

REPORT

OF THE

ATTORNEY GENERAL

TO THE

Governor of Virginia

From July 1, 1928, to June 30, 1929

RICHMOND
1929

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LETTER OF TRANSMITTAL

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., August 24, 1929.

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

MY DEAR GOVERNOR:

In accordance with the provisions of section 377 of the Code of Virginia, I herewith transmit to you my annual report. This gives the "state and condition," as is required by this section, of the causes pending in the courts in which the Commonwealth is a party. You will observe I have added a number of opinions on questions of public interest, as well as a statement of the expenditures of this office for the year ending July 1, 1929.

The opinions included in this report 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.

Personnel of the Office

(Postoffice address Richmond.)

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

Attorneys General of Virginia

From 1776 to 1930

EDMUND RANDOLPH	1776-1786
JAMES INNES	1786-1796
ROBERT BROOKE	1796-1799
PHILIP NORBORNE NICHOLAS	1799-1819
JAMES ROBERTSON	1819-1834
SIDNEY S. BAXTER	1834-1852
WILLIS P. BOCOCK	1852-1857
JOHN RANDOLPH TUCKER	1857-1865
THOMAS RUSSELL BOWDEN	1865-1869
CHARLES WHITTLESEY (military appointee)	1869-1870
JAMES C. TAYLOR	1870-1874
RALEIGH T. DANIEL	1874-1877
JAMES G. FIELD	1877-1882
FRANK S. BLAIR	1882-1886
RUFUS A. AYERS	1886-1890
R. TAYLOR SCOTT	1890-1897
R. CARTER SCOTT	1897-1898
A. J. MONTAGUE	1898-1902
WILLIAM A. ANDERSON	1902-1910
SAMUEL W. WILLIAMS	1910-1914
JOHN GARLAND POLLARD	1914-1918
*J. D. HANK, JR.	1918
JOHN R. SAUNDERS	1918-1930

*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. *Allen, George E. v. His Excellency, Harry Flood Byrd, Governor of Virginia.* Mandamus. Mandamus denied.
2. *Brookman, Wayman v. Commonwealth.* From circuit court of Albemarle County. Robbery. Affirmed.
3. *Burr, Mary Powell, Admx. of Charles Gilbert Burr, deceased v. Virginia Railway & Power Company.* From the hustings court of the city of Petersburg. Action for damages. Reversed and remanded.
4. *Cobb, Harry S. v. Commonwealth.* From corporation court of city of Norfolk. Prohibition. Affirmed.
5. *Crane, Richard v. Commonwealth, et al.* On motion to remand to the circuit court of Charles City county for a new trial after being reversed by the Supreme Court of the United States. Alleged erroneous assessment of taxes. Remanded for further proceedings.
6. *Fenner, Robert Lee v. Commonwealth.* From circuit court of Chesterfield county. Robbery. Affirmed.
7. *Gullion, Otto v. Commonwealth.* From circuit court of Tazewell county. Prohibition. Error confessed.
8. *Johnson, Millard v. Commonwealth.* From circuit court of Charlotte county. Lewd and lascivious conduct. Affirmed.
9. *Johnson, Sanford v. Commonwealth.* From circuit court of Orange county. Prohibition. Affirmed.
10. *Jones, Wayman v. Commonwealth.* From circuit court of Henrico county. Prohibition. Error confessed.
11. *Keeton, Sam L. v. Commonwealth.* From circuit court of Dinwiddie county. Prohibition. Affirmed.
12. *Meade, Roy v. Commonwealth.* From circuit court of Wise county. Prohibition. Error confessed.
13. *McNeil, Beatrice and Odessa Kelly v. Commonwealth.* From the corporation court of the city of Hopewell. Perjury. Error confessed.
14. *Oliver, Roy v. Commonwealth.* From circuit court of Greene county. Murder. Affirmed.
15. *Pauley, E. D. v. Commonwealth.* From circuit court of Tazewell county. Murder. Affirmed.
16. *Savage, James R. v. Commonwealth.* From circuit court of Accomac county. Motor vehicle carrier. Affirmed.
17. *Seay, Leo N. v. Commonwealth.* From circuit court of Charles City county. Automobile forfeiture. Affirmed.
18. *Shaver, Alvin T. v. Commonwealth.* From circuit court of Augusta county. Seduction. Affirmed.
19. *Shiflett, Patrick H. v. Commonwealth.* From circuit court of Greene county. Murder. Affirmed.
20. *Sink, George v. Commonwealth.* From circuit court of Montgomery county. Seduction. Affirmed.
21. *Stokes, Berry v. Commonwealth.* From circuit court of Tazewell county. Prohibition. Affirmed by divided court.

22. *Stuart, R. E., Etc. v. Commonwealth.* From corporation court of city of Alexandria. Affirmed.

23. *Sweat, Edward B. v. Commonwealth.* From corporation court of city of Norfolk. Small loan law. Affirmed.

Cases Decided by the Supreme Court of the United States

1. *Crane, Richard v. Commonwealth of Virginia and County of Charles City.* On writ of certiorari to the Supreme Court of Appeals of the State of Virginia. Alleged erroneous assessment of taxes. Reversed.

2. *Kelleher, Daniel v. G. T. French, State Entomologist.* From the District Court of the United States for the Western District of Virginia. Injunction denied. Affirmed.

Cases Pending in the Supreme Court of Appeals of Virginia

1. *Boggs, Simon v. Commonwealth.* From circuit court of Wise county. Murder.

2. *Boggs, Willard v. Commonwealth.* From circuit court of Wise county. Assault and battery.

3. *Bornstein v. Commonwealth.* From hustings court of city of Richmond. Prohibition.

4. *C. I. T. Corporation v. Commonwealth.* From circuit court of Roanoke county. Forfeited automobile.

5. *Dinges, Franklin v. Commonwealth.* From the circuit court of Page county. Larceny.

6. *Dingus, Victor v. Commonwealth.* From circuit court of Russell county. Murder.

7. *Duggins, Lawrence v. Commonwealth.* From circuit court of Roanoke county. Murder.

8. *Eaton, Tullie v. Commonwealth.* From circuit court of Princess Anne county. Hunting in violation of section 7, chapter 392, Acts 1928.

9. *Finney, Schley v. Commonwealth.* From circuit court of Accomac county. Rape.

10. *Goodman, Joe v. Commonwealth.* From hustings court of city of Portsmouth. Manslaughter.

11. *Hannah, Harris v. Commonwealth.* From circuit court of Lee county. Murder.

12. *Hardyman, George v. Commonwealth.* From circuit court of Alleghany county. Rape.

13. *Hodge v. City of Winchester.* From corporation court of city of Winchester. Prohibition.

14. *Hopkins, Walter v. Commonwealth.* From circuit court of Giles county. Seduction.

15. *King, Daniel v. Commonwealth.* From circuit court of Fauquier county. Prohibition.

16. *Meekins, Vernon v. Commonwealth.* From circuit court of Warwick county. Prohibition.

17. *Miller, Russell v. Commonwealth.* From circuit court of Russell county. Seduction.
18. *McElroy, Dona Laxton v. Commonwealth.* From circuit court of Wise county. Malicious wounding.
19. *Nelson, Gilbert v. Commonwealth.* From circuit court of Alleghany county. Murder.
20. *Nelson, Thomas v. Commonwealth.* From circuit court of Albemarle county. Murder.
21. *Parsons v. Commonwealth.* From circuit court of Northampton county. Prohibition.
22. *Sifford v. Commonwealth.* From circuit court of Pulaski county. Attempt to murder.
23. *Spratley, Charlie v. Commonwealth.* From corporation court of city of Portsmouth. Prohibition.
24. *Webb, D. E. v. Commonwealth.* From circuit court of Pittsylvania county. Murder.
25. *Williams, V. S. v. Commonwealth.* From circuit court of Princess Anne county. Assault and battery.
26. *Wood, Louis H. v. Commonwealth.* From corporation court, part one, of city of Norfolk. Prohibition.
27. *One Hudson Coupe, Sherman Stamper, Owner v. Commonwealth.* From circuit court of Russell county. Prohibition.
28. *Chrysler Coupe, W. M. Barrett, Owner v. Commonwealth.* From circuit court of Russell county. Prohibition.
29. *Chevrolet Coupe, H. L. Dillard, Owner v. Commonwealth.* From circuit court of Russell county. Prohibition.

Cases Pending or Tried in the Circuit Court of the City of Richmond

AT LAW

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

AGRICULTURE AND IMMIGRATION, COMMISSIONER OF—Authority to label apples for foreign shipment.

RICHMOND, VA., *August 16, 1928.*

HON. J. H. MEEK, *Director,*
Division of Markets,
Department of Agriculture and Immigration,
Richmond, Virginia.

