"Please advise me as to special elections. There is no regular June election in this city this year, but there is a special election on June 19.

"Have I the right to open my books to register a voter at any time after and before the special election, after I have closed them on the third Tuesday in May, or do my books remain closed from the third Tuesday in May until after the special election on June 19?"

Under section 98 of the Code, your registration books will be open on and after June 13 and will not be closed again until thirty days previous to the November, 1928, election.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### REGISTRATION—Time for closing books.

RICHMOND, VA., *May 20, 1928.*

MR. W. H. LANKFORD, *Registrar,*  
*Franklin, Virginia.*

DEAR MR. LANKFORD:

Your letter of the 7th instant was inadvertently overlooked until today.

In it you ask as to the closing of your registration books annually after the third Tuesday in May until after the municipal election held on the second Tuesday in June, and I note your reference to section 98 of the Code.

I take it that you do not have a municipal election in Franklin this June, and that your inquiry is directed to the registration of voters for the special election of June 19 on the constitutional amendments.

Section 98 provides for the registration in towns having a separate registrar. Where a town has a registrar and the town is a part of a precinct in which both town and country people vote, registration may be done by the precinct registrar at any time up to and including the day of June 19 election.

Under section 2995, registrars of towns are only allowed to registrar voters who have already registered in the district in which the town is situated. The town registrar does not go through the usual form of registration provided by the Code, but simply at the request of a person already registered in the precinct puts that person upon the town registration books.

This office has held that, while a voter may register in the precinct in which the town is situated at any time, only such persons who have registered on or before the third Tuesday in May may be transferred to the town registration books, and that this registration on the town books must be done on or before that day.

In other words, the precinct books are opened at all times except for the period preceding the November election, whereas town registration books are closed after the third Tuesday in May until after the town election.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### REHABILITATION—Legal status of.

RICHMOND, VA., *January 20, 1928.*

MR. D. M. BLANKENSHIP, *Supervisor,*  
*Bureau of Rehabilitation,*  
*Department of Education,*  
*Richmond, Virginia.*

DEAR SIR:

Your letter of the 17th instant has been received. You ask of this office an opinion as to the present legal status of rehabilitation work in the State of Virginia, with special reference to the Acts of the General Assembly of 1920 and 1922 concerning rehabilitation work.

Chapter 392, page 583, Acts of 1920, provides for vocational training and rehabilitation of employees coming within the provisions of the Workmen's Compensation Act—employees injured in industry—the creation of a division of vocational rehabilitation within the Industrial Commission, an appropriation of \$10,000 out of surplus standing to the credit of administrative funds of the Industrial Commission, the cooperation of the Industrial Commission with the Federal government in the rehabilitation and training of employees injured in the course of their employment, and appointed the Industrial Commission a trustee to receive gifts and legacies.

The Act of 1920 was in anticipation of Federal legislation on the subject, but no reference was made in the Act to such prospective legislation. However, such an Act of Congress was passed June 2, 1920, providing an appropriation for the promotion of vocational rehabilitation of persons disabled in industry or in any legitimate occupation or otherwise. To secure the benefit of the appropriation, each State was required, in substance:

- (1) To accept by legislative action the provisions of the Federal Act;
- (2) To direct the board designated or created as the State Board of Vocational Education to co-operate in the administration of the Federal Act with the Federal Board for Vocational Education;
- (3) By legislation to provide a plan for the cooperation of the Industrial Commission;
- (4) To appoint a State Treasurer as custodian of funds appropriated.

By chapter 516 of the Acts of 1922, page 901, the General Assembly met the requirements of the Federal Act, passing an act covering the entire subject without referring to or repealing the Act of 1920. Considering the fact that the Act of 1922 carries provisions largely inconsistent with the Act of 1920, and being the last statute enacted, its provisions, wherever inconsistent with the provisions of the Act of 1920, prevail.

Previously, under chapter 73 of the Acts of 1918, the General Assembly had accepted the provisions of the Federal Smith-Hughes Act, making an appropriation for vocational

education in agriculture, trades and industries, and designated the State Board of Education as a State Board for Vocational Education, under the Smith-Hughes Act.

In my opinion, the legislation of the General Assembly has designated the State Board of Education as the State authority—in co-operation with the Industrial Commission—for the administration of both the State and Federal statutes and appropriations regarding vocational rehabilitation work in Virginia.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**RESIDENCE—What constitutes bona fide.**

RICHMOND, VA., June 28, 1928.

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

DEAR SIR:

Acknowledgment is made of your letter of June 26, 1928, in which you request me to advise you what constitutes a bona fide resident within the meaning of the game and fish laws.

It is absolutely impossible for me to furnish you with a rule which would determine every case that might arise. Residence is very largely a question of fact and must necessarily depend upon the facts in each individual case as it arises. The Court of Appeals held in *Williams v. Commonwealth*, 116 Va. 272, that 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. The Court further held that, where a legal residence was once acquired, it could be lost only by the combination of two acts: first, a physical removal; second, with the intention of abandoning the legal residence at the first place and acquiring a new legal residence at some other place. The clerk, of course, in each case before issuing a license should make inquiry to determine whether the applicant is a resident or not.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**RESIDENCE—Place of.**

RICHMOND, VA., June 12, 1928.

MR. J. T. FOREMAN,  
*Box 143,*  
*Holland, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of June 10, 1928, received this morning, in which you say in part:

"I moved from South Norfolk, Norfolk county, Virginia, to Holland, Nansemond county, Virginia, on the 5th of January, 1928, thinking I could transfer from one county to another with six months residence before general election. I requested a transfer from South Norfolk to Holland, Virginia. After getting it I find that you have to be a resident one year before you can transfer. So last week, I took the transfer back to South Norfolk and asked to be put back on their books, which they refused to do. Now, what I want to know is, how I am going to vote.

A resident of State, taxes paid and registered, but not on any qualified list. Please advise me at your earliest convenience what to do, as I certainly want to vote on the 19th, when the amendments are voted on."

It would appear from the facts stated in your letter that when you moved from Norfolk County to Nansemond County you moved with the intention of changing your legal residence from Norfolk County to Nansemond County. If this be true, I doubt very much if you have the right to vote anywhere until you have resided in Nansemond County one year. In the event that proposal No. 1 is ratified in the election on the 19th of June, you would then be entitled to vote in Nansemond County after having resided there six months.

I call your attention to section 18 of the Constitution, which reads as follows:

"Every male 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 General 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."

The last part of this section would indicate that once a person has changed his residence, no right to vote in his former place of residence, remained except when he moved from one precinct to another in the same county.

Trusting this gives you the desired information, I am

Very truly yours,

JNO. R. SAUNDERS,

*Attorney General.*

#### REAL ESTATE—Tax rate on.

RICHMOND, VA., July 18, 1927.

MR. THOMAS P. BEERY,  
*Harrisonburg, Virginia.*

MY DEAR MR. BEERY:

Acknowledgment is made of your letter of July 15, 1927, in which you say in part:

"The City Council of Harrisonburg recently called a meeting of the citizens to discuss the matter of increasing the local tax rate on real estate from \$1.75 to \$2.00. After considerable discussion of the matter, a vote was taken which showed a large majority against the proposed increase. Immediately following this meeting the City Council met and, disregarding the vote of the citizens, increased the rate to \$2.00. Would the council have a legal right to make this increase, or could they be enjoined from making the increase? Your reply on the subject will be greatly appreciated."

I have examined with care chapter 545 of the Acts of 1926, section 2½ of which requires the local governing authority of a community to give notice to the public before any local tax levy may be increased. The act, whoever, apparently leaves it within the discretion of the governing authorities as to whether or not the tax shall be increased, after the proper notice has been given and the public hearing provided for held.

It is, therefore, my opinion that the City Council did not exceed the authority conferred on it by law, when it increased the tax, however injudicious such an increase may have been from a political standpoint. It would seem that the only remedy in

such a case is at the ballot box, if the governing authority declines to follow the wishes of the majority of the people of a community with reference to tax increases.

Very sincerely yours,

JNO. R. SAUNDERS,  
*Attorney General.*

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**REAL ESTATE—Bond of executors.**

RICHMOND, VA., *August 10, 1927.*

HON. GLENN EDWARDS,  
*Commonwealth's Attorney,  
Hillsville, Virginia.*

MY DEAR MR. EDWARDS:

Acknowledgment is made of your letter of July 30, 1927, in which you send me a copy of the will of Franklin Branscome, deceased, of Snake Creek, Carroll County, and request me, after examining the same, to let you know whether it is necessary for the executors to give bond at this time, covering the value of the real estate which they are authorized to sell upon the death or marriage of the widow.

I have examined section 5570 of the Code, which governs this matter, and in my opinion the penalty of the bond should at this time be fixed so as to include the full value of both the real and personal property. I do not think this section can be construed so as to authorize the clerk to require a bond only for the personal property, when the will under which the qualification takes place authorizes a sale of the real estate.

Sincerely yours,

JNO. R. SAUNDERS,  
*Attorney General.*

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**REAL ESTATE—License to sell farms.**

RICHMOND, VA., *September 29, 1927.*

HON. JAMES C. PAGE,  
*American National Bank Bldg.,  
Richmond, Virginia.*

MY DEAR MR. PAGE:

Acknowledgment is made of your request of September 29, 1927 that I advise you whether Mr. D. C. Clarke, trading as the Louisville Real Estate Company of Louisville, Ky. is required to obtain a license in order to sell farms or other tracts of land at public auction in the several counties of this State.

As you recall, upon receipt of your communication we conferred with Hon. C. Lee Moore, Auditor of Public Accounts, and we are of the opinion that in order to sell farms or other tracts of land in the manner indicated it will be necessary for Mr. Clarke to obtain a license as a land agent under sections 54 and 55 of the Tax Bill, in each county in which he operates.

I further call your attention to the law creating the Virginia Real Estate Commission. In my opinion Mr. Clarke's operations are such as to require him to register under this law and obtain from the commission the license required by that statute.

Yours very truly,

LEON M. BAZILE,  
*Assistant Attorney General.*

**SCHOOLS—School boards, authority to charge tuition.**RICHMOND, VA., *February 21, 1928.*

MR. R. N. ANDERSON,  
*Division Superintendent of Schools,  
Lebanon, Virginia.*

DEAR SIR:

Your letters of the 11th ultimo and of the 6th instant have been received.

You ask, first, the constitutionality of the statute providing for high school tuition. I know of no case which has reached the Supreme Court in which the constitutionality of section 703 of the Code, allowing district school boards to charge for tuition in the high schools, has been passed on. In my opinion, such a charge is constitutional.

Second, you ask as to the legality of drawing money of the sinking fund from the county treasurer's hands and depositing the funds on time deposit at interest in local banks to the account of the school board. This may be done pursuant to section 773 of the Code. This section provides for an investment in bonds or any such other securities as the board may, with the approval of the division superintendent of schools, select. I presume that the bank will issue you an interest-bearing certificate of deposit and that this bond would be satisfactorily secured.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**SCHOOL BOARDS—Disbursement of tuition from non-resident pupils.**RICHMOND, VA., *February 16, 1928.*

DR. C. W. ANDERSON,  
*Arvonia, Virginia.*

DEAR SIR:

I am in receipt of a letter from you, undated, in which you say that in the county of Buckingham there is collected for tuition in its high schools from \$4,000 to \$5,000. I assume that this tuition is collected from non-resident pupils and that the amount you mention is collected annually.

You then ask if this money may not be disbursed directly to teachers instead of having it pass through the hands of the county treasurer at a cost of 5 per cent commission to him.