DEAR SIR:

I am in receipt of your letter of yesterday, in which you quote a letter from Glaize & Hurst, Winchester, Virginia, in which they say that they will pack apples for the firm of Joseph Travers & Sons, 119 Cannon Street, London, and that they desire the label used by them to show that the apples were packed in Virginia, United States of America, for Joseph Travers & Sons, 119 Cannon Street, London. They desire to know whether they will be permitted to pack under the suggested label, provided they register with you a statement that their firm is packing under the suggested label and that the firm will accept the responsibility for complying with the State law concerning the grading and packing of the apples destined for their customer.

In my opinion, you are right in requiring the label to show that the apples were "packed by Glaize & Hurst, Winchester, Virginia."

Further on you state:

"* * * However, I am wondering, in case it should become necessary to prosecute a case against these people for violation of the law, if it would be legal to permit the suggested marking, with the acknowledgment of Glaize & Hurst that they are the Virginia representatives of Joseph Travers & Sons, London."

I am uncertain as to whether your reference to prosecution of these people "for a violation of law," if the law should be violated, refers to Glaize & Hurst or to Joseph Travers & Sons.

Undoubtedly, Glaize & Hurst can be prosecuted, should they violate the apple packing law. I do not think that Travers & Sons could be prosecuted, unless they are participating in the violation of law by Glaize & Hurst, and that Glaize & Hurst are their agents in Virginia. Even if they participate in the violation of the law and recognize Glaize & Hurst as their agents, it is doubtful that they could be held for a violation of law. The original packers, Glaize & Hurst, cannot possibly escape because of their acting as agents for Travers & Sons.

If I have misunderstood the meaning of your question, and you will make it plain, I will be pleased to let you have my further opinion.

Yours very truly,

EDWIN H. GIBSON,
Assistant Attorney General.

AGRICULTURE AND IMMIGRATION, COMMISSIONER OF—Au-
thority to promulgate quarantines.

RICHMOND, VA., *March 26, 1929.*

HON. G. W. KOINER,
Commissioner of Agriculture,
Richmond, Virginia.

My DEAR MR. KOINER:

Acknowledgment is made of your letter of March 23, 1929, in which you say:

"I should like very much to have your opinion as to my authority to officially promulgate quarantines under the crop pest law, chapter 39, sections 870 to 905 of the Code, as amended, without first obtaining official approval of the Board of Agriculture and Immigration. I would refer you to Acts of 1926, chapter 122, page 116, sections 1 and 2.

"We are now confronted with a quarantine which is urgently needed on account of the Japanese beetle. This quarantine should be promulgated as soon as possible and, if I have authority under the acts to promulgate the quarantine now and subsequently present it to the Board for approval, I should like to take such action."

The State Board of Crop Pest Commissioners was abolished by chapter 122 of the Acts of 1926. The second section of that law, so far as applicable, provides as follows:

"That the law-enforcing powers and duties imposed by law upon the State Board of Crop Pest Commissioners are hereby transferred to and shall hereafter be exercised or performed by the Commissioner of Agriculture and Immigration under the direction of the Board of Agriculture and Immigration."

In *Turner v. Commonwealth*, 149 Va. 468, 475 (1928), the Court of Appeals, speaking of this section, said:

"When this transfer of authority was made the Commissioner of Agriculture, under the direction of the Board of Agriculture and Immigration, stepped into the shoes of the Crop Pest Commission, so far as the duties of the latter were concerned."

Therefore, while the authority is vested in you to discharge the powers and duties heretofore vested in the State Board of Crop Pest Commissioners, those duties must be discharged under the direction of the Board of Agriculture and Immigration, which, in my opinion, requires prior or at least contemporaneous action on the part of the State Board of Agriculture and Immigration.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

AGRICULTURE AND IMMIGRATION, COMMISSIONER OF—
Nursery stock, registration fee.

RICHMOND, VA., *September 21, 1928.*

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

MY DEAR MR. KOINER:

Acknowledgment is made of your letter of September 19, 1928, in which you request my opinion on the following question:

"Does section 882 of the Code of Virginia, as amended, require the payment of a fee of one dollar by or for each solicitor employed by a nursery located in another State when said agent merely solicits orders from prospective customers and transmits them to his principal for acceptance or rejection, the stock being subsequently shipped direct from said nursery to the purchaser or to him through the solicitor?"

Section 882 of the Code makes it unlawful for any person, firm or corporation, either for himself or his agent for another, "to offer for sale, sell, deliver, or give away, within the bounds of this State, any plants, or parts of plants, commonly known as nursery stock, unless such person, persons, firm or corporation shall have first procured * * * a certificate of registration, which certificate shall contain such rules and regulations concerning the sale of nursery stock as the Board of Crop Pest Commissioners may prescribe * * *. The Auditor of Public Accounts shall not issue any certificate of registration except upon the payment of the sum of ten dollars for each nurseryman or dealer, and one dollar additional for each agent of such nurseryman or dealer, and shall forward all certificates to the State Entomologist for his approval before allowing the same to the party making application therefor."

This section, as this office has heretofore held, is primarily a police requirement in order to prevent the introduction of crop and tree pests into Virginia, opinion of the Attorney General to Mr. W. J. Schoene, dated May 15, 1916, report of the Attorney General 1916, page 22. Opinion to W. J. Schoene, dated March 16, 1917, and an opinion dated November 2, 1916, report of the Attorney General 1917, pages 18 and 19.

Where the agent of a nurseryman attempts to deliver or give away within the bounds of this State any plants, or parts of plants, commonly known as nursery stock, I am of the opinion that as a prerequisite to doing so he must obtain the registration certificate required by this section. But, where all that the agent does is to solicit orders for nursery stock located in another State and that stock is delivered direct from the seller to the purchaser without the intervention of such agent, I am of the opinion that such agent is engaged in interstate commerce and, therefore, not required to obtain the certificate required by this section of the Code.

This, of course, will not relieve the nurseryman, although located in another State, from complying with section 882 of the Code, as is pointed out in the Attorney General's opinion to Mr. Schoene, dated May 15, 1916, *supra*.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

AUTOMOBILE LICENSE—Cannot be taxed by town when only uses Lee Highway through the town.

RICHMOND, VA., September 14, 1928.

HON. WILLIAM F. MOFFETT,
Commonwealth's Attorney,
Washington, Virginia.

DEAR SIR:

I am in receipt of your letter of August 25, but find that it has been inadvertently overlooked until today. I quote from your letter:

"W. B. Jenkins runs and operates a bus line from Winchester, Virginia, to Fredericksburg, Virginia, hauling passengers for hire, etc. He resides in the town of Washington and keeps two of his automobiles which he uses for said purpose in the town. But he does not run said automobiles over the streets of the town, as the Lee Highway runs through the town and he only uses that."

You then ask whether or not, under the circumstances, Jenkins is subject to a license tax by the incorporated town of Washington, Virginia, on the automobiles used in his bus service.

In my opinion, the town cannot levy a tax upon Mr. Jenkins' automobiles so long as he keeps them off of other streets of the town than the Lee Highway. The ordinary town tax on automobiles is not based upon the property value of the automobiles, but is charged for the use of streets which the town has to keep up, and, as such, every resident of a town is required to pay an automobile license tax.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

AUTOMOBILES—Authority of incorporated towns to require citizens to purchase tags.

RICHMOND, VA., *November 24, 1928.*

H. C. AHALT, ESQ.,
*Virginia Polytechnic Institute,
Blacksburg, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of November 22, 1928, in which you say:

"Is there a law to make citizens of a town, who reside within the corporation, purchase town licenses or city tags for their automobiles?"

Subsection (e) of section 29 of chapter 149 of the Acts of 1926, as amended by the Acts of 1928, pages 29 and 1395-1397, provides in part:

"Incorporated towns and cities may levy and assess taxes and charge license fees and taxes upon vehicles as heretofore * * *."

The Court of Appeals held in *City of Portsmouth v. Miller, Rhoads & Schwartz, Inc.*, 138 Va. 823 (1924); that under the law as it existed prior to the Acts of 1928, an automobile could be subjected to a license tax in the city in which the machine was kept, but that it could not be taxed by other communities for local taxes.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

AUTOMOBILES—Chauffeur's license.RICHMOND, VA., *February 1, 1929.*

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

DEAR MR. HAYES:

Your letter of January 26, enclosing a letter from Honorable H. H. Kerr, Attorney for the Commonwealth of Augusta County, has been received, and I have very carefully noted its contents, especially the conclusions of yourself and Mr. Kerr in reference to the necessity for drivers for Coca-Cola companies and laundries and drivers of tank delivery trucks regularly employed as drivers, deliverymen and salesmen of their respective companies to secure chauffeurs' licenses, under the provisions of section 19½, chapter 149, Acts of 1926, page 271.

In Mr. Kerr's letter he states that upon the arrest of a Coca-Cola driver, a NeHigh driver, a driver for a wholesale grocery firm, and a driver for a tank truck for the Harvey System, the proprietors of the companies immediately interested themselves in their drivers' cases, and that they filed with him a letter written by me to Mr. Laird L. Conrad, attorney at law, Harrisonburg, Virginia, as authority for the position that all of these men were exempt from the payment of chauffeurs' licenses.

My letter to Mr. Conrad, under date of June 21, 1927, was in reply to a letter from him in which an opinion was asked as to whether a certain employee was required, under the provisions of law relating to chauffeurs' licenses, to obtain such a license. This letter contained the following paragraph, which I quote in full:

"The employee is not employed for any particular type of service, but is used by the employer as the employer sees fit, and as circumstances may determine. An employee used for inside work may be sent out upon a route, or one who has ordinarily been used upon a route may be shifted to inside work. They are not selected because of any particular skill in driving a motor vehicle, nor is any particular skill required for driving trucks of the capacity used by the employer. Secondly, the duties of the employee when out upon a route are primarily those of a salesman, and the driving of the truck is merely incident thereto. Their duties, in addition to driving the truck, are to take orders for delivery at a subsequent date, to deliver the orders previously received, to collect for orders delivered upon that trip and account therefor to the corporation, or where customers are charge customers, to periodically collect for past deliveries. They are the only employees who come in contact with the customer, and are expected, as a part of their duties, to maintain satisfactory business relations between the employer and the customer, adjusting any complaint with an old customer and hunting out additional business with new customers. In brief, they are the sales force of the employer and are selected and continued in service for their ability to produce and sustain trade for the employer and to keep the accounts receivable in their own territory in a satisfactory condition for the employer."

The provision of law to which I referred Mr. Conrad is also quoted:

"The language of section 19½ of chapter 149 of the Acts of 1926, so far as is applicable to the question here under consideration, is as follows:

"Any person other than the owner of a motor vehicle which has been registered and licensed to be operated in this State, whose principal duty or occupation is the driving of a motor vehicle for com-

pensation, 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 * *."

I said to Mr. Conrad that "salesmen or drummers using automobiles of employers and operating same as incidental to their duty as salesmen are not required to secure a chauffeur's license before operating the same. (Report of Attorney General, 1916, pp. 28, 32.)"

The conclusion expressed in my letter was in the following language:

"Therefore, if your client is a salesman who drives a truck as an incident to the sale and delivery of his employer's goods, I am of the opinion that he could do so without obtaining a chauffeur's license. On the other hand, if he is employed to drive the truck and that is his principal duty or occupation, a chauffeur's license would be necessary.

"It seems to me that the question is always one of fact and that each case necessarily must be determined upon the facts involved in it."

To the opinion, that where the driving of a truck is only an incident to the sale and delivery of goods he is not required to have a chauffeur's license, I adhere. On the other hand, if he is employed to drive a truck and that is his principal duty or occupation, I held a chauffeur's license necessary, and you will note that I wrote Mr. Conrad that the question as to whether or not a particular individual was required to secure a chauffeur's license was a matter of fact to be decided upon the evidence in each particular case. You will also notice that the first sentence of Mr. Conrad's letter is to the effect: "the employee is not employed for any particular type of service, but is used by the employer as the employer sees fit, and as circumstances may determine."

If, as a matter of fact, a person is employed to drive a particular vehicle, such as a Coca-Cola delivery wagon, a laundry delivery wagon, or a tank delivery truck, is regularly employed and paid for his services as driver and that is really the principal duty assigned to him by his employer, he is, in my opinion, required to secure a chauffeur's license, irrespective of whether or not he takes orders and delivers the goods of his employer and whether or not he collects accounts, is generally useful and a handy man in carrying on his employer's business.

I certainly did not intend, and do not construe, my opinion as holding to the effect that the character of employees mentioned in Mr. Kerr's letter is exempt from the operation of law requiring a chauffeur's license. My reference to salesmen was intended to apply and did apply to "salesmen or drummers in the general and usual acceptation of those words" and not as including any and all characters of employees making sales of their employer's products. Certainly the driver of a Coca-Cola wagon, a laundry delivery wagon and gas tank delivery truck would not be ordinarily classed as salesmen or drummers.

Trusting that this opinion answers the request for an opinion contained in your letter, I am

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

AUTOMOBILES—Chauffeur's license.RICHMOND, VA., *February 5, 1929.*

WHEELER MILLING COMPANY,

*R. F. D. No. 1,**Vienna, Virginia*

GENTLEMEN:

I am in receipt of your letter of the 4th instant, in reference to chauffeur's license for men who drive your milk trucks. In one paragraph of your letter you say:

"We (Wheeler Milling Company) hire three men to work in our mill, on the farm as well as drive our trucks, and we would like to know for our benefit if these men are required to have chauffeur's license. I wish to impress the fact that these men are not hired to drive trucks, only."

In the succeeding paragraph, in quotation marks, you say:

"We operate a milk truck which hauls our milk and others from Browns Chapel to Washington and, in case this driver quits or we discharge him, what will we do with such a perishable article as milk? It would be impossible to let it stand until we could obtain another permit for our new man."

In an opinion given to Honorable James M. Hayes, Jr., Director, Division of Motor Vehicles, on February 1, I held that where a person drove for compensation, whose main or principal duty it was to drive a truck, such person should obtain a chauffeur's license.

It would seem from my second quotation from your letter that it is the principal business of one of your drivers to operate your milk truck. This man should certainly have a chauffeur's license.

If another of the three men whose occupation principally is farm work should occasionally be called upon to drive your milk truck, I do not think that he would be required to take out a chauffeur's license.

In reply to the suggestion that it would be impossible for you to let your milk stand until you could obtain a permit for the new man, I would say that, should you lose your milk driver and put either of your other workmen to drive permanently, or employ an outside man to take the driver's place, such new driver should be permitted to operate the truck until you could obtain a chauffeur's license for him.

Yours very truly,

JNO. R. SAUNDERS,

*Attorney General.***AUTOMOBILES—Chauffeur's license.**RICHMOND, VA., *March 9, 1929.*

HON. FARRAR VERSER,

Crewe, Virginia.

DEAR MR. VERSER:

I am in receipt of your letter of yesterday, asking for an opinion as to whether or not a certain employee of a grocer is required by law to obtain a chauffeur's license. For the purpose of my reply, I am quoting your letter in full.

"In the matter of chapter 149 of Acts 1926, section 19½, Chauffeur's License:—

"In the case of a retail merchant handling a general line of merchandise, among which is included groceries, hardware, etc., who each day of the week delivers such merchandise at the home of his customers, and among his employees is one who devotes the major portion of his time to driving a motor truck, owned by the said merchant, and delivering the merchandise at the homes of the different customers of the merchant; at other times during the day this employee with the truck hauls less car load freight shipments from the depot to the store; the residue of his time during the day is devoted to general work as an employee about the store: Please give me an opinion as to whether the above mentioned section of the 1926 Acts of the General Assembly requires the employee above described to have chauffeur's license.

"In case chauffeur's license is required in the above case, please also give opinion as to what extent this law operates to require employees of retail merchants who devote a portion of their time to driving the merchant's truck and delivering goods to his customers to obtain chauffeur's license."

The matter of chauffeur's license has given me a great deal of trouble. I can only advise as to the general principle of law and hesitate to apply my opinion of law to a particular case, as each case must stand upon its own facts and no two are exactly the same. Enclosed you will find a letter written to Honorable James M. Hayes, Jr., Director of the Division of Motor Vehicles, which may be of interest to you in connection with the case cited in your letter.

As to the employee of the merchant of your town you say that there is "one who devotes the major portion of his time to driving a motor truck, owned by the said merchant, and delivering the merchandise at the homes of the different customers of the merchant; at other times during the day this employee with the truck hauls less carload freight shipments from the depot to the store; the residue of his time during the day is devoted to general work as an employee about the store."

I think that the fact that he devotes the major portion of his time to driving a motor truck includes him in the class of persons for whom a chauffeur's license is required.

The last sentence in your letter asks my opinion as to the extent the law operates to require employees of retail merchants who devote a portion of their time to driving a merchant's truck and delivering goods to customers to obtain a chauffeur's license.

In my opinion, an answer to this general question depends upon the time the employee devotes to driving of the truck and the capacity in which he is employed as such driver. You will notice that the law requires a chauffeur's license of every employee "whose principal duty or occupation is the driving of a motor vehicle for compensation."

The last quotation is the criterion by which is to be judged the necessity for a chauffeur's license.