In my opinion, the money should pass through the hands of the county treasurer. He is a bonded officer and the only one who can handle State or county money under the present law. However, he is not entitled to 5 per cent commission on these funds. The commission to which he is entitled is fixed in the last paragraph of section 2431 of the Code, under sub-section entitled "Miscellaneous Items," the item providing that the "treasurer shall receive as compensation for his services in receiving and disbursing such funds one per centum of the amount of such funds. Such funds include \* \* \* and all other funds ordered to be received by the treasurer by the county, city or school authorities." This is the only provision by which funds collected for school tuition can be converted into the county treasury.

The treasurer's ordinary commission under section 2431 varies according to the amounts collected by him from as much as 7 per cent to as low as 3 per cent. The commission under the general provisions of section 2431 under the head of "local revenues" includes "taxes on real estate and personal property, licenses, merchants' purchases, and

all other subjects of taxation \* \* \* to be used for the benefit of the several counties cities, school districts, road districts, or magisterial districts in which such assessment are made." Clearly, tuition fees are not included in local revenues.

I advise you to consult with the attorney for the Commonwealth of your county.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**STATE INSTITUTIONS—Insufficiency of funds for expenses.**

RICHMOND, VA., *February 25, 1928.*

HON. E. R. COMBS,  
*Comptroller's Office,*  
*Richmond, Virginia.*

DEAR SIR:

I am in receipt of your letter of the 21st instant, in which you say:

"I am advised by two of the State institutions that they will not have on February 29, 1928, in their possession, sufficient funds to meet their payrolls covering personal services rendered during the month of February, 1928, and that for this reason their payrolls for these services will be submitted to me for payment on March 1, or within a day or two thereafter, such payments to be charged in the records of my office against the appropriations available for the appropriation years March 1, 1928, to February 28, 1929."

You then request my opinion on the following:

"May I lawfully pay out of appropriations becoming available March 1, 1928, approved payrolls covering services rendered during the month of February, 1928, and approved invoices covering goods contracted for and delivered prior to March 1, 1928?"

I also note that you call my attention to section 5 of chapter 136 of the Acts of 1926, page 234.

The chapter you quote has to do with the 1927-28 biennium appropriation for the several departments of the State government, and section 5 of that chapter expressly limits the expenditure of each State department to the amount carried in the appropriation. Only in a case of an emergency, and then with the consent of the Governor, can a department, institution, or any governmental agency, exceed its appropriation. This is coupled with the express provision that no reimbursement of an excess expenditure shall be made to cover a deficiency and it imposes a personal liability upon the head of the department making expenditures in excess of its appropriation and subjects him to removal by the Governor for neglect of official duty.

I am of the opinion that there is no authority in law for the payment by you out of appropriation for 1928-29 to any person or upon account of any invoice or contract, liability for which has been incurred for services prior to March 1, 1928, or for goods contracted for and delivered prior to that date, without the express consent and approval of the Governor in writing.

Should the Governor withhold his consent, resort should be had to the Legislature, now in session, for the passage of a deficiency appropriation bill.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*



**SUPERINTENDENT OF POOR—Holding office as commissioner of revenue.**

RICHMOND, VA., March 6, 1928.

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

MY DEAR MR. STEPHENSON:

In reply to your letter of March 3rd, in which you ask whether a superintendent of the poor can hold the office of deputy commissioner of the revenue, I beg leave to refer you to section 2702 of the Code of Virginia. This section in part provides 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 officer, elective or appointive, at the same time, except certain other offices mentioned in said section."

The office of deputy commissioner of the revenue is not one of the exceptions. I am of the opinion, therefore, that the superintendent of the poor cannot hold the office of deputy commissioner of the revenue.

I am

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**STATE ENTOMOLOGIST—Shipping insecticides and fungicides into State.**

RICHMOND, VA., March 15, 1928.

MR. G. T. FRENCH,  
*Chief Botanist and State Entomologist,*  
*Department of Agriculture and Immigration,*  
*Richmond, Virginia.*

DEAR SIR:

I am in receipt of your letter of the 8th instant, in which you ask a number of questions concerning the construction of the act approved March 27, 1922, being chapter 476 of the Acts of that year, in reference to the proper administration of the law in case of shipments of insecticides and fungicides into this State. I gather from your letter that you are especially anxious to be advised as to what you should do where there have been misrepresentations concerning the efficacy of the products shipped; whether or not insecticides include such articles as are intended for the use of man or animals, or to be confined to plant diseases and protection, and also to be advised as to the proceedings to be taken in the event that the property shipped into the State is adulterated or misbranded, as defined in the law concerning insecticides and fungicides.

Section 1 of the act, you will notice, makes it unlawful for any person to *manufacture, sell, or offer for sale*, within the Commonwealth, any insecticide or fungicide which is adulterated or misbranded. Section 2 provides that any person who knowingly or recklessly misrepresents the value of insecticides or fungicides for the treatment of trees, shrubs, vines, or other plant material, or to any animal for preventing, destroying, repelling, or mitigating any insect, fungus, or bacterial disease, or for accelerating its growth or productive power.

These two sections make persons violating any of the acts prohibited therein guilty of a criminal offense. I do not think that, where the articles have been manufactured in other states and sold by traveling salesmen for delivery in Virginia, the manufacturer

or seller who ships the article into Virginia is punishable under the Virginia law; while a person, though a traveling salesman for such a concern, who knowingly or recklessly misrepresents the value of the article for the purpose of defrauding another, is guilty of a criminal offense.

Section 3 gives to the Commissioner of Agriculture and Immigration plenary power to adopt and promulgate uniform rules and regulations concerning the enforcement of this law and, if the Commissioner has not acted pursuant to the authority given him, and there is necessity for such rules and regulations, it will be well for him to provide therefor.

Under the present law, pursuant to section 8, he may condemn any insecticide or fungicide which he has found after the examination and notice required in section 3 to be given to the person in custody of an article suspected of being adulterated or misbranded, provided that no contest of the defect in the article is made by the person in possession. You will notice that it provides that the article shall be confiscated and disposed of by destruction in such manner as the court may direct.

A practical application of the law would seem to provide for the taking of a sample, for the examination thereof, in order to ascertain whether or not it comes up to the analysis upon its brands or labels; that, if it does not analyze according to what may be called its guarantee, the Commissioner should notify the person from whom the sample was taken and he should be given an opportunity to be heard as to the correctness of the analysis; and, if the Commissioner is of the opinion that the analysis is correct and the article is adulterated or misbranded, he should certify the facts concerning the violation of law to the circuit court of the county or corporation or hustings court of the city and file a petition in such court asking to be allowed to destroy the adulterated or misbranded articles. While it is not plainly stated as to what authority is to be the final judge of the fact of adulteration or misbranding, I take it that such a question is determinable by the court.

The question of efficacy is upon a parity with that of strength and purity, and if it falls below the standard or the quality of a pure article of the character for which it was sold, it is adulterated.

The term insecticide is expressly made to include substances which have to do with insects infesting man and animals, as well as plant life.

It would seem to me that the department should base its administration of the law concerning misbranding and adulteration upon the representations contained upon labels of articles sold or misrepresentations made in writing and authorized by the manufacturer or wholesale dealer, and that it would be unwise for the department to undertake to test the efficacy of every article sold as an insecticide or fungicide which, it is claimed by the purchaser, does not produce the results as represented by the seller. However, that is a matter for your department. I cannot advise you that you may lawfully seize articles while in the custody of carriers.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**SHERIFF—Giving bond before clerk.**

RICHMOND, VA., *January 12, 1928.*

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

DEAR SIR:

You have called to my attention the fact that on the 31st day of December, 1927,

H. F. Keyser qualified before the clerk of the circuit court of Rappahannock county as sheriff, and executed a bond with personal security in the proper penalty, and that on the — day of January, without any order of the court, Mr. Keyser again appeared before the clerk and executed the bond in the same penalty with the same conditions, with a fidelity company as his surety.

The first qualification and bonds were according to section 2697 of the Code, while the second did not undertake to follow any of the provisions of that section, providing for new bonds. However, I am of the opinion that it is an inherent right of any officer who qualifies with sureties to appear before the proper authority and execute a new bond with other securities; that the bondsmen on the first bond would be liable for any default of the officer until a second bond was given and from that date the sureties on the second bond would be liable for default of the sheriff.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**STATE HOSPITALS—Receiving insane persons.**

RICHMOND, VA., *November 21, 1927.*

DR. H. C. HENRY, *Superintendent,*  
*Central State Hospital,*  
*Petersburg, Virginia.*

MY DEAR SIR:

Your letter of the 18th instant with reference to the matter of the commitment to your hospital of Wm. J. Robertson from the County of Pittsylvania has been received.

I note you say this patient has never been received at the hospital for the reason that he appeared to the authorities of the county to have recovered before being sent for, and that Dr. G. O. Emerson has written requesting you to give this man a discharge, and asking that the hospital send for him in order to give him an examination prior to his discharge. You state that to have him carried to the hospital for examination would incur considerable expense, and ask if there is not some simpler way to ascertain Robertson's present mental condition and manner of discharge.

A careful examination of the Code in reference to the committal of insane persons to hospitals, or in the discretion of the commission finding the person on examination insane, leads me to the conclusion that the statute has not provided a short cut for the discharge of an insane person so far as hospital authorities are concerned.

There are two methods of dealing with a person judged insane by a commission:

1—To commit him to the sheriff for ultimate delivery to a hospital.

2—To parole him in the custody of friends, they giving bond for his care.

The only provision for the discharge of an insane person committed to a hospital is contained in section 1028 of the Code, which provides that after an insane person is admitted to a hospital he shall be detained until the superintendent and his assistants shall have ample opportunity to observe and examine him, and if he is, in their opinion, not insane he shall be returned by the hospital authorities to the county or city from whence he was committed with a certificate of discharge. It would certainly be a very loose practice for a superintendent of an insane hospital to discharge a patient as sane who had formally been adjudged insane by a commission until he had been conveyed to a hospital and the proper authorities has had ample opportunity to examine and judge him.

From your letter I am not advised as to the present custody of Robertson. If he has been committed to friends under section 1040 of the Code, he may by such friends

under section 1042 be delivered to the sheriff of the county or sergeant of the city, according to the condition of his bond, and such officer is directed to carry such person before a judge or justice of his county or corporation, and the same proceeding shall be had as in the case of the person brought before a judge or justice under his warrant under section 1017. You will see that this section provides for the *re-examination* before a commission of a person who is declared insane who has not been committed to and received in a hospital.

My suggestion to you in this case is that you write Dr. Emerson to this effect, and to save you time I am enclosing copy of this opinion which you may forward to him.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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### SCHOOLS—Handling of finances.

RICHMOND, VA., *March 31, 1928.*

HON. J. WALTON HALL,  
*Superintendent of Schools,  
Ashland, Virginia.*

MY DEAR MR. HALL:

Acknowledgment is made of your letter of recent date, in which you ask several questions with reference to the handling of school finances under the new School Code.

At the outset let me say that, in my opinion, this act is not an emergency act, and will not go into effect until sometime in June. Therefore, I think that the school taxes for the year 1928 could be laid under the old law, which is still in force, and there would be no change for this year. Of course, under section 698 of the new Code the Board of Supervisors, in lieu of making a school levy, would have the authority to make an appropriation for the schools. In this event, the money so appropriated would be expended in accordance with the provisions of the new law.

Answering your other question specifically, I am of the opinion that the Board of Supervisors has the authority, for the year 1928, to levy district taxes just as it has heretofore, and that, when a district tax is laid, the proceeds must be expended in that district. I do not think that the board would have the authority to expend funds heretofore raised in one district outside of that district, even after the School Code goes into effect. I have very grave doubts as to the power of the General Assembly to authorize the expenditure of funds derived from a district tax outside of the district in which they were raised, and certainly the General Assembly has not so provided in the new Code. In my opinion, the town of Ashland school district is included in the territory in which the county school tax must be laid.

I call your attention to section 698 of the School Code, which provides in part that councils in the incorporated towns in any county in the State are authorized to levy an additional tax of not more than one dollar for the support and maintenance of schools in such town. This tax, of course, would be in addition to the county tax.

After a careful consideration of sections 644 and 698 of the new School Code, I am of the opinion that the Board of Supervisors may repay a loan from the Literary Fund and the interest thereon from either the county school levy or the district tax, whichever the board may, in its discretion, determine to do.

Trusting this gives you the desired information, I am

Sincerely yours,

LEON M. BAZILE,  
*Assistant Attorney General.*

**SEARCH WARRANTS—Affidavits necessary.**RICHMOND, VA., *April 2, 1928.*

HON. WILLIAM B. BROADDUS, JR.,  
*Commonwealth's Attorney,*  
*Martinsville, Virginia.*

MY DEAR MR. BROADDUS:

I am just in receipt of your letter of March 30, in which you ask my advice as to why an affidavit is not necessary in view of section 4482-a of the Code of Virginia, by which, I presume, you refer to the section following 4822, but it seems to have been erroneously numbered 4482-a.

In this connection, it will be necessary for me to briefly explain the legislation concerning written affidavits upon application for search warrants.

The Mapp law of 1918, section 22, provided for the issue of search warrants upon "complaint on oath." The practice was almost universal to issue search warrants without a written complaint or affidavit. This was so generally the practice that during the 1920 session of the Legislature Senator Deal, of Norfolk, was the patron of a bill providing that no search warrant should issue until there was *filed* with officers authorized to issue search warrants an *affidavit*.

During the 1924 session of the General Assembly the Mapp prohibition law was revised and re-enacted, and the provision for the issue of search warrants was put in section 31 of the Layman law, this section providing for the issue of search warrants and basing the issue thereof upon "complaint on oath", thus adopting the language of the Mapp act instead of the language of the Deal bill.

While I have personally never been called upon to make a ruling upon the necessity for a written affidavit, under the Layman law, I understand that Colonel Thomas Whitehead, a special assistant to the Attorney General, in the Prohibition Department, has advised that no written affidavit is necessary.

I am further advised that Judge Joseph W. Chinn ruled to the same effect in a case recently decided in the Circuit Court of Westmoreland County that a written affidavit was unnecessary.

The Court of Appeals has never been called upon to pass upon the question you ask me.

Very sincerely yours,

JNO. R. SAUNDERS,  
*Attorney General.*

**SHENANDOAH NATIONAL PARK ASSOCIATION—Subscriptions.**RICHMOND, VA., *December 30, 1927.*

HON. W. E. CARSON, *Chairman,*  
*State Conservation and Development Commission,*  
*Riverton, Virginia.*

MY DEAR MR. CARSON:

Acknowledgment is made of your letter of December 20, 1927, which reached me at a time when all of us were busily engaged in trying to complete the Commonwealth's briefs in the cases on the January docket of the Court of Appeals, and this is the first opportunity that I have had in which to reply to your letter. As you doubtless know, this is one of the matters of the office which was referred to Mr. Bazile to handle and he has practically had charge of it, though, of course, I have been conversant with what he has done and have concurred in his views.

I note that you say after going over the letters of Messrs. Hildebrandt and Nisbet that I allowed them \$18,150 on their claim. I did not allow this item, but pursuant to a resolution of the Shenandoah National Park Association, Incorporated, I had a conference with Messrs. Hildebrandt and Nisbet with a view of settling the controversy existing between them and the Association, during part of which conference Mr. Fippin was present and furnished us the figures on which the \$18,150 was reached. He informed us that the total subscriptions were \$800,000, of which a large part had already been collected. It appeared that a large quantity of land had been donated in addition to the subscriptions. A general discussion resulted, during which I read to Messrs. Hildebrandt and Nisbet my opinion of December 2, 1926, to Colonel H. J. Benchoff, President of the Association, in which, at the joint request of Colonel Benchoff and Mr. Rinehart, I construed the contract between the Bankers Service Corporation and the Shenandoah National Park Association, Incorporated.

Messrs. Hildebrandt and Nisbet stated that they agreed with the construction placed on the contract by my letter to Colonel Benchoff, but stated that it had been agreed that the City of Richmond was to reimburse them \$4000 for the expense incurred here in return for their waiver of compensation on donations made in the City of Richmond. A letter was produced to this effect, and, in my opinion, both in law and in justice, the Association is entitled to this \$4000.

If the total subscriptions amount to \$800,000, and the whole matter was to be settled at this time, which I understood was the request of the Association in transmitting the matter to me, the Bankers Service Corporation would be entitled to 10% of this \$800,000, or \$80,000. In addition to this, they would be entitled to the \$25,000. In my letter of December 2, 1926, they were not required to return this, unless their total compensation, including the \$25,000, amounted to as much as \$125,000. A claim was made for compensation on the donations made by the railroads, but this claim was finally reduced to \$1150 on the donations made by the S. A. L. and A. C. L., and waived as to the other railroads operating in the City of Richmond.

Exclusive of the real estate on the figures furnished me, the Association was entitled to 10% on \$800,000, or \$80,000 to retain the guarantee fund of \$25,000. \$4000 on account of its release of claim on the Richmond donations, and \$1150 on account of the subscriptions of the S. A. L. and A. C. L. Railroads, making a total, exclusive of the real estate, of \$110,150. I was informed that the Association had already been paid \$92,000, leaving a balance of \$18,150. To settle the matter in full, Messrs. Hildebrandt and Nisbet offered to take the \$18,150, and on the bases that the figures furnished me by Mr. Fippen were correct, I told them that I would recommend this settlement, which I did through my assistant, Mr. Bazile.

At the meeting of the Conservation Commission I am advised by Mr. Bazile, which information is confirmed by your letter, that some question was raised as to whether the Bankers Service Corporation, or its assignee, is entitled at this time to compensation on the uncollected subscriptions secured for the proposed Shenandoah National Park. So far as I am advised, this was the first time that any question was raised as to whether all of the money is now due the Shenandoah National Park Association.

I have examined the contract with care and observe from the fourth paragraph thereof that it is provided:

"The employer agrees to pay to the employee for its said services a commission of ten per cent on *all donations of money and land made to the employer* \* \* \*."

In paragraph 8 of the contract it is provided:

"It is mutually agreed that the employee is hereby granted the exclusive right to solicit subscriptions and donations for the employer within the territory covered by the agreement or by written notice as aforesaid and that it shall be entitled to

its commission on all donations and subscriptions received by the employer from sources within such territory regardless of whether *such subscriptions or donations are obtained by the employee or not, except \* \* \**."

The contract, I am advised, was drawn by the Bankers Service Corporation, and is, therefore, to be more strongly construed against it.

It will be seen that its compensation is based on donations of money and land, while the eighth paragraph thereof draws a distinction between subscriptions and donations. In view of this, it is my opinion that the commission due at present is only on that portion of the fund which has already been paid, as the contract clearly draws a distinction between a donation and a subscription.

A subscription, in my opinion, does not become a donation until paid. There can be no question about the fact, however, that the \$4000 is now due the Bankers Service Corporation on account of its waiver of the Richmond Campaign and ought to be paid. While the item of \$1150 on the two railroads' subscriptions mentioned above may be open to dispute, it must be remembered that the purposed settlement takes no account of any donation of land, which, if allowed, I am advised would considerably exceed the amount of \$1150.

I would not have agreed to recommend the above settlement if the Shenandoah National Park Association had not requested me to finally adjust the dispute existing between the Association and the Bankers Service Corporation. Of course, my recommendation of the sum of \$18,150 was based upon the accuracy of the figures furnished me by Mr. Fippen. If, as you say, only \$521,361.38 has been collected on account of the \$800,000 pledged, of course only 10% of that amount would now be due the Bankers Service Corporation subject to any credit for payments thereon, if the Commission wishes to stand on its legal rights and settle with the Bankers Service Corporation and its assignee only when the donations are collected.

I should, say, however, that I have carefully re-examined my opinion of December 2, 1926, to Colonel Benchoff and I am of the opinion that it is correct, and that it properly construed the contract between the Bankers Service Corporation and the Shenandoah National Park Association, Incorporated, and that when settlement is finally made with the Bankers Service Corporation, or its assignee, in the absence of a compromise, payment will have to be made in accordance with the rules there laid down, with the exception of the item of \$4000 which is due the Bankers Service Corporation at this time on account of its waiver of commissions on the Richmond donations.

Very sincerely yours,

JNO. R. SAUNDERS,  
*Attorney General.*

#### STATE EMPLOYEES—Bonus.

RICHMOND, VA., April 12, 1928.

HON. E. R. COMBS, *Comptroller,*  
*State Library Building,*  
*Richmond, Virginia.*

DEAR MR. COMBS:

Acknowledgment is made of your request of several days ago that I advise you, in view of the House Resolution adopted March 9, 1928 (H. J. 782), whether you are authorized to pay the item of \$100.00 directed by that resolution to be paid to the Honorable William B. Fitzhugh. You will recall that early in March you informed me that this item was a bonus and I advised you, under date of March 15, 1928, that, in view of the provision of section 3462 of the Code, as amended by an act approved March 14, 1928, it could not be paid.

Paragraphs two and three of section 3462 of the Code, as amended, read as follows:

"The provisions of this Act shall apply to the present and subsequent sessions of the General Assembly.

"It is further provided that in consideration of the increases granted in this Act no bonuses shall be granted to the employees whose salaries are fixed in the preceding sections."

This law having been passed by the General Assembly, neither house by itself is authorized to direct the payment of a bonus to the employees mentioned in this and the preceding sections of the Code, as amended.

On examination of the House Resolution of March 9, 1928, I find that this payment was directed to be made to Mr. Fitzhugh not as a bonus, but for extra services, the resolution reading, so far as is applicable, as follows:

"Mr. Jones of Richmond city offered the following resolution:

"Resolved that the Clerk of the House issue warrants approved by the Speaker and payable out of the contingent fund in favor of the following employees, viz:

"William Bullitt Fitzhugh, extra services \$100.00, which was agreed to."

A bonus is defined in Webster's New International Dictionary, 1928, as "something given in addition to what is ordinarily received by, or strictly due to the recipient;" and as "money, or other valuable given in addition to an agreed compensation."

It appears from the letter of Senator Keezell written you under date of March 27, 1928, that this allowance was made Mr. Fitzhugh for extra services on account of the fact that he performed, during the session, a very large part of the duties of the Sergeant at Arms of the House, who was kept from his post on account of illness.

The House of Delegates having allowed this item for extra services, I am of the opinion that it should be paid as it cannot be regarded as a bonus, if paid for extra services rendered by Mr. Fitzhugh.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### STATE OFFICERS—Date for giving bond, where required.

RICHMOND, VA., January 17, 1928.

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

DEAR MR. MOORE:

I understand from you that several county and city treasurers handling State funds qualified in court, or before clerks, by executing their official bonds on the second or third day of January.

The statute provides that, unless such an officer qualifies on or before the first day upon which his term begins, his office shall be vacant.