This letter may not satisfactorily answer the thought which is in your mind, but you will realize the very difficult problem of applying a general law to a particular case, and especially so where the law contains no exact and accurate definition which can be applied to all cases and in which it is necessary to take evidence in order to provide for its application.

Yours very truly,

JNO. R. SAUNDERS,

Attorney General.

AUTOMOBILES—Chauffeur's license.RICHMOND, VA., *March 6, 1929.*

HON. W. K. MATHEWS,
Attorney at Law,
Mutual Building,
Richmond, Virginia.

MY DEAR JUDGE MATHEWS:

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

"Referring to subsection 19½g of the Motor Vehicle Law in Virginia, I desire to submit to you the following:

"A client of mine, who owns his truck and has paid all the taxes assessable against him by the State, and who operates his own truck on the streets of Richmond and does odd jobs—that is to say, people employ him to move articles of property from place to place, as such jobs may offer themselves.

"Now, what I desire to have your opinion about is this: Does this owner, who is in no sense a chauffeur for compensation, and who, as I view it, does not use his truck as a 'public or common carrier' have to purchase a chauffeur's license?"

Section 19½ of chapter 149 of the Acts of 1926, so far as applicable provides as follows:

"Chauffeurs' license; how obtained; form of license.—Any person other than the owner of a motor vehicle which has been registered and licensed to be operated in this State, whose principal duty or occupation is the driving of a motor vehicle for compensation, and every person who drives a motor vehicle while in use as a public or common carrier of persons or property before he shall operate a motor vehicle in this State shall first take out a chauffeur's license. * * *"

From a careful examination of this section, it is my opinion that the owner of a motor vehicle is not required to obtain a chauffeur's license as a prerequisite to operating his own vehicle unless such vehicle be a common carrier.

It is true that the act uses the words "public or common carrier." I think the two words are used synonymously as a public carrier is a common carrier and is, of course, clearly distinguishable from a private carrier. 6 Cyc. 364, notes 12 and 13.

A man engaged in the business referred to in your letter is not a public or common carrier, but a private carrier and, therefore, is not required to obtain a chauffeur's license.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

AUTOMOBILES—Chauffeur's license.

RICHMOND, VA., February 12, 1929.

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

MY DEAR DOCTOR:

I am just in receipt of your letter of February 11, to which I will reply at once.

In this you state that you have certain employees on the farm of the Western State Hospital whose principal duty it is to work on the farm and the driving of trucks is incidental to their work. You then desire to be advised whether or not, under these conditions, these hands are required to have a chauffeur's license.

If the driving of the truck is incidental to their work, then, in my judgment, they are not required to have a chauffeur's license.

You will observe from a reading of section 19½ of chapter 149 of the Acts of 1926 that the law states:

"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 * * * shall first take out a chauffeur's license. * * *"

I am enclosing you copy of an opinion given Mr. Hayes on February 1, which, in my judgment, fully states the law.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

AUTOMOBILES—Municipal licenses—State-owned cars exempt from.

RICHMOND, VA., February 23, 1929.

HON. T. H. CRABTREE, *Mayor,*
Abingdon, Virginia.

MY DEAR MR. CRABTREE:

I am in receipt of yours of February 22, in which you say:

"The town of Abingdon has an ordinance which requires all persons residing in the town and operating an automobile therein to obtain a license tag, for which there is a charge of \$3.50.

"Please advise whether or not the town can require a license fee from a State officer who resides in the town, such as motor vehicle officers, public health officers, etc. These persons claim that their automobiles are owned by the State and are, therefore, exempt from a town charge for license to operate in the town."

In reply I will state that, if the cars referred to are owned by the State, the town of Abingdon cannot require the operators of them to pay the \$3.50 for a license tag.

I happen to know that the automobiles operated by motor vehicle officers and public health officers are, as a rule, owned by the State.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

AUTOMOBILES—Licenses—Trucks used for passengers—School trucks.RICHMOND, VA., *January 25, 1929.*

HON. CLARENCE JENNINGS,
*Superintendent of Schools,
Toano, Virginia.*

MY DEAR MR. JENNINGS:

Acknowledgment is made of your letter of January 21, 1929, in which you state that the Director of the Division of Motor Vehicles has ruled that owners of trucks, used for the transportation of school children, must obtain regular passenger licenses for such vehicles instead of truck licenses.

Section 29 of chapter 149 of the Acts of 1926, as amended by the Acts of 1928, provides that "all motor vehicles designed and used for the transportation of passengers shall be licensed according to weight." This language, in my opinion, requires trucks used for the transportation of school children to be licensed according to weight, and, therefore, the Director of the Division of Motor Vehicles has correctly construed the law.

The act referred to in your letter (chapter 551 of the Acts of 1926) relates to motor vehicle carriers and has no bearing upon the question submitted by you.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

AUTOMOBILES—Transfer of license plates and registration number legal.RICHMOND, VA., *June 11, 1929.*

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

DEAR MR. HAYES:

I am in receipt of your letter of the 1st instant, in which you enclosed a letter from Mr. A. D. Manuel, one of your deputies, under the date of the 31st of May, and I note that both of these letters have to do with the question as to whether or not, where an automobile has been the subject of an execution sale, the number plates and registration number originally assigned to the execution debtor go with the property in the automobile to the purchaser at the execution sale.

Under your construction of the law, the plates and registration number remain the property of the execution debtor. I note from your letter that Honorable H. A. W. Skeen, Judge of the Circuit Court of Wise County, and Honorable W. W. G. Dotson, attorney for the Commonwealth of that county, hold a contrary view and are of the opinion that the license plates and registration number become the property of the purchaser.

You ask my opinion as to the law upon this subject and you call my attention to subsection (b) of section 15 and subsection (f) of section 17 of the Motor Vehicle Laws.

Frankly, I must say that there is an apparent inconsistency between the sections quoted in your letter.

Subsection (a) of section 7 and subsection (a) of section 9 provide that every owner of a motor vehicle shall apply for the registration thereof and a certificate therefor.

Subsection (a) of section 11 provides for the issuance by the department to each owner of a motor vehicle of a registration card and a certificate of title therefor as separate documents.

Subsection (a) of section 14 provides that the department shall issue two number plates for every automobile.

Coming to subsection (b) of section 15, I find that that section allows the owner who sells a registered vehicle the privilege of having his number plates and registration number assigned to another vehicle, with the further provision that the purchaser of a vehicle bearing the registration number may, with the consent of the previous owner, have the registration number thereof assigned to him.

Subsection (a) of section 16 provides for the annual renewal of the registration of every vehicle by the payment of the fees required by law.

Subsection (f) of section 17 provides that, where the title or interest of an execution debtor is transferred by operation of an *execution sale*, or otherwise than by the voluntary act of the person whose title or interest is so transferred, the transferee may make application to the department for a certificate of title therefor, giving the name and address of the person entitled thereto, and accompany such application with the registration card and certificate of title previously issued for the vehicle, if available, together with such instruments or documents of authority, or certified copies thereof, and the department is authorized to cancel the registration and issue a new certificate of title to the person entitled thereto, and the transferee may also obtain the registration of the purchased vehicle.

You will note that the law under which you are operating makes a very decided distinction between the voluntary sale or transfer of a motor vehicle, under subsection (b) of section 15, and the transfer by operation of law, under subsection (f) of section 17. Under section 15, the seller may transfer the number plates and registration number to some other vehicle in his possession, or may allow the purchaser to have the registration number assigned to him, and I presume the license plates are allowed to remain upon the car. By section 17, the execution debtor or the person whose title or interest is transferred otherwise than by the voluntary act of such person, is accorded no such consideration or privilege and the purchaser or person otherwise acquiring title is entitled to have a new certificate of title and to obtain registration of the purchased vehicle.

In my opinion, the license plates and the registration number automatically become the property of the purchaser and he is entitled, upon his application and sufficient proof of the regularity of the transaction, to have the registration number and number plates assigned to him upon the payment of the regular transfer fees.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

AUTOMOBILES—License—Dealer's plates, use of.RICHMOND, VA., *April 13, 1929.*

MR. H. AMES DRUMMOND,
Attorney at Law,
Accomac, Virginia.

MY DEAR MR. DRUMMOND:

Acknowledgment is made of your letter of April 11, 1929, in which you say in part:

"It is claimed in this county by certain automobile dealers that any person employed by them, be the same salesmen, automobile mechanics or labor-men, can use their machines under their dealers' tags at any time, be the same for demonstration purposes or for their personal use."

The last paragraph of subsection (d) of section 29 of chapter 149 of the Acts of 1926, as amended, reads as follows:

"It shall be unlawful for any such manufacturer, dealer, agent or any other person to use such number plates other than on machines used for sales purposes, and any violation of this section shall be punished by a fine of not less than ten dollars and not more than fifty dollars."

This section clearly prohibits the use of a dealer's tags on any machine other than one used for sales purposes. I think that unquestionably an automobile owned by a dealer and used for sales purposes may be driven about such dealer's business by salesmen, or even operated by mechanics or labormen, when operated in connection with a bona fide effort to sell or demonstrate the same. I do not think, however, that the law contemplates that such tags may be used at any time regardless of the purpose for which such car is used, although I am frank to say that it is rather hard, if not impossible, to lay down any hard and fast rule which would control every conceivable case.

Trusting this will give you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

AUTOMOBILES—License not required of those owned by railroads and used in connection therewith.RICHMOND, VA., *March 6, 1929.*

C. M. BAIN, ESQ.,
Assistant General Counsel,
Norfolk Southern Railroad Company,
Norfolk, Virginia.

MY DEAR MR. BAIN:

My delay in answering your letter of February 13, 1929, is due to the fact that at the time it was received I was confined to my bed as the result of an automobile accident. When I was able to return to my work the occasion for which you wished a reply had passed. I regret very much that I was unable to help you. In this letter you say in part:

"Norfolk Southern Railroad Company owns a Ford emergency repair truck which is kept in and around Virginia Beach. The truck is used exclusively in the business of Norfolk Southern Railroad Company to make emergency repairs to its trolley lines, at its sub-stations, and also to repair power lines transmitting electric current which we sell to third parties."

and request my opinion as to whether, in view of section 177 of the Constitution of Virginia, your railroad is required to pay the regular license fee for automobiles and obtain license plates therefor.

On December 21, 1923 (Report of the Attorney General 1923-25, p. 39), a similar inquiry was submitted to the Attorney General by Edward R. Wilcox, Esquire, of Norfolk, Virginia, and in response thereto the Attorney General said:

"In view of the provisions of section 177 of the Constitution of Virginia 1902, I am inclined to the opinion that section 2125 of the Code of 1919, as amended, does not apply to motor vehicles owned and used by railroad companies in connection with the necessary operation of their railroads.

"By this, do not understand me to mean that a railroad company could establish an additional freight or passenger line over the highways of this State by means of motor vehicles without obtaining the necessary license therefor."

When section 177 of the Constitution is read in connection with section 176 thereof, it would seem clear that the State cannot repair a railroad taxed in accordance with these sections of the Constitution to pay an automobile license tax for an automobile used in the manner indicated in your letter.

Yours very truly,

LEON M. BAZILE,
Assistant Attorney General.

AUTOMOBILES—Conditional sales contract, recordation of.

RICHMOND, VA., July 25, 1928.

HON. KENNON C. WHITTLE,
Attorney at Law,
Martinsville, Virginia.

DEAR MR. WHITTLE:

I am in receipt of your letter of July 19, in which you ask my interpretation of certain provisions of chapter 374, page 990, of the Acts of 1928—

First, as to the necessity for docketing conditional sales contracts in the clerk's office of the county or city in which the lienee resides.

It is not now necessary to docket liens in the county in which the lienee lives, it being expressly provided in subsection (i) that—

"* * if such conveyance be an automobile the memorandum of lien on the certificate of title issued by the Motor Vehicle Commissioner of Virginia on said automobile shall make any other recordation of the same unnecessary * *."

Second, you state that you have a case of a lien holder in North Carolina whose lien has been docketed according to the laws of that State, who is asking for the return of a car caught in Henry county.

Provided that the car was seized since the 19th day of June, 1928, the car is liable to forfeiture, irrespective of the fact that there is a lien upon the same which has been duly docketed in the State of North Carolina.

Yours very sincerely,

JNO. R. SAUNDERS,
Attorney General.

AUTOMOBILES—Recordation of conditional sales contract.

RICHMOND, VA., *August 22, 1928.*

DRUGAN MOTOR CO., INC.,
Bristol, Tenn.-Va.

GENTLEMEN:

I am in receipt of your letter of August 30, asking to be advised if there is a new ruling eliminating the necessity for the recordation of conditional sales contracts for cars purchased and owned in the State of Virginia.

In paragraph (i), page 993, of the Acts of 1928, it is provided:

“ * * if such conveyance be an automobile, the memorandum of lien on the certificate of title issued by the Motor Vehicle Commissioner of Virginia on such automobile shall make any other recordation of same unnecessary. * * ”

This provision is an amendment to the old law making it necessary to record a conditional sales agreement on an automobile, in order for a person to be entitled to receive relief, in the county in which the owner resides, and that it is no longer necessary to record such a lien and that the only place where it is necessary for such lien to appear is upon the certificate of title held by the owner.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

AUTOMOBILES—Liens, recordation of.

RICHMOND, VA., *September 18, 1928.*

MR. W. A. DICKINSON,
Attorney at Law,
Cape Charles, Virginia.

DEAR SIR:

I am in receipt of your letter of the 14th instant, asking my construction of that provision of section 28 of the prohibition law, as amended, having reference to the recordation of liens upon automobiles, and especially as to whether the term automobile as used in the section referred to by you covers other kinds of motor vehicles.

It was undoubtedly the intention of the Legislature to cover all characters of motor vehicles required to be registered in the Division of Motor Vehicles, and I am of the opinion that, where the title to the motor vehicle contains a notation

on the lien, such is sufficient and it is not required to docket the lien in the county of the owner's residence.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

AUTOMOBILES—For hire vehicles, liability insurance, bonds, when not required.

RICHMOND, VA., *January 14, 1929.*

HON. JAS. M. HAYES,
Director Division of Motor Vehicles
Richmond, Virginia.

MY DEAR MR. HAYES:

My office has been besieged for the last several days with persons seeking a construction of subsection (g) of section 29, chapter 149 of the Acts of 1926, as amended by chapter 531 of the Acts of 1928. This section, so far as applicable to the question here under consideration, reads as follows:

"The director shall, in the granting of a license, require the applicant to procure and file with said director, liability and property damage insurance, or bond with surety, on such motor vehicles to be used in the service aforesaid, in such amount as the director may determine but not in excess of five hundred (\$500.00) dollars per revenue producing seat, insuring or indemnifying passengers and the public receiving personal injury by reason of an act of negligence, and for damage to property of any person other than the assured, such policy or bond to contain such conditions, provisions and limitations as the director may prescribe, and shall be kept in full force and effect, and failure to do so shall be cause for the revocation of such license; provided, that when bond, with solvent personal surety, is offered, the same may be accepted; and provided further that where such a bond is required by the municipality in which the applicant operates, no further or additional bond shall be required hereunder."

Due to the wording of this section, it is my opinion that the bond provision does not apply to freight carriers. This section is not very clear in its meaning, but the machinery provided for the requirement of the bond based on the revenue producing seats in such vehicles limits its application, in my opinion, to passenger carriers.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

AUTOMOBILES—Operator class "C" motor vehicle carrier, right to accept passengers on return trip.

RICHMOND, VA., *September 20, 1928.*

HON. W. N. JONES,
Justice of the Peace,
Appalachia, Virginia.

MY DEAR SIR:

In further reference to your letter of the 7th instant, asking as to the right of an operator of a class "C" motor vehicle carrier, I have called up Hon. James

M. Hayes, Jr., Director of the Division of Motor Vehicles, and explained to him the statement made in your letter concerning which you ask for an opinion. I quote from your letter:

"I now have a case pending before me, as justice of the peace, where a class "C" operator was employed in Appalachia to make a special trip to the town of Norton, which he did, and when he had discharged the passengers in Norton, some passengers, seeing that he was operating a taxi from Appalachia, called to him and solicited him to take them back to Appalachia on his return trip, which he did and was paid for the trip from Norton, Appalachia being his point of operation."

I am of the opinion, and understand that Mr. Hayes agrees with me, that a class "C" operator may at the end of a trip for which he is engaged, if solicited by a person, accept such a person as a passenger upon a return trip.

In the case stated by you, the class "C" operator employed in Appalachia for a special trip to Norton may, after he has discharged his passengers at Norton, accept persons at Norton and carry them back to Appalachia, provided he is solicited by his passengers.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

AUTOMOBILES—Proper for truck operator to haul produce for delivery to customers—Driver must have permit "E."

RICHMOND, VA., November 21, 1928.

MR. T. JANNEY,
*Janney Brothers, Inc.,
Alexandria, Virginia.*

DEAR SIR:

I am in receipt of your letter of November 17th, which I quote:

"We are writing to ascertain from your office if we have the right to make arrangements with a truck operator, hauling milk from Purcellville to Washington to carry back groceries for us to certain merchants, we paying delivery charges."

In my opinion you have a perfect right to make arrangements with the truck operator hauling from Purcellville to Washington to carry back groceries for your customers.