You ask whether or not officers qualifying on the second or third day of January of this year are legally qualified, or their offices vacated, pursuant to section 2697 of the code.

This year, the first day of January falling on Sunday, the next day was a public holiday, pursuant to section 5758 of the Code.

The Supreme Court of Appeals in *Bowles v. Brauer*, 89 Va. 466, and *Lakeside Inn v. Commonwealth*, 134 Va. 696, held that, irrespective of statute, Sunday is *dies non juridicus* and that any act which may be done on Sunday may be done on the following day.

Monday following Sunday, January 1, being a legal holiday, I am of the opinion that



any officer who qualified on either the second or third of January is a legally and duly qualified officer, and that bonds taken upon either of such days are valid.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**SCHOOL TRUSTEES—Election of.**

RICHMOND, VA., June 23, 1928.

HON. HARRIS HART,  
*Superintendent of Public Instruction,  
State Board of Education,  
Richmond, Virginia.*

MY DEAR MR. HART:

Acknowledgment is made of your letter of recent date, in which you request my opinion as to the term for which the school trustees for the city of Richmond are elected.

In my opinion this matter is governed by section 27-a of chapter 318 of the Acts of 1926, entitled an act to provide a new charter for the city of Richmond. This section provides that the council of the city in joint session on the first Monday in June shall elect nine members of the city school board, "the terms of which officers \* \* \* so to be appointed shall be two years from the first day of July succeeding their appointment except as herein otherwise provided."

I, therefore, concur in the opinion given by Hon. James E. Cannon, City Attorney, to Hon. Alf. H. McDowell, City Clerk, under date of June 1, 1928.

Very truly yours,

JNO. R. SAUNDERS,  
*Attorney General.*

**STATE TEACHERS' COLLEGE—To whom chairman shall make report.**

RICHMOND, VA., October 25, 1927.

HON. JOHN PRESTON McCONNELL, *President,*  
*State Teachers College,*  
*East Radford, Virginia.*

DEAR SIR:

The act of the Assembly to which you refer in your letter of the 24th instant is found on page 324 of the Acts of 1926, instead of on page 86.

You ask to whom your report should be made. Section 986 of the Code of 1924 provides that it shall be the duty of the chairman of the board of visitors or the president of every State institution which is educational in its character to cause to be made out a report for the year ending the thirtieth of June preceding, and to forward the same on or before the first day of October to the Superintendent of Public Instruction.

My conclusion that the Superintendent of Public Instruction is the proper person to whom to address the report concerning the absence of employees is because of that paragraph of the law which says that a report of absence from duty shall be transmitted with the annual report of the departments and institutions, and as the Superintendent of Public Instruction is the proper person to whom to make your annual report, I should report to him a record of absences as provided by the law to which you refer.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**SCHOOL BOARDS—Pooling of school funds Henrico County.**

RICHMOND, VA., November 2, 1927.

E. Q. HUNTER, ESQ., *Trustee,*  
*Henrico County Public Schools,*  
*Glen Allen, Virginia.*

MY DEAR SIR:

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

"It has been suggested by the superintendent of schools of Henrico county, and concurred in by Mr. Harris Hart, Superintendent of Public Instruction, that the school funds of Henrico county be pooled.

"This includes the county levy and the district levies. At present each magisterial district has a different levy.

"Since the effective date of the unit law, the finances of each district have been kept separate and paid out for schools in their respective districts. The county levy and State appropriations are divided between the several districts according to the school population."

You then request my opinion as to the right of the board to pool the county and district school funds.

In view of the provision of section 1 of chapter 398 of the Acts of 1920, which requires both the county and district to raise sums by a tax on property, and in view of the provision contained in the last sentence of section 4 of chapter 423 of the Acts of 1922, creating the county school boards, which reads "nothing in this act shall be construed to affect the present plan of levying district as well as county school taxes nor to affect the obligations of any district for bond issues for school purposes or other debts peculiar to that district," it is my opinion that a tax raised by a district levy cannot be used outside of the district or for a purpose other than that for which it was laid.

Trusting this gives you the desired information, I am

Very truly yours,

JNO. R. SAUNDERS,  
*Attorney General.*

**SERGEANTS—Fee for serving summons, payment of.**

RICHMOND, VA., November 3, 1927.

HON. A. S. J. WHEELER, *Sergeant,*  
*The City of Hopewell,*  
*Hopewell, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of November 2, 1927, in which you say in part:

"I most respectfully ask you to favor me with an opinion as to whether or not I can be compelled to serve a summons or other legal process for a defendant in a criminal proceeding or trial without first being paid therefor."

It is my opinion that it is your duty to serve summons or other legal process for a defendant in a criminal proceeding without being first paid therefor.

Section 8 of the Constitution entitles every person accused of crime "to call for evidence in his favor." I am of the opinion that this gives him the right to do so without advancing the fees of the officer directed to obtain this evidence for him by summoning the necessary witnesses.

Trusting this gives you the desired information, I am

Very truly yours,

JNO. R. SAUNDERS,  
*Attorney General.*

**STATE HOSPITAL—Appropriations for erection of separate unit for voluntary pay-patients.**RICHMOND, VA., *September 26, 1927.*

HON. FRANK BANE,  
*Commissioner of Public Welfare,  
Richmond, Virginia.*

MY DEAR MR. BANE:

Acknowledgment is made of your letter of September 23, 1927, in which you say:

"It has been proposed that one or more of the State hospitals for the insane erect a separate unit devoted to the care of voluntary pay-patients, and that said patients be charged from \$20.00 to \$30.00 per week.

"In the event that such a plan is put into effect, I wish to know whether the balance accruing from the operation of such a unit can be used altogether for the betterment of the individual hospital at which the unit is located. In other words, if the Western State Hospital should receive an appropriation of \$400,000 for the year 1928, and if a unit there shows a profit of \$40,000, will the Western State Hospital be allowed to expend for the year 1928 the sum of \$440,000, or will the individual hospital be restricted to its original budget and such balances as may accrue be turned into the State treasury?

"The General Hospital Board has requested that I get a very definite opinion on this matter prior to its meeting the first part of October."

In response to your letter I have examined section 10 of chapter 33 of the Acts of 1927 with care, and, from my examination of sub-sections (c) and (i) thereof, it is my very definite opinion that any money received by a hospital from such a project must be paid into the general fund of the State treasury and thereafter cannot be paid out, except in pursuance of appropriations made by law.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**SCHOOLS—Authority to make loan from Literary Fund.**RICHMOND, VA., *August 10, 1927.*

W. J. EDMONDSON, ESQ.,  
*Superintendent of Schools,  
Abingdon, Virginia.*

MY DEAR MR. EDMONDSON:

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

"We have a peculiar situation in the community known as Tumbling Creek. We wish to build a school house in that section and the Mathieson Alkali Company own all the mineral rights on every piece of land in that section. We can get a clear title with that exception. So far as we know, there are no minerals on the surface and possibly none below the surface. In order to build the school house, it will be necessary to make a loan from the Literary Fund.

"We would consider it quite a favor if you could make an exception as to the title because of the circumstances which I have above mentioned. Unless some arrangement of this kind can be made, it will be impossible to build a school house in any part of that territory."

In reply I beg to say that section 762 of the Code of Virginia, relating to loans from the Literary Fund, is as follows:

"Before making any loan under this chapter, the State Board of Education shall be satisfied that the school district or board borrowing the money has a good

and sufficient title in fee to the real estate on which the proposed building is to be erected, or that the same has been leased by the local school authorities for a period of twenty years, or more, upon such terms that there is no liability of the loss of any money that may be loaned under the provisions of this chapter, and that the same is free from incumbrances, and shall take proper measure to secure the expenditures of the money for the purpose for which it is loaned; and in cases where loans are made for the enlargement of school houses, previous loans thereon made from the literary fund shall not be considered an incumbrance within the meaning of this section; but in no case shall the total amount of loans from the literary fund be in excess of the amount herein prescribed, nor more than two-thirds of the cost of such school house and the addition thereto."

In view of this section, it would be impossible for the State Board of Education to make a loan for the erection of the school house you mention unless the land is either conveyed in fee simple or leased for 20 years, and, in my judgment, there should be, in case of lease, a covenant that the lessor would not work the mines under the property leased or otherwise interfere with the use of the property for school purposes during the term of the lease.

Very sincerely yours,

JNO. R. SAUNDERS,  
*Attorney General.*

#### SCHOOLS—Establishment of depository on default by treasurer.

RICHMOND, VA., *August 10, 1927.*

HON. HARRIS HART,  
*Superintendent of Public Instruction,  
State Board of Education,  
Richmond, Virginia.*

MY DEAR MR. HART:

Acknowledgment is made of your letter of August 8, 1927, in which you call attention to section 732 of the Code and to the situation existing in Buchanan county due to the failure of the treasurer to settle his accounts. You then say in part:

"Some time ago the State Board approved a loan of \$15,000 for school-house construction in Buchanan county. The local board is now in much need of this fund and we are in a position to send it.

"Section 732 of the Code provides that in case a treasurer does not pay a warrant authorized by the school board, or does not make satisfactory report as to the non-payment of such warrant, then the county school board is authorized to establish a depository other than the treasurer's office for the receipt of school funds. This statute does not apply, of course, in reference to the pending loan, or other State funds, because the money has not been sent to the county treasurer and he has had no opportunity to refuse payment.

"Will you please advise me if there is any other statute under which State money can be withheld from Buchanan county or any other law whereby the local board can establish a satisfactory depository? The situation there is becoming serious, and, unless State funds may be sent in some fashion, the school board will be much embarrassed, and, what is of far more significance, school children may be denied certain facilities."

I have been unable to find any other statute relating to this subject, except section 732 and its companion section 731 of the Code. It seems to me from a reading of these sections that, if the treasurer has made default in the payment of any school warrant when he had in his hands sufficient funds to pay such warrant, the board would be justified in designing the depository provided for by sections 732 and 733 of the Code.

I know of no specific section of the Code which would prohibit State funds from being

paid to the treasurer, except on general principle. I have advised the Auditor not to transfer any State funds to the treasurer of Buchanan county in view of the default made by him in the settlement of his accounts with the Commonwealth, and for the additional reason that his bond does not comply with the provisions of the statute in such cases made and provided. You are no doubt familiar with the correspondence passing between this office and the Governor, and this office and the Auditor of Public Accounts, with reference to the situation in Buchanan county, and with section 2791 of the Code which authorizes the Governor to suspend the treasurer and appoint someone to take his place so far as the handling of State funds is concerned.

Very truly yours,

JNO. R. SAUNDERS,  
*Attorney General.*

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**STATE HOSPITALS—Authority to carry liability insurance.**

RICHMOND, VA., August 5, 1927.

HON, CHARLES A. OSBORNE,  
*Commissioner of State Hospitals,  
Richmond, Virginia.*

MY DEAR MR. OSBORNE:

In response to your request of recent date that I advise you whether the Boards from various hospitals have the authority to carry liability insurance to cover accidents resulting from the use of cars owned by these State institutions, I am of the opinion that the State cannot be sued for an accident resulting from the negligence of the operators of such cars, and the institutions being a part of the State likewise cannot be sued for injuries resulting from the negligent operations of automobiles owned by such institutions. See *Graves v. Eastern State Hospital*, 105 Va. 151.

I am further of the opinion that in view of the fact there is no liability upon the State in such cases that in the absence of express authority from the General Assembly the hospitals would not be authorized to expend public funds for the purpose of carrying liability insurance.