Under the Virginia law relating to automobiles, the truck operator would be required to secure permit "E" from the State Corporation Commission, as he would not be allowed to haul property for compensation without such license.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

BOARD OF SUPERVISORS—Authority to borrow money.RICHMOND, VA., *April 17, 1929.*

HON. JOHN H. COLE,
Commonwealth's Attorney,
Stony Creek, Virginia.

MY DEAR MR. COLE:

Acknowledgment is made of your letter of April 16, 1929, in which you say:

"I am requested by an official of this county to ask you for a ruling upon the question of whether or not the board of supervisors has authority to borrow money upon the credit of the county to meet general county expenses.

"I have looked into the question myself and I find no express authority of law for so doing, but, as this person desires your ruling and not mine, I would appreciate it very much if you would write me your opinion at your earliest convenience in order that I might transmit it."

After a careful examination of the Code, I am of the opinion that the board of supervisors of a county is without authority to borrow money upon the credit of such county to meet general county expenses. The only authority that I have been able to find for the contracting of a debt by such board of supervisors is found in sections 2738 and 2110-2115 of the Code, all of which statutes provide for bond issues after approval by the people in an election held for that purpose.

Some people have thought that section 2727 of the Code authorized a loan of the kind referred to in your letter. This section reads as follows:

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

It is my opinion, however, that this section solely relates to the raising of funds by levy and not to the making of loans.

I also call your attention to section 2724 of the Code, which provides in part:

" * * The board of supervisors of any county shall not issue in any one year a greater amount of warrants than the amount of county tax levied for such year * *."

The only exception to this provision is where the treasury has a surplus of county funds in addition to the county tax levied for such year.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

BOARD OF SUPERVISORS—Authority to accept negotiable notes, duty of clerk to index.RICHMOND, VA., *July 27, 1928.*

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

DEAR MR. GLOTH:

I am in receipt of your letter of yesterday, in which you quote from section 7, chapter 234, page 743, of the Acts of 1928, as follows:

"The board of supervisors shall have authority to accept negotiable notes or bonds in payment for water connection charges. Whenever any such note or bond is accepted by said board in payment for such charges, such notes or bond shall be listed by the treasurer of the county in a special book provided by the board of supervisors for that purpose, which list shall set forth the name of the maker, the date thereof, the amount due, and when and how payable, and shall be indexed in the name of the maker in the general index for deeds in the clerk's office of the circuit court of the county. From and after the time such note or bond has been so listed and indexed, it shall be a lien upon and against the real estate upon which the water connection was made."

You then ask:

"In your opinion is it necessary for the clerk to both index and record the note or bond described in the aforesaid section or is it sufficient for the clerk to index the same in the name of the maker and merely file the note or bond."

In my opinion, the law only requires indexing and not recording in the office of the clerk of your county. The indexing should be, on the grantor's side, in the name of the maker of the note or bond (who should be the owner of the property). It should show, as is required to be shown in the treasurer's book, the name of the maker, the date thereof, the amount due, when and how payable, and to whom payable.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

**BOARD OF SUPERVISORS—Authority to levy license tax on pumps
of gasoline filling stations.**

RICHMOND, VA., *December 3, 1928.*

HON. T. RUSSELL CATHER,
Winchester, Virginia.

DEAR SIR:

I am in receipt of your letter of the first instant, in which you write:

"A question has arisen as to the power of the board of supervisors of Frederick county levying a specific license tax on pumps of gasoline filling stations located within the county. I know that such taxes are levied by the cities of the State and know of no reason why similar levies should not be made by the counties. I shall greatly appreciate your advice in this regard."

There is no law authorizing counties to impose license taxes on pumps of gasoline filling stations located within counties.

Such concerns are merchants and they may be taxed upon their capital invested in business just as other merchants are taxed.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

BOARD OF SUPERVISORS—Authority to pass prohibition ordinance.RICHMOND, VA., *December 12, 1928.*

HON. WILSON M. FARR,
Commonwealth's Attorney,
Fairfax, Virginia.

MY DEAR MR. FARR:

Acknowledgment is made of your letter of recent date, in which you request me to advise you whether the board of supervisors of your county is authorized to adopt a prohibition ordinance paralleling the State Prohibition Law, so that fines imposed for violations of such ordinance may be used for the purpose of enlarging the jail facilities of your county.

The only authority for the enactment of county prohibition ordinances is found in section 37 of the Virginia Prohibition Law. The only counties authorized by this section to pass such ordinances are, first, counties coming within the provisions of chapter 102 of the Acts of 1916, giving to the boards of supervisors in counties adjoining cities having a population of one hundred and twenty-five thousand or more inhabitants the same powers possessed by city councils; and, second, to counties coming within the provisions of chapter 349 of the Acts of 1912, which apply only to counties having more than three hundred inhabitants per square mile.

As I understand it, Fairfax county does not fall within the provisions of either of these acts. It is, therefore, my opinion that the board of supervisors of your county is without authority to pass a county prohibition ordinance.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

BOARD OF SUPERVISORS—Ordinances, fishing on Sunday.RICHMOND, VA., *June 24, 1929.*

HON. J. P. JONES,
Commonwealth's Attorney,
New Castle, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of June 19, 1929, in which you say:

"At the request of the board of supervisors of Craig county, I am writing to ask that you give me your opinion as to whether or not it is lawful for the local board of supervisors to enact an ordinance forbidding fishing on Sundays. This is a much discussed question here and I will appreciate it if you will advise me your opinion as to the legality of such action."

I am advised by the Department of Game and Inland Fisheries that the boards of supervisors in the counties of Alleghany, Botetourt, Highland and Rockbridge have adopted such ordinances. Frankly, I very seriously doubt whether the board of supervisors of a county has the power to pass such an ordinance.

Section 3301 of the Code prohibits seine or net fishing in the Potomac river on Sunday, but it is limited to the Potomac river. Section 4570 of the Code, our Sunday statute, only attempts to prohibit laboring or other business, except in household or other work of necessity or charity.

So far as the State law is concerned, therefore, one may lawfully fish in this State on Sunday, except in the Potomac river.

While it is true that under section 2743 of the Code the board of supervisors of a county may pass an ordinance "to prevent the destruction of * fish * * and to limit still further than is provided by general law the time, manner, and means by which they may be taken * * *; the number that may be taken or removed from the county in a given time, and the manner and condition of such removal," I doubt very much whether this is broad enough to permit the adoption of an ordinance which is aimed solely at fishing on Sunday; in other words, which is a Sunday and not a fishing or game regulation.

I cannot believe that that paragraph of section 2743 of the Code, which authorizes the boards of supervisors of the counties "to adopt such measures as they may deem expedient to secure and promote the health, safety, and general welfare of the inhabitants of their respective counties not inconsistent with the general laws of this State," could authorize the adoption of such an ordinance.

Yours very truly,

JNO. R. SAUNDERS,

Attorney General.

BOARD OF SUPERVISORS—Authority to provide stenographer for Commonwealth's attorney.

RICHMOND, VA., *December 6, 1928.*

HON. WM. C. GLOTH,
Commonwealth's Attorney,
Clarendon, Virginia.

MY DEAR MR. GLOTH:

Acknowledgment is made of your letter of recent date, in which you request me to advise you whether the board of supervisors of your county has the authority to provide a stenographer for the Commonwealth's attorney of your county.

Section 2743a of the Virginia Code of 1924 provides in part:

"The boards of supervisors of counties adjoining and abutting a city, within or without this State, with a population of one hundred and twenty-five thousand, or more inhabitants * * *, be, and they are, hereby vested with the same powers and authority as are now vested or which may hereafter be vested in the councils of cities and towns by virtue of the Constitution of the State of Virginia or the acts of the Assembly passed or which may hereafter be passed, in pursuance thereof, * * *."

Section 2988 of the Code provides in part:

"The council of every city or town of this Commonwealth having in their several charters the power to appoint certain municipal officers shall, in addition to such power, have power to appoint such other officers and employees as the council may deem proper, or any committee of such council, or any municipal board, or the mayor of the city or town, or any head of a department of such city or town government, may also appoint such officers and employees as the council may determine, the duties and compensation of which officers and employees shall be fixed by the council of the city or town, except so far as the council may authorize such duties to be fixed by such committee or other appointing power."

You will see from this that the councils of cities are vested with the power to provide for such employees as the council may deem proper. This same power is vested by section 2743a of the Virginia Code of 1924 in the boards of supervisors of those counties adjoining and abutting a city, within or without this State, with a population of one hundred and twenty-five thousand, or more inhabitants.

Arlington county is one of the counties to which this last cited section applies. It is, therefore, my opinion that under the authority of section 2743a of the Virginia Code of 1924, and section 2988 of the Code, the board of supervisors of Arlington county has the authority to provide a stenographer for the Commonwealth's attorney of that county.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

BOARD OF SUPERVISORS—Authorized to appropriate money to Children's Home Society.