I call your attention to the fact, however, that the authorities in charge of such institutions should exercise the utmost care in selecting competent drivers for State owned vehicles, as the driver of such vehicles is unquestionably liable for injuries inflicted through his negligence. If the officers employing such agents fail to select a reasonably competent driver they to might incur liability.

Trusting this gives you the desired information, I am

Very truly yours,

JNO. R. SAUNDERS,  
*Attorney General.*

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**STATE TEACHERS' COLLEGE—Payment of salaries of teachers taking additional training.**

RICHMOND, VA., August 8, 1927.

DR. SAMUEL P. DUKE, *President,*  
*State Teachers College,*  
*Harrisonburg, Virginia.*

MY DEAR DR. DUKE:

Your letter of the 2nd has been duly received and I have given it very careful con-

sideration. I note that you wish my opinion as to the legality of the following resolution recently adopted by the Board of Virginia Teachers Colleges:

"This board authorizes the presidents of the several Teachers Colleges to pay to instructors that may be on leave of absence for additional training in their work in such institutions their regular salaries, less amount required to furnish a satisfactory substitute, upon the said instructors giving a note to repay the college the difference between these sums in case the instructor does not return to the service of the college after the expiration of his leave of absence."

I have never had occasion to pass upon the legality of such a resolution and, though I appreciate the desirability of some such action in a few isolated cases, I am strongly inclined to the opinion that such resolution is beyond the authority of the Board. In all the departments of the State government there has been a long-standing custom, which has been recognized by the executive officers of the State, to grant employees two weeks annually while receiving their regular salaries, and that is the limit of time during which an employee may have a vacation with pay. If any Board, Institution, or other branch of the State government, could lengthen these vacations with pay, there might be cases in which embarrassment would result, if not actual loss.

I have discussed this matter with Mr. Crosby, Auditor of the State Board of Education, who concurs in this opinion.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### SERGEANTS—Fee and commissions of.

RICHMOND, VA., July 21, 1927.

HON. C. C. CURTIS,  
*City Sergeant,*  
*Newport News, Virginia.*

MY DEAR MR. CURTIS:

With further reference to your letter of recent date in which you say:

"Section 3487 of the Code provides a fee of 25 cents to the Sergeant each for receiving and discharging a prisoner. Section 3510 provides for a fee to the jailor of 50 cents for the *first* commitment. Section 3511, in the last sentence, would seem to provide that these three fees would be due upon the discharge of the prisoner from jail. I have not heretofore been receiving them but since my attention has been called to these sections I cannot see why I am not entitled to them under the law. Will you not please let me know whether it is proper for me to make these three items of charge?

"Also, I wish you would inform me whether, under the expression, 'when first committed' or otherwise, I am entitled to a second commitment fee when the case of a person charged by the State, say with a felony, has been continued and he is remanded to jail by the police justice. I know I do not get it when he is remanded to jail by a court of record, but do not know whether I am entitled to it when remanded to jail upon a continuance of the case by the police justice before the prisoner is sent to the grand jury."

I have examined section 3487, 3504, 3510 and 3511 of the Code as amended with care.

The provisions of section 3487 (6-7) are confusing when considered alone with the first paragraph of section 3510 of the Code. However, upon mature consideration of the matter I have reached the conclusion that section 3487 of the Code as amended relates exclusively to the fees to be paid officers in civil cases, and has no application to the fees to be paid out of the State Treasury for services rendered by such officers in criminal

cases. That the provisions of paragraphs 6 and 7 of section 3487 do not apply to criminal cases is emphasized by the provision of paragraph 8 of this section, which provides a fee for carrying a prisoner, other than a prisoner arrested for felony or misdemeanor, to or from jail.

Paragraphs 6, 7 and 8 of section 3487, in my opinion, refer to prisoners arrested in civil cases, such as those arrested on a *capias ad respondendum* as provided for by sections 6419-6425. These paragraphs of section 3487 of the Code as amended may possibly apply to other civil cases, which I do not recall at the present time.

Section 3510 of the Code as amended relates to criminal cases, and in my opinion this is the section under which fees are payable out of the Treasury to a sergeant for receiving a prisoner in jail.

Answering the inquiry submitted in the second paragraph of your letter, it is my opinion that the language of this section "when first committed" means that only one fee can be paid to the sergeant out of the State Treasury where the same prisoner is committed to jail for the same offense, regardless of the number of commitments. The statute provides that a fee shall be paid only for the first commitment. I do not think that you would be entitled to an additional fee in the case referred to in your letter.

Very truly yours,

JNO. R. SAUNDERS,  
*Attorney General.*

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**SERGEANTS—Right to receive fees and commissions.**

RICHMOND, VA., *August 1, 1927.*

M. E. TUCK, ESQ.,  
*Clarksville, Virginia.*

DEAR SIR:

Acknowledgment is made of yours of the 29th, in which you ask whether a town sergeant who receives a salary may also receive fees for making arrests and summoning witnesses.

In reply I beg to say that, if these arrests and summoning of witnesses are in connection with Commonwealth cases, the sergeant would receive the same fees as the sheriff or constable.

What fees he would receive in cases arising under the town ordinance would depend on the charter and ordinance of the town.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**SCHOOLS—Authority of board to make loans.**

RICHMOND, VA., *July 18, 1927.*

C. W. STEELE, ESQ.,  
*Meadow View, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of July 16, 1927.

In response thereto, I call your attention to section 762 of the Code, which provides in part:

"Before making any loan under this chapter, the State Board of Education shall be satisfied that the school district or board borrowing the fund has a good

and sufficient title in fee to the real estate on which the proposed building is to be erected, or that the same has been leased by the local school authorities for a period of twenty years, or more upon such terms that there is no liability of the loss of any money that may be loaned under the provisions of this chapter, and that the same is free from incumbrances, \* \* \* .”

Some easements might not be of such a nature as to be treated as incumbrances within the meaning of this statute; other easements might be regarded as such. Each case would have to depend upon the particular facts relating thereto.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### **SCHOOLS—Right to employ daughter of school trustee to teach.**

RICHMOND, VA., July 11, 1927.

DR. R. T. AKERS,  
*Alum Ridge, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of July 8th in which you request me to advise you whether the law is still in force that prohibits school trustees from employing members of their family as teachers in the public schools.

The law to which you refer is section 659 of the Code of Virginia, 1919, as amended by the Acts of 1920, page 600. This section which is equally applicable to the county school board provides in part:

“No district school board shall employ or pay any teacher from the public funds if said teacher is the father, mother, brother, sister, wife, son, or daughter of any member of said board. Any member of any district board who shall violate any of these provisions shall be personally liable to refund any public funds paid in violation of this section, to be recovered from him by suit in the name of the Commonwealth at the relation of the attorney for the Commonwealth; \* \* \* .”

Under the provisions of section 644c of the Virginia Code of 1924 this section is made applicable to the county school board.

Trusting this gives you the desired information, I am

Very truly yours,

JNO. R. SAUNDERS,  
*Attorney General.*

#### **SUNDAY LAWS—Sale of merchandise, violation of.**

RICHMOND, VA., July 5, 1927.

MRS. J. H. BINFORD, *President,*  
*W. C. T. U.,*  
*Disputanta, Virginia.*

DEAR MADAM:

I beg to acknowledge receipt of your letter of June 27, enclosing letter of June 18 addressed to you from Judge M. R. Peterson of the Third Judicial Circuit, both of which I have read with close attention.

The law in regard to Sunday observance is not at all difficult to understand, but, as Judge Peterson says, it is difficult to apply for the reason that the opinions of people differ as to what constitutes a work of necessity or charity. The law as originally enacted in 1877-8, which is section 3799 of the Code of 1887, was as follows:



"If a person, on a sabbath day, be found laboring at any trade or calling, or employ his apprentices or servants in labor or other business, except in household or other work of necessity or charity, he shall forfeit two dollars for each offence. Every day any servant or apprentice is so employed shall constitute a distinct offence."

The present law on the subject is section 4570 of the Code of 1919 and is in the following language:

"If a person, on a Sunday be found laboring at any trade or calling, or employ his apprentices or servants in labor or other business, except in household or other work of necessity or charity, he shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than five dollars for each offence. Every day any person or servant or apprentice is so employed shall constitute a distinct offence and the court in which or the justice by whom any judgment of conviction is rendered may require of the person so convicted a recognizance in the penalty of not less than one hundred nor more than five thousand dollars, with or without security, conditioned that such person shall be of good behavior, and especially to refrain from a repetition of such offence, for a period not exceeding twelve months. This section shall not apply to furnaces, kilns, plants and other business of like kind that may be necessary to be conducted on Sunday."

The history of this legislation can be found in the case of *Pirkey Brothers v. Commonwealth*, 134 Va. 713, 114 S. E. 764. In that case the court held that no fixed and unvarying definition of "necessity" as used in the statute can be given. What may be a necessity in one place may not be in another. Every case must stand on its own peculiar facts and circumstances. From this you will see that Judge Peterson is correct in saying that there is no hard and fast rule by which the law can be construed. Indeed such has been the judicial interpretation of this statute since its original enactment in 1779. Naturally, I am not able to place a more rigid construction upon the law than the Supreme Court of Appeals of this State has done. I can only say that I think Judge Peterson correctly advised you to institute proceedings, if you desire, under the advice of the Attorney for the Commonwealth, against those who you have reason to think are violating the law. In case any of them is convicted, it will be the province of this office to uphold the conviction, if appeal should be taken to the Supreme Court of Appeals. Trusting this will give you the desired information, I beg to remain

Very respectfully yours,

JNO. R. SAUNDERS,  
*Attorney General.*

#### SCHOOL BOARD—Authority of School Trustee Electoral Board to fill vacancies.

RICHMOND, VA., July 1, 1927.

MERIWETHER I. ARMSTEAD, ESQ.,  
*Attorney at Law,*  
*Surry C. H., Virginia.*

MY DEAR MR. ARMSTEAD:

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

"As chairman of the Surry School Trustee Electoral Board, I am writing for your opinion as to the powers of the said board to fill vacancies occurring in the school board by resignation of its members. I suggest that your opinion include the answer to the question if the School Trustee Electoral Board can accept the resignation of members of the school board.

"The facts upon which these questions arise are as follows: Two members of the school board have tendered to us their resignations and have requested that they be accepted, but consented to hold on, so that the board could function, until we could prevail on suitable men to accept the appointments. The electoral board

is about to meet to consider these resignations, and it has been suggested that the electoral board cannot make these appointments. If this construction of the law is correct, then it occurs to me that we cannot accept these resignations.

"The two sections of the Code involved, which are apparently in conflict, are sections 632 and 644-b of the 1924 Code of Virginia. I would appreciate it if you will render us your opinion as to whether the School Trustee Electoral Board, who were appointed under section 629 of the Code, as amended by the Acts of 1926, page 104, have authority to accept these resignations and make appointments to fill the vacancies thus occurring, or if these resignations are to be tendered to the judge of the circuit court and by him passed upon and he to fill the vacancies thus caused. To sum up briefly the question: Does the power to fill these vacancies lie in the School Trustee Electoral Board or is it vested in the judge of the circuit court?"

In reply I beg to say that chapter 423, page 737, of the Acts of Assembly 1922 re-organized the administration of the school system, amending and repealing, either expressly or by implication, a number of provisions which had previously been enforced. Section 1 of that act, which is section 644-a of Michie's Code of 1924, provides that one trustee shall be selected in the manner provided by law in each school district who shall constitute the county school board, "The manner provided by law" is set forth in section 631 providing for their appointment by the School Trustee Electoral Board. Since this board has the power to appoint the trustees, it also has the power to receive their resignations. However, the authority given to the School Trustee Electoral Board by section 632, which was last amended by Acts of 1922-3-4, page 806, no longer exists, since section 2 of chapter 423 of the Acts of 1922, which is section 644-b of Michie's Code of 1924, gives authority to fill vacancies which may occur on the county school board to the Judge of the Circuit Court.