RICHMOND, VA., *October 18, 1928.*

DR. W. J. MAYBEE,
*Children's Home Society,
Room 911, 301 E. Grace Street,
Richmond, Virginia.*

MY DEAR DR. MAYBEE:

Acknowledgment is made of your request of today that I advise you whether, in my opinion, the board of supervisors of a county has the authority to make an appropriation or donation to the Children's Home Society, that society being solely engaged in caring for indigent or dependent children, which children are received from the counties and cities of the State generally.

I do not find any specific authority in the law for such an appropriation or donation, but it seems to me that the well recognized obligation of the localities to provide for their poor and the provisions of chapter 111 of the Code would permit a board of supervisors to make such an appropriation or donation.

Section 2743 of the Code authorizes the several boards of supervisors "to adopt such measures as they may deem expedient to secure and promote the health, safety and general welfare of the inhabitants of their respective counties, not inconsistent with the general laws of the State." Section 2795 of the Code makes the expenses of maintaining the poor of such county a charge on the county and directs the board of supervisors to provide for raising the funds necessary to meet such requirement.

It is possible that some doubt might arise as to the validity of an appropriation or donation to the Children's Home Society by the board of supervisors of a county when none of the indigent children from that county is cared for by the society, but, in my opinion, in any case in which the Children's Home Society is caring for indigent children from a county, the board of supervisors of such county would be authorized to appropriate money to the society.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

BOARD OF SUPERVISORS—Authority to borrow money and issue bonds to erect school building—schools—school code.

RICHMOND, VA., July 16, 1928.

HON. J. R. H. ALEXANDER,
Commonwealth's Attorney,
Leesburg, Virginia.

MY DEAR MR. ALEXANDER:

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

"Mr. O. L. Emerick, our Division Superintendent of Schools, has made inquiry of me as to the law on the following statement of facts:

"On March 21, 1928, the Governor approved an act of the General Assembly, found on page 950 of the Acts of 1928, authorizing the county school board of Loudoun County, with the approval of the board of supervisors, to borrow a sum not exceeding \$55,400.00 and issue bonds therefor, to be expended as provided in the act. Contract has been let for the school in Mercer district and the building almost completed. The school board now desires to let contracts for the other buildings provided for in the act. Up to this date no loan has been contracted for nor bonds issued.

"Mr. Emerick desires to know whether or not the constitutional amendment, carried at the recent election and prohibiting the contraction of a public debt without the sanction of the electors, will in any way interfere with the carrying out of the plans made by the school board and the board of supervisors for the erection of the buildings provided for in the act and payment therefor. In short, can the county school board and the board of supervisors of Loudoun county now execute and sell the bonds provided for in the acts above referred to?"

Section 115-a of the Constitution, as amended June 19, 1928, reads as follows:

"No debt shall be contracted by any county, or by or on behalf of any district of any county, or by or on behalf of any school board of any county, or by or on behalf of any school district in any county, except in pursuance of authority conferred by the General Assembly by general law; and the General Assembly shall not authorize any county, or any district of any county, or any school board of any county, or any school district in any county, to contract any debt except to meet casual deficits in the revenue, a debt created in anticipation of the collection of the revenue of the said county, board or district for the then current year, or to redeem a previous liability, unless in the general law authorizing the same provision be made for the submission to the qualified voters of the proper county or district, for approval or rejection, by a majority vote of the qualified voters voting in an election, of the question of contracting such debt; and such approval shall be a prerequisite to contracting such debt. No scrip, certificate or other evidence of county or district indebtedness shall be issued except for such debts as are expressly authorized in this Constitution or by the laws made in pursuance thereof."

I am of the opinion that, as to the school which has already been contracted for and partially erected, the bonds authorized by chapter 356 of the Acts of 1928 can be issued without an election, as they will unquestionably be issued for redeeming a previous liability. I do not think, however, that bonds could now be issued, under this act, for the purpose of paying for the erection of buildings which were not contracted for prior to June 19, 1928, as the constitutional provision is about as clear as it could be made that no debt or obligation, save those expressly excepted, shall be made or created without having first been approved by the qualified voters of the proper locality in an election held for that purpose.

We have the question submitted by you as to loans from the Literary Fund under consideration at this time, but have not as yet reached a definite conclusion as to whether such loans can be made. As soon as the question is determined, a copy of the opinion will be sent to you.

Yours very truly,

LEON M. BAZILE,

Assistant Attorney General.

BOARD OF SUPERVISORS—Claim of county treasurer for money paid judges.

RICHMOND, VA., August 27, 1928.

HON. H. P. BURNETT,

Commonwealth's Attorney,

Independence, Virginia.

DEAR SIR:

Your letter of August 13, addressed to Honorable E. R. Combs and me, has been received. In this letter you state:

"Mr. A. M. Kirk, former treasurer of this county, has filed a claim before the board of supervisors for amounts paid by him on the salary of the circuit court judge for the years 1925, 1927 and 1928. The records show that he paid these and charged himself with same, but that he failed to give himself credit on books for same. His settlement with the State Accountant will show this. He only recently discovered his error in failing to give himself credit for these amounts paid by him. I have investigated his books and am absolutely satisfied that he is correct.

"I am writing you gentlemen for your opinion as to whether the county should reimburse him for these amounts so charged to him and paid by him, but for which he received no credit in his settlements."

It is my opinion, in which Mr. Combs concurs, that Mr. Kirk should be reimbursed by the board of supervisors of your county for the amounts paid and for which he has not been reimbursed.

The failure to take these items in consideration was evidently a mutual mistake and should be corrected.

Yours very truly,

JNO. R. SAUNDERS,

Attorney General.

BOARD OF SUPERVISORS—Compensation for looking after roads.

RICHMOND, VA., October 18, 1928.

HON. W. W. G. DOTSON,

Commonwealth's Attorney,

Wise, Virginia.

MY DEAR DOTSON:

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

"Our board of supervisors is looking after the roads of the county instead of hiring a road supervisor, and they have asked me to give them my opinion as to what they are entitled to for their services. Under the

Acts of 1928, page 568, as I construe the statute, they are entitled to \$6.00 per diem for all their services required by law, outside of \$6.00 per diem and mileage for each meeting of the board. I would like for you to construe this statute and give me your opinion by return mail. Our board does not want to accept anything unless it is in accordance with the law."

The only provision that I know of for the compensation of supervisors is found in section 2769 of the Code, as amended by chapter 76 of the Acts of 1928, pages 337-340. You will observe that this section of the Code provides a compensation of \$6.00 per day and mileage, with exceptions as to certain counties. There is a limitation, however, as to the number of days for which a supervisor may be paid, and, while there is a provision in this section that it shall not prevent supervisors in the counties which have special road laws from receiving additional compensation for services in connection with road work done under said special road laws, so much thereof has been rendered inoperative by section 46 of chapter 159 of the Acts of 1928, a later act which has repealed all such special road laws. It would, therefore, seem from the provisions of section 2769 of the Code that the maximum compensation, which could be drawn by the members of your board, could not exceed \$240.00 and mileage in any one year.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

BOARD OF SUPERVISORS—Date of month on which meetings should be held.

RICHMOND, VA., *December 19, 1928.*

MR. CHARLES H. MARTIN, *Pres.*,
Roanoke Sales Corporation,
Mountain Avenue and Third St., S. E.,
Roanoke, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of December 18, 1928, in which you request certain information as to the date of the month on which meetings of the board of supervisors of a county should be held. The matter is governed by section 2711 of the Code, which reads as follows:

"The board of supervisors of each county shall assemble at the court house of said county in regular session once each month upon such day as may be prescribed by an order of the board, and it may adjourn from day to day or time to time not beyond the time fixed for the regular meeting, until the business before it is completed. It may also hold special meetings at such other times as it may deem necessary. The meeting held in July shall be known as the annual meeting of the board, and that held in January as its semi-annual meeting."

Trusting this gives you the desired information, I am

Very truly yours,

JNO. R. SAUNDERS,
Attorney General.

BOARDS OF SUPERVISORS—Enactment of local legislation by—Sunday ordinances.

RICHMOND, VA., June 7, 1929.

JOHN MARTIN, ESQ.,
Attorney at Law,
Halifax, Virginia.

DEAR MR. MARTIN:

Acknowledgment is made of your letter of May 24, 1929, in which you say:

"I have recently been asked for an opinion on a question that most probably you have already given an official opinion on, or at least considered. The question is this: has the board of supervisors of a county now the authority to enact police regulations governing the conduct of business in the county? If it has not this authority now, can the legislature confer it?"