Answering your question specifically, therefore, I would say that the School Trustee Electoral Board has authority to receive the resignations of members of the county school board, but the vacancies must be filled by the Judge of the Circuit Court.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### TOWNS—Charter of, levying and collection of school tax.

RICHMOND, VA., March 8, 1928.

HON. R. T. HUBARD,  
*Commonwealth's Attorney,*  
*Salem, Virginia.*

DEAR MR. HUBARD:

In your letter of February 24, you call my attention to the charter of the town of Salem and direct special attention to that part of the charter creating Salem a separate school district.

You also state that since the passage of the charter the town has been levying and collecting its own school taxes within the corporate limits of the town; but that recently a question has been raised as to the legality of this tax, and you ask for my opinion on the following:

"1. Should the board of supervisors extend its county school levy over the town of Salem, or should the council of the town of Salem make their own levy within the corporate limits of said town?"

In reply to this question, I would say that, pursuant to section 1 of chapter 398 of the Acts of 1920, found on page 587, each county, city, town, if the same be a separate

school district, and school district is authorized and required to levy county, city, town and district taxes. Therefore, I will say that the board of supervisors of Roanoke county not only may, but are required to levy a county school tax upon all of the property in that county, subject to local taxation, and that that levy includes property in the town of Salem. This levy is collectable by the treasurer of Roanoke county.

"2. Should the board of supervisors of Roanoke county levy a district school tax in the town of Salem, or should the council of the town levy the district school tax?"

The charter of the town of Salem covers your inquiry. Power to levy taxes is given its council—page 418, section (1). The council is authorized to establish and administer public schools—page 424, section (26). The treasurer of the town is the collecting officer of district school taxes—page 432, section (b). The town of Salem is created a separate school district—page 443, section (a). The school board of the town—or district—is required to furnish the town council with an estimate of money needed for each succeeding year—page 443, section (b). The town of Salem is required to levy, and the town treasurer collects, the district school tax.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### **TREASURER—Validity of bond.**

RICHMOND, VA., *January 12, 1928.*

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

DEAR SIR:

You have handed me for my opinion as to its validity the bond of William A. Adair, who was elected in November of last year treasurer of Rockbridge county, and I note that Mr. Adair executed a bond in compliance with a special Act approved February 28, 1896, being chapter 522, page 538, of the Acts of 1895-96. The title of this law is as follows:

"An Act to fix the penalty of the bond of the treasurer of Rockbridge county, require every sixty days' statement of collections and payment into the treasury of the State's revenue, and to empower the county board of supervisors to demand new or additional bond."

There is no doubt that this is a special Act concerning the collection of taxes in the county of Rockbridge, and I am of the opinion that such an Act is in conflict with section 63, clause 5, of the Constitution of Virginia, which provides:

"The General Assembly shall not enact any local, special, or private law in the following cases: \* \* \* for the assessment and collection of taxes, except \* \* \*."

The bond required of all county treasurers is provided for by section 2698 of the Code of 1924, and should be in a penalty such as the Circuit Court of Rockbridge county requires, but not less than 50 per centum of the amount to be annually received by him.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**TREASURER—Proper custodian of the sinking fund.**RICHMOND, VA., *January 10, 1928.*

HON. JOHN H. COLE,  
*Commonwealth's Attorney,*  
*Stony Creek, Virginia.*

MY DEAR MR. COLE:

Acknowledgment is made of your letter of January 6, 1928, in which you say:

"At the last meeting of the Board of Supervisors of Sussex county a discussion arose as to who was the proper custodian of the county sinking fund, the fund created to pay the interest and retire county bonds. I stated to the board that I thought the county treasurer was the proper custodian, as set out in an Act of the General Assembly of 1926.

"However, I will appreciate it very much if you would write me your opinion as to this in order that I may show your letter to the board at its next meeting."

I have examined chapter 153 of the Acts referred to in your letter, and after reading the same I am of the opinion that you were correct in advising the board of supervisors that the county treasurer is the proper custodian of the fund resulting from this Act.

Sincerely yours,

JNO. R. SAUNDERS,  
*Attorney General.*

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**TREASURER—Custodian of sinking fund.**RICHMOND, VA., *January 23, 1928.*

HON. JOHN H. COLE,  
*Commonwealth's Attorney,*  
*Stony Creek, Va.*

MY DEAR MR. COLE:

I am in receipt of your letter of the 21st instant, requesting my opinion as to the proper custodian of the sinking fund created by the board of supervisors of your county to retire certain bonds issued to the Atlantic, etc., Railroad Company.

I have examined all of the Acts in connection with the subscription of the county to the railroad and to the matter of the handling of the sinking fund created for their retirement, and am still of the opinion that the treasurer of the county is the proper custodian of the sinking fund.

This is true, although I am of the opinion that the board of supervisors of your county may, subject to the approval of the court, lend, or deposit, or invest said funds. Such power given the board would not, in my opinion, even under chapter 805 of the Acts of 1897-98 affect the right and duty of the treasurer of the county to handle the funds.

It is more than likely that chapter 153 of the Acts of 1926 was passed for the very purpose of setting at rest any question which may have arisen between boards of supervisors and county treasurers as to the handling of just such funds as the sinking fund of your county.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

## TRIALS—Jurisdiction of mayor's court.

RICHMOND, VA., *January 23, 1928.*

HON. A. F. DIZE, *Mayor,*  
*Cape Charles, Virginia.*

DEAR MR. DIZE:

The Attorney General has handed me your letter of the 18th instant, concerning the trial of criminal cases in the mayor's court of your city. You refer in your letter to the decision of the Supreme Court of the United States as affecting your jurisdiction, and to several cases already heard in your court.

The Tumey case, which was decided by the Supreme Court of the United States, in an opinion by Justice Taft, passed upon an Ohio statute. The Court of Appeals of Virginia on last Thursday has greatly differentiated that case from cases arising in the mayor's court of the town of Potomac, Arlington county, Virginia. Without going into detail as to the Virginia decision, it sustained the conviction of a man named Brooks, who had been tried and convicted by the mayor of the town of Potomac for a violation of the speed ordinances of that town. Brooks had appealed to the Circuit Court of Arlington county, which court convicted him, and his appeal was from the Circuit Court to the Supreme Court. The Supreme Court held that, notwithstanding the mayor of Potomac received a greater fee upon a conviction than upon an acquittal and the fine went to the town of Potomac, the case before the Circuit Court was *de novo*, the ordinance of the town of Potomac was constitutional and valid, and Brooks' conviction was sustained.

On the same day the Supreme Court denied to certain parties a writ of prohibition against the mayor of the town of Potomac, in which they undertook to prevent him from hearing other cases against town ordinances, both because of the fact that his fees for conviction were greater than in cases of acquittal and because of the final interest of the town of Potomac in the fines imposed upon every person convicted.

Undoubtedly, the ordinances of your city are valid and constitutional and you, as mayor, have a right to try them and to impose the penalty provided therein. Were I you, I should proceed to hear and try all cases against your town ordinances just as you have always done, as, under the ruling of our Supreme Court, the ruling of Judge Westcott was erroneous. He should have tried the cases. However, until the Supreme Court rendered its decision, there was great uncertainty as to which way the court would decide.

You ask if it would be possible for the town council to pass an ordinance making it mandatory that no judicial officer receive costs in criminal cases and that the costs go into the town treasury, or that no costs or fine be imposed. In reply, I will suggest that this can be done in any except prohibition cases, but that in prohibition cases the penalties must be the *same* as those provided for by the State prohibition law. This as to the penalties, including fines. You could pass an ordinance disallowing fees to the officer trying the case, but, if the decision of our court holds, I do not think that this will be necessary.

I have to apologize for not having fulfilled my promise about writing you several ordinances, but I was anxious to get a decision of the Supreme Court upon this and the matter of the jurisdiction of mayors outside of actual city or town limits before writing the ordinances. If you will let me know that you still want the ordinances about which you wrote, I can now fix them up for you *immediately*.

Yours very truly,

EDWIN H. GIBSON,  
*Assistant Attorney General.*

**TRIALS—Misdemeanors, place where tried.**RICHMOND, VA., *February 23, 1928.*MR. H. M. LAND,  
*Lone Oak, Va.*

DEAR SIR:

Your letter of January 12 was inadvertently overlooked. In it you ask me whether a person can be tried for a misdemeanor in one district when the offense was committed in another.

Under the law, he is entitled to be tried in the district in which the offense was committed. There is no penalty provided by law as a punishment for a constable who arrests a person in one district and carries him in another for trial, but the person has a right to object to being tried in any other district than that in which the offense was committed.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.***TAXES—Authority of board of supervisors to levy school tax.**RICHMOND, VA., *February 11, 1928.*MR. ROBERT M. NEWTON,  
*Division Superintendent of Schools,  
Hampton, Virginia.*

DEAR MR. NEWTON:

I am in receipt of your letter of February 9, in reference to the proposal to increase the school tax in your county from \$1.25 to \$1.75.

After calling my attention to the fact that the law allows an election upon the refusal of the board of supervisors to levy for the amount estimated by the school board as necessary for school purposes, you ask my opinion as to whether or not the school board would have a right to demand an election in case an increased rate is authorized by the legislature.

In my opinion, the Act providing for an election upon the refusal of the board of supervisors to levy for the amount asked by the school board would apply, provided there is nothing to the contrary in the special Act to which you refer. It strikes me that it would be wise to have the special Act incorporate any provision the representatives of the county will support and which is agreeable to the school board.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.***TREASURER AND AUDITOR OF PUBLIC ACCOUNTS—Salary of.**RICHMOND, VA., *March 15, 1928*HON. E. R. COMBS, *Comptroller,  
State Library Building,  
Richmond, Virginia.*

DEAR SIR:

Your letter of today, in reference to the salaries of the State Treasurer and the Auditor of Public Accounts, has just been received, and I note that you desire my opinion

as to the legality of the increases allowed the Treasurer and the Auditor of Public Accounts by enactments of the 1928 session of the General Assembly.

In reference to the salary of the Treasurer you state:

"In the case of the State Treasurer, who was elected by the people and began his term of office at a salary of \$5,000 per year, his salary was increased during his term of office to \$6,000, and the increase provided for, according to my understanding, was to compensate him for additional duties imposed upon him since his election."

In the Reorganization Act of 1927, effective March 1, 1928, large additions were made to the duties of the Treasurer. For one thing, practically all of the duties of the Second Auditor, whose office was abolished by the special session of 1927, effective March 1, 1928, were transferred to the State Treasurer.

In an opinion in *Moore v. Moore*, 147 Va. 460, it was held by the court that an officer upon whom additional duties were imposed by law was entitled, notwithstanding a constitutional provision against the increase of his salary during his term of office, to compensation on account of such additional duties.

There is no question that the State Treasurer is entitled to receive the salary of \$6,000 provided in the appropriation bill of 1928.

In the matter of the salary of the Auditor of Public Accounts you state:

"In the case of the Auditor of Public Accounts it is my understanding that he was elected to this office by the legislature prior to March 1, that he qualified and assumed his duties on March 1, and on this date the appropriation bill was pending before the legislature, carrying an appropriation of \$5,000 as salary to the Auditor of Public Accounts, and that subsequent to March 1 the appropriation bill was amended and his salary increased to \$6,000."

In my opinion, the Auditor is entitled to receive the salary of \$6,000 provided by the appropriation bill of this year. This amount is not an increase of the salary to which he was adjudged entitled in *Moore v. Moore*. He was entitled to the sum of \$6,000 according to that decision and the appropriation bill only provided the amount which he has been receiving pursuant to the judgment of the Supreme Court.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**TAXES—Paid by administrators of estate.**

RICHMOND, VA., February 24, 1928.

MR. OTIS BRADLEY,  
*Clerk of Corporation Court,*  
*Danville, Virginia.*

DEAR SIR:

I am in receipt of yours of January 13, asking if the State tax should be charged upon an estate going into the hands of an administrator, d. b. n., upon his qualification, after a tax had been paid upon the entire estate at the time of the qualification of the former administrator and executor.

In my opinion, and I have conferred with the Auditor of Public Accounts and he concurs with me, the tax upon the entire estate having once been paid, no tax upon the estate should be made and collected.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**TAXES—Condemnation suits.**

RICHMOND, VA., January 20, 1928.

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

DEAR MR. MOORE:

You have handed me the correspondence between your office and Honorable W. Y. C. White, Clerk of Washington county, Virginia, and copy of a letter from Judge W. J. Henson to Mr. White, relative to the State tax, if any, upon condemnation suits, and have asked my opinion as to whether section 14 of the State Tax Law, in reference to the tax on suits, includes a writ tax on condemnation proceedings.

The condemnation proceedings is, in my opinion, an original suit commenced by a notice, and a writ tax is due thereon, the amount of such tax depending upon the value of the interest or estate intended to be taken or the damages likely to arise by reason of the condemnation proceedings.

The tax should not be less than \$1.00 and should be 10 cents on each \$100.00 in excess of \$500.00 on the estimated value of the interest, estate or damages.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

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**TAX COMMISSION ATTORNEYS—Must secure license to practice.**

RICHMOND, VA., June 1, 1928.

HON. C. H. MORRISSETT,  
*State Tax Commissioner,*  
*Richmond, Virginia.*

MY DEAR MR. MORRISSETT:

I beg leave to acknowledge receipt of your letter of the 31st in which you submit the following question:

“Will you please advise me whether or not in your opinion counsel for this department, whose practice is devoted exclusively to representing the Commonwealth in tax matters, should, under the law, take out the regular State and local licenses as a practicing attorney?”

Section 159 of the Tax Code, chapter 45 of the Acts of 1928, page 106, requires every person admitted to prosecute or defend actions, or other proceedings in the courts of this Commonwealth, to obtain a revenue license and provides in part:

“No person shall act as attorney at law or practice law in any court of this Commonwealth without a separate revenue license.”

One of the duties of the attorney representing your department is to prosecute or defend actions or other proceedings relating to taxes in the courts of the Commonwealth, and in doing so, it is my opinion that he is engaged in the practice of the law and therefore must obtain a license.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*



**TRESPASS—Application of statute.**RICHMOND, VA., *September 3, 1927.*

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

MY DEAR SIR:

Acknowledgment is made of your letter of September 2, 1927, in which you say:

"I would thank you if you would be kind enough to give me your opinion on section 3338 of the Code of Virginia, 1919, as amended by an Act of the General Assembly of 1926.

"Does this section apply to any other kind of trespass other than that committed while hunting?

"The case I have in mind is as follows: Mr. A is a traveling salesman operating under a State license. He visits several homes owned by a local lumber company and which they rent to their employees for the purpose of selling his goods. The lumber company owns and operates a general merchandise store at this place. An official of this company notified Mr. A to get off of the premises and not come there any more. Mr. A refuses to do so.

"The lumber company now desires to have Mr. A arrested, charging him with criminal trespass.

"It does not seem to me that section 3338 applies to this case and I would thank you very much if you would enlighten me along this line."

I fully agree with you that section 3338 of the Code of 1919 as amended has no application to such a case.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**VENDING MACHINES—Legality of.**RICHMOND, VA., *May 24, 1928.*

HON. S. L. WALTON,  
*Commonwealth's Attorney,*  
*Luray, Virginia.*

MY DEAR MR. WALTON:

Acknowledgment is made of your letter of May 21, 1928, in which you say:

"At the request of Mr. Frank Dolan, Harrisonburg, Virginia, I am writing you for an opinion on the new slot machine law, as amended by Acts of Assembly, 1928, section 4685 of our Code; he states that the following is a description of the machine he is going to put on the market, without permission:

"The following is a description of the merchandise vending machine on which I courteously request your opinion as to its conformity to the laws of this State.

"The machine in question is of slot device construction and vends merchandise, namely, hard candies of various kinds and flavors. Those features which must, in the final analysis determine its legal character, are briefly, the following:

"1. It contains four merchandise compartments in which as many kinds of flavors of candies may be placed.

"2. If anyone or more of such compartments is empty and does not contain merchandise, the coin inserted by the customer is automatically returned to him.

"3. The customer always receives full value in merchandise for every coin inserted.

"4. In addition to the merchandise so received by the customer, he may, from time to time, receive tokens.

"5. The machine has three revolving cylinders, each moving independently of the other, and on these cylinders are written fortune-telling sentences and when the reels come to rest they tell in a brief way the 'fortune' of the player.

"6. The tokens that may be received by the player have no trade or monetary value but may be played back into the machine solely for the amusement of the player in having his 'fortune' told.

"7. No merchandise is received by the player for any such tokens that may be so re-played.

"You will please note that these machines are built to sell merchandise and cannot be operated by anyone unless there is merchandise in them as the machine automatically locks when the candy in the vending compartment is exhausted and in that case, the coin is automatically returned to the player.

"I am enclosing a sample of the tokens used in this machine which plainly states it is of no trade or monetary value and for amusement purposes only. This is the only kind of token that will be used in this machine.

"The Tax Bill, section 198, has been amended, as you know, which now requires attorneys for the Commonwealth to approve the machine, before the Commissioner of the Revenue will grant the applicant a license to have and operate a slot machine."

Section 4685, pages 1124-1125, as amended by the Acts of 1928, provides as follows:

"If any person keep or exhibit for use, or be concerned in interest in keeping or exhibiting for use, any punch board or similar device of any kind or description; or any slot machine or similar device of any kind, or character, or any other device that operates on the nickle-in-slot-principle, in the operation of which, any element of chance whatever may enter, or through and from which it may be possible for one person to get any article of more value than that which any other person could and would get, or through and from which the article or thing vended is not the fair equivalent in value, to the coin required to operate such machine or device; or shall permit any such punch board or similar device, or slot machine or similar device to be kept or exhibited for use in his place of business or in any other place in this State, he shall be guilty of misdemeanor, and such punch board, slot machine or other device shall be deemed a gaming apparatus and shall be embraced within the provisions of sections forty-eight hundred and twenty to forty-eight hundred and twenty-two inclusive, insofar as said sections relate to gaming apparatus. The possession of any such punch board or device, or slot machine or device, shall be prima facie evidence of the use thereof, provided, however, that any slot machine or device that operates on the nickel-in-the-slot principle, and which does not uniformly return to the customer in each transaction the equivalent in value and kind of merchandise unaccompanied by coins, trade checks or other items of monetary value that it returned in each preceding transaction, shall be deemed to embody the element of chance within the meaning of this Act, even though the said machine or device be so constructed as to indicate in advance of each transaction that it will dispense upon the deposit of the next coin or slug."

From the description of the machine referred to in your letter, I am of the opinion that it does not violate the provisions of section 4685 of the Code, as amended, it being my understanding that the checks referred to cannot be used for the purchase of merchandise, or for any other purpose other than the operation of a part of the machine which pretends to tell one's fortune. This, in my opinion, could not be construed as gambling.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### **VETERINARIANS—License to practice.**

RICHMOND, VA., February 2<sup>d</sup>, 1928.

DR. H. C. GIVENS,  
*State Veterinarian,  
Richmond, Virginia.*

MY DEAR DOCTOR:

I am just in receipt of your letter of today, asking for my opinion as to whether or

not there is any other provision of law by which a class of persons who have been practicing veterinary medicine and surgery in this State without having obtained a certificate from the Board of Veterinary Examiners may secure a permit to continue the practice of that profession.

I know of no other provision for the relief of persons who have begun the practice since the first day of May, 1896. However, there may be persons who have been prevented by good cause from appearing before the Board of Examiners. In such case, the president of the board may appoint three members to examine such applicant for a certificate. That committee may, if they see fit, grant him a certificate, and such certificate has the same force and effect as though granted him by the full board.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**VIRGINIA MILITARY INSTITUTE—Resident and non-resident students.**

RICHMOND, VA., *April 23, 1928.*

HON. JOSEPH BUTTON,  
*State Office Building,  
Richmond, Virginia.*

MY DEAR COLONEL BUTTON:

Acknowledgment is made of your request of April 17, 1928, that I advise you what constitutes residence in Virginia with reference to the admission of Virginia and State cadets to V. M. I. Your request is limited to the residence of the parents of such cadets.

In my opinion the test should be whether or not the parents of such cadets pay their capitation, intangible and other personal property taxes in the State. Unless the capitation taxes of such parents, the tax on their intangibles, their incomes, etc., are paid in Virginia, I do not think their children can be admitted as Virginia or State cadets.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**VENDING MACHINES—Unlawful operation of.**

RICHMOND, VA., *June 23, 1928.*

MR. RUSSELL C. DEY,  
*Reedville, Virginia.*

DEAR SIR:

I am in receipt of your letter of the 21st instant, in which you ask me as to the legality of the operation of automatic mint vending machines in Virginia. In your letter you state:

“Each purchase is an absolute certainty, void of risk or element of chance. The tokens received from this vendor are of no value and will not be redeemed in cash or merchandise. Tokens may be used to replay this vendor for the customer's sole amusement.”

Provided no element of chance enters into the operation of the vending machine, its operation is not unlawful. Just what the tokens received from the machine are good for, you do not state, except that they are of no value, that they will not be redeemed in cash or merchandise, and that their only use is to play the machine for the customer's amusement. If this is the only use to which tokens received from the machine may be put, it does not violate our gaming statute.

You will realize, however, that I am not in a position to pass with any degree of certainty or finality upon the legality of a machine which I have never seen work, and you should further understand that the legality of the operation of the machine about which you write must, if there is complaint as to its legality, be passed upon by courts of law.

I should advise you to consult with the Commonwealth's Attorney and the sheriff of your county.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

---

**VENDING MACHINES—Authority of town to pass ordinance prohibiting operation.**

RICHMOND, VA., May 31, 1928.

HON. J. LEE STONEBURNER,  
*Justice of the Peace,*  
*Mount Jackson, Virginia.*

DEAR MR. STONEBURNER:

I am in receipt of your letter of May 30, requesting my opinion as to whether or not an incorporated town has authority to pass an ordinance to prohibit the use of mint vending slot machines, of the kind that, when played, will throw a package of mints a part of the time and checks a part of the time.

The operation of a slot machine or similar device of any kind of character, or any other device that operates on the nickel-in-the-slot principle, in the operation of which any element of chance whatever enters, or from which it may be possible for one person to get an article of more value than that which any other person would get, or through and from which the article or thing vended is not the fair equivalent in value to the coin required to operate such machine or device, is illegal and made a misdemeanor by chapter 439, page 1124 of the Acts of 1928.

Not only is it made a misdemeanor to operate slot machines, but the section to which I refer makes slot machines, punch boards and other devices gaming apparatus and provides that such articles shall be embraced within the provisions of sections 4820 to 4822 inclusive, so far as such sections relate to gaming apparatus. You will notice that the fourth paragraph of section 4820 relates to gaming apparatus or implements used, or kept and provided to be used, in unlawful gaming. You will further notice that, under section 4822, all such apparatus which is seized by an officer under a warrant, which you have a right to issue under section 4820, should be burned or otherwise destroyed.

The law I am quoting becomes effective on the 17th day of June, 1928, but even before the Act quoted becomes effective, it is unlawful to operate a slot machine in which there is any element of chance.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

**WESTERN STATE HOSPITAL—Jurisdiction of superintendent over inebriates.**RICHMOND, VA., *November 15, 1927.*

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

DEAR DR. DEJARNETTE:

I am in receipt of your letters of November 7 and 10, the first enclosing certain questions and answers of Mr. Armistead M. Dobie concerning matters connected with your authority over inebriates committed to the Western State Hospital, and the second containing a record of the convictions of Aubrey Warren Chesterman for drunkenness in Lynchburg.

In your letter of the 7th you ask me several questions, the first of which is as to the right of the hospital to receive a patient when his commitment papers state he was then charged with crime, and I note that you call my attention to the fact that the Southwestern State Hospital is a special institution for the criminally insane, and that you also ask whether or not a patient must be under indictment before he can be sent to the criminal department of the hospital at Marion.

My investigation leads me to the conclusion that your institution should receive patients, even though they are charged with a crime, provided they are not charged with, or have been convicted of, a felony. It is very true that section 1004 of the Code provides for a continuing of the department for the criminally insane at Marion and Petersburg and provides for what patients they are to be used, but I call your attention to the further provisions contained in the last sentence of the first paragraph of that section, which reads:

**“Provided, however, that it shall not be lawful to receive into the criminal departments of such hospitals such feeble-minded persons, unless they be charged with or convicted of felony.”**

Bearing in mind this last sentence, I conclude that all persons committed to hospitals for the insane, though charged with misdemeanor crimes, should be received in appropriate hospitals, exclusive of the criminal wards at Marion and Petersburg. I am confirmed in this opinion by section 1022 of the Code, making it the duty of the sheriff or sergeant to make application to the nearest appropriate State hospital for the admission of an insane, epileptic, feeble-minded, or inebriate person, and by section 1023 authorizing the commissioner of State hospitals in certain cases to direct the sheriff to convey the person to some named institution.

A person does not have to be indicted for a felony before he can be sent to the department for the criminally insane at Marion. He can be sent provided he is charged with a felony, and I take it that this means charged in a warrant as well as by indictment.

Second, you ask if the Western State Hospital is authorized to charge for the care and treatment of epileptic and feeble-minded persons who have been properly committed to the Colony for the Epileptic and Feeble-Minded. I do not think so. I appreciate the fact that epileptic and feeble-minded persons should be committed to and received at the appropriate colony for that class of defectives, but, under section 1023, the commissioner of State hospitals can order them committed to any other institution and, even though not committed to any institution, the commissioner, under section 1037, can provide for their care outside of hospitals and colonies until they can be provided for therein, and section 1038 provides for the payment of the expenses of persons outside hospitals and colonies by the State upon the order of the commissioner of hospitals. Section 1086, providing for the transfer of a feeble-minded persons from a colony to a hospital, makes no mention of payment to hospitals.

Third, you ask if it is legal to transfer an inebriate or drug addict misdemeanant from your hospital to the State Farm. Section 1086 provides that this may be done by the superintendent of a hospital when the patient's mental condition is such to enable him to be detained at the State Farm, in order that his bed may be released for more acute non-misdemeanant cases. This section was amended by the 1926 session of the Legislature, but I do not understand that the authority given to superintendents of State hospitals covers cases of inebriates committed to hospitals for treatment, even though they have been previously fined in police court for drunkenness, and this is true, although I am of the opinion that the violation of an ordinance against drunkenness is a misdemeanor. If you were holding an inebriate in your institution on a commitment upon conviction of drunkenness, it would be within your authority to have him transferred to the State Farm. In other words, I am of the opinion that, to come within the meaning of the statute providing for the transfer of misdemeanants from a hospital to the State Farm, he must at the time be held for punishment upon a conviction of a misdemeanor, and that it was not intended to include inebriates who are committed to a hospital under section 1068 of the code. You will notice that under that section the inebriate is to be *kept and held* in the *institution* to which he was committed until the superintendent of that institution shall declare such person cured and restored to his normal condition.

If I have not answered your letters to your entire satisfaction, and I know that I am not in thorough accord with your views, I shall be glad to have you write me again, as I recognize the fact that you are well versed in the laws of your institution and are always looking out for its best interest.

Yours very truly,

EDWIN H. GIBSON,  
*Assistant Attorney General.*

#### WILLS—Taxation on testator's estate.

RICHMOND, VA., June 29, 1928.

HON. JOHN P. LEE,  
*Commonwealth's Attorney,  
Rocky Mount, Virginia.*

MY DEAR JUDGE LEE:

Acknowledgment is made of your letter of June 28, 1928, in which you say:

"In fixing the value of an estate under section 125 of the Tax Code of Virginia (Acts of Assembly 1928, page 94), the following question arises:

"The testator in a will was the owner of stock in a North Carolina corporation. He borrowed \$11,000.00 from a bank and placed this stock with the bank as collateral security for his note of \$11,000.00. In arriving at the value of this stock, should the estate be charged with the testator's equity in the stock, which would be its value less the amount of the loan, or should the value be placed on the stock as if the testator owned the stock instead of only owning an equity therein?"

The first paragraph of section 125 of the Tax Code (Acts of 1928, page 94) reads as follows:

"On the probate of every will or grant of administration, not exempt by law, there shall be a tax of one dollar, where the estate, real, personal or mixed, passing by such will or by intestacy of the decedent, shall not exceed one thousand dollars in value at the time of the death of the decedent, and for every additional one hundred dollars of value, or fraction of one hundred dollars, an additional tax of ten cents; and no one shall be permitted to qualify and act as executor or administrator until said tax shall have been paid; provided, however, that the tax imposed by this section shall not apply to estates of decedents of one hundred dollars or less in value."

I am of the opinion that, under this section, no deduction can be made on account of the debt due by the estate. In other words, the stock must be taxed as if the decedent owned it unencumbered.

I have been unable to place my hands on the correspondence at this time, but I recall that a similar ruling was made by the Auditor of Public Accounts several years ago under section 12 of the Tax Bill.

Very truly yours,

JNO. R. SAUNDERS,  
*Attorney General.*

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**WESTERN STATE HOSPITAL—Admission of feeble-minded persons.**

RICHMOND, VA., *August 23, 1927.*

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

MY DEAR DR. DEJARNETTE:

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

"Our Board met last night and discussed the question whether or not we could admit feeble-minded persons into this institution. They read sections 1022, 1023 and 1086.

"My contention is, that before a feeble-minded person can be admitted into an insane hospital he would have to be committed as insane, and before an insane person can be sent to the Colony for the feeble-minded he would have to be adjudged as recovered and committed as feeble-minded. In other words, a feeble-minded person cannot be sent to the State hospital without being committed as insane and an insane person cannot be sent to the feeble-minded colony until he has been committed as feeble-minded."

I have examined sections 1022, 1032 and 1086 of the Code, the former as amended, and I am of the opinion that the Commissioner of State Hospitals is given the authority by the first two sections to handle, as expeditiously as possible, all emergency cases which have to do with the insane, epileptic feeble minded or inebriate.

Section 1086, to which you refer, has to do with normal procedure of commitments by courts, and I take it that the other two sections afore mentioned were inserted primarily to handle those situations which occur by reason of the inevitable overcrowding of one or more of our hospitals, or the colony.

I am therefore of the opinion that the Commissioner of State Hospitals may designate your hospital as a place in which feeble minded persons can be confined.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

---

**WESTERN STATE HOSPITAL—Liability insurance for employees.**

RICHMOND, VA., *August 23, 1927.*

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

MY DEAR DR. DEJARNETTE:

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

"The employers liability act requires that they shall insure their employees against accidents, etc. Our Board wishes to know if the State hospitals, a branch of the State, should take out insurance in case of accident to an employee. The hospital being an arm of the State and cannot be sued, it impresses me the situation would be very similar to the decision you handed down a short time ago in regard to carrying insurance on our automobiles, trucks, etc., to protect our institution from liabilities of damage. In other words, we want to know if we are to pay out three or four hundred dollars per year for insurance to protect our employees against accidents."

Your conclusion would be correct but for the fact that the General Assembly has provided by statute otherwise.

Section 2 (a) of the Workmen's Compensation Act expressly includes the State, a branch of which your hospital is, within the definition of employers as used in that Act, while section 8 thereof expressly provides "that the State shall not have the right to reject the provisions of this Act relative to payment and acceptance of compensation; and the provisions of sections five, six, sixteen, seventeen and eighteen shall not apply to them."

It is therefore my opinion that your hospital is required to either carry liability insurance, or become a self insurer under the Workmen's Compensation Law.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*

#### WILLS—Probation of.

RICHMOND, VA., July 28, 1927.

E. W. OGLE, ESQ.,  
*Hillsville, Va.*

DEAR SIR:

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

"In a case a will is probated, names two executors, requires bond, directs that personal property be sold as soon as practicable after death, devises real estate to widow but upon condition that it be sold after her death or subsequent marriage. The widow is still living.

"Should bond be required at the qualification of the executors for an amount sufficient to cover both personal property and real estate?"

In reply I beg to say that it is my opinion that the bond required of the executors should be sufficient to cover both the personal and real property.

Yours very truly,

JNO. R. SAUNDERS,  
*Attorney General.*



**Statement**

*Showing the Current Expense of the Office of the Attorney General from June 30, 1927, to July 1, 1928*

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General repairs.....	\$	60 00
Telegrams.....		40 01
Telephone service and tolls.....		352 15
Subscriptions to and purchase of law books.....		152 50
Postage.....		179 08
Towels, drinking water, furniture, office supplies, repairs.....		863 71
Additional stenographic service.....		50 00
Additional legal service.....		235 00
Insurance premiums.....		11 63
		<hr/>
		\$1,944 08

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**Statement**

*Showing Amounts Expended from the Appropriation for Traveling Expenses from June 30, 1927, to July 1, 1928*

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1927		
May 9.	Leon M. Bazile, expenses to Lynchburg, attending hearing in Cedar Rust Case.....	\$ 45 19
Sep. 12.	Leon M. Bazile, expenses to Staunton, attending Court of Appeals.....	11 25
Sep. 12.	John R. Saunders, expenses to Staunton, attending Court of Appeals.....	10 00
Oct. 26.	John R. Saunders, expenses to Baltimore, Md., attending Conference re: Controversy as to boundary of Potomac River...	24 68
1928		
Feb. 25.	Leon M. Bazile, expenses to Washington, in re: Western Gas Construction Co. v. Commonwealth in Supreme Court of United States.....	36 40
Apl. 16.	John R. Saunders, expenses to Lynchburg, attending Virginia Conference of Social Work.....	17 39
Apl.	Leon M. Bazile, expenses to Staunton, in re: Prisoner in road camp before Corporation Court of Staunton.....	9 00
Apl. 30.	Leon M. Bazile, expenses to Washington, in re case of Brooke v. Commonwealth.....	20 52
	<hr/>	
	Total.....	\$174 43

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