"The specific question asked me related to the authority of the board to order gasoline filling stations to be closed on Sundays, or at least to prescribe the hours that they might stay open on Sundays as well as other days. If you have ever considered this question, I would be very glad indeed to know your views."

Section 65 of the Constitution of Virginia authorizes the General Assembly to confer upon the boards of supervisors of counties such powers of local and special legislation as it may from time to time deem expedient, not inconsistent with the limitations contained in the Constitution.

The only legislation that I have been able to find, authorizing counties to pass local legislation, is section 2743 of the Code, as amended. The only thing in this section which could possibly apply to the specific question you have under consideration is the eighth paragraph, which provides that the boards of supervisors shall have power—

"To adopt such measures as they may deem expedient to secure and promote the health, safety, and general welfare of the inhabitants of their respective counties *not inconsistent with the general laws of this State.*" (Italics supplied.)

The General Assembly has already enacted legislation covering the subject of working or transacting business on Sunday (section 4570 of the Code). This section expressly exempts works of necessity. As to what is a necessity and as to how it may be determined, I call your attention to the cases of *Lakeside Inn Corporation v. Commonwealth*, 134 Va. 696, and *Pirkey Brothers v. Commonwealth*, 134 Va. 713. If the sale of gasoline on Sunday is a work of necessity, then the board of supervisors of a county would be without authority to either regulate or prohibit its sale. If, on the other hand, the sale of gasoline on Sunday is not a work of necessity, then it would seem clear that the board of supervisors would have authority to regulate or prohibit its sale under authority of section 2743 of the Code, as amended.

Trusting this will give you the desired information, I am

Very truly yours,

JNO. R. SAUNDERS,
Attorney General.

BOARDS OF SUPERVISORS—Without authority to reject specific items on delinquent tax list.RICHMOND, VA., *October 29, 1928.*

HON. W. EARLE CRANK,
Commonwealth's Attorney,
Louisa, Virginia.

MY DEAR MR. CRANK:

Acknowledgment is made of your letter of October 20, 1928, in which you request me to advise you whether the board of supervisors of a county has the right to reject any tax bill, which the county treasurer may wish to return delinquent, if the board is of the opinion that it is collectable.

As you stated in your letter, the board had this right as it existed prior to 1928, but the whole law with reference to the return of delinquent taxes was re-drafted and changed by sections 387-396 of the Tax Code. It would appear from an examination of these sections that, inasmuch as the delinquent list does not become final until one year after it has been filed and the treasurer continues to collect such taxes during that time, the board no longer has the power to reject specific items on this list.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

BROKERS—Application for license of—Compensation for witnesses.RICHMOND, VA., *July 27, 1928.*

MR. WM. D. RUDD, *Executive Secretary,*
Virginia Real Estate Commission,
Richmond Trust Building,
Richmond, Virginia.

MY DEAR MR. RUDD:

I beg leave to acknowledge receipt of your letter of recent date in which you ask certain questions pertaining to witnesses who were summoned to appear before the commission in the application for license as a broker made by one James W. Steele.

Section 4359(85) of the Code of Virginia, 1924, provides for a hearing before the commission before application is refused or license suspended or revoked. This section, among other things, provides:

"The commission shall have the power to subpoena and bring before it any person in this State, or take testimony of any such person by deposition with the same fees and mileage in the same manner as prescribed by law in judicial procedure in courts of this State in civil cases."

The amount allowed by law for witnesses is 50 cents for each day's attendance, all necessary ferriage, tolls and five cents per mile over five miles going and returning to the place of trial.

I do not think it is necessary for the claims of witnesses to be filed under oath, but a witness who appears before the commission should state to the secre-

tary the distance he has traveled in order to appear before the commission, and also what ferriage, or tolls he paid in addition. The commission should then authorize the payment of this witness out of the State Treasury, and the Comptroller, on a proper order from the commission, would pay this witness.

I trust I have made myself clear in this matter.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

CITIES AND TOWNS—Charter of Bowling Green—Ordinances passed by board of trustees must be passed on by mayor.

RICHMOND, VA., December 5, 1928.

HON. L. D. VINCENT, *Mayor,*
Bowling Green, Virginia.

MY DEAR MR. VINCENT:

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

“Has our town council any authority, under our charter, to pass resolutions or ordinances paying out money without first submitting such ordinance or resolution to the mayor for approval or veto?”

This matter is governed by section 12 of your charter (chapter 144 of the Acts of 1902-3-4, pages 135-6), which provides in part:

“ * * all ordinances passed by the board of trustees shall, within five days from their passage, be submitted to the mayor by the board of trustees, and by him approved or vetoed within five days after they shall have been so presented to him * * *.”

The above section then provides how such ordinances may be passed over the veto of the mayor. This section very clearly provides that all ordinances of every character and description must be submitted to the mayor for his approval or veto.

Trusting this gives you the desired information, I am

Very truly yours,

JNO. R. SAUNDERS,
Attorney General.

CITIES AND TOWNS—Town charter repealed by section 3028 of the Code.

RICHMOND, VA., December 5, 1928.

HON. L. D. VINCENT, *Mayor,*
Bowling Green, Virginia.

MY DEAR MR. VINCENT:

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

“Will you kindly favor me with an interpretation of section 3028 of the Code of Virginia, which reads in part as follows:

“ * * The mayor shall preside over the said council and the council may direct the payment to the mayor of a salary not exceeding nine

hundred dollars per annum, payable as the council may direct, and anything in the charter of any town in the Commonwealth in conflict with this provision is hereby repealed and in the event of the absence of the mayor, the council may appoint a president pro tempore. * *

"A letter from you to one of our councilmen, construing our town charter, has brought the same in conflict with this section of the Code, and, since the law referred to above was enacted subsequent to the enactment of the town charter, I have contended that the conflict of authority is apparent and has been repealed by section 3028."

Your quotation from section 3028 of the Code is correct, and it is my opinion that the above provision of that section has repealed anything in your charter (chapter 144 of the Acts of 1902-3-4) in conflict therewith. Section 3028 of the Code, having been enacted subsequent to the Acts of 1902-3-4 incorporating your town, necessarily controls as to any matter in which it conflicts with the earlier act.

It is true that on September 13, 1928, I undertook to construe for L. A. Bodine, Esquire, of your town, certain sections of your town charter. Mr. Bodine's request was limited to the construction of the charter provisions, and in my reply to him I did not make an examination of the general law but only gave him my views as to the meaning of the provisions of the charter of his town. The opinion of September 13, 1928, given to Mr. Bodine is correct, except so far as it has been altered by the enactment of section 3028 of the Code.

Trusting this gives you the desired information, I am

Very truly yours,

JNO. R. SAUNDERS,
Attorney General.

CITIES AND TOWNS—Mayors, authority to suspend officers and employees.

ELECTIONS—Primaries, city councilmen.

RICHMOND, VA., *February 27, 1929.*

HON. J. S. ASHWORTH,
City Attorney,
Bristol, Virginia.

MY DEAR MR. ASHWORTH:

Acknowledgment is made of your letter of February 17, 1929, in which you say in part:

"Will you kindly advise me at your earliest convenience whether or not the mayor of a city, like Bristol, under the city manager form of government, has the power to suspend, for cause, the city manager? Your attention is respectfully called to section 2950 of the Code. That section, as well as section 3010 of the general law, seems broad enough to give the authority.

"I would also be very grateful if you would advise me as to whether or not, under the holding of our Supreme Court of Appeals in the case of *Lambert v. Barrett*, city councilmen are such officers as would properly come under our primary laws—are they such officers as may be nominated by a direct primary (sections 222 and 246)? Bristol has three councilmen to elect in June of this year, and only three have filed their declaration of candidacy for the primary. Can the Democratic Committee declare all three nominees?"

Section 2950 of the Code, in prescribing the powers and duties of mayors in cities and towns, provides in part:

" * * They shall have general supervision of all departments and the right to suspend all municipal officers and employees and the members of any police or fire board or commission except members of the council."

Section 2949 of the Code, which is in the same chapter and immediately precedes section 2950 thereof, authorizes the council of any city or town to employ a city or town manager. Unquestionably, it seems to me that a town manager is either a municipal officer or employee, and, therefore, under authority of section 2950 of the Code, may be suspended by the mayor thereof.

I have examined sections 222 and 246 of the Code and the case of *Lambert v. Barrett*, 115 Va. 136. It is my opinion that city councilmen are such officers as come under the primary law, and that section 246 of the Code applies to the case referred to in your letter.

Trusting this gives you the desired information, I am

Very truly yours,

JNO. R. SAUNDERS,

Attorney General.

CITIES AND TOWNS—Collection of taxes in.

RICHMOND, VA., June 13, 1929.

HON. W. R. ASHBURN,
Attorney at Law,
Citizens Bank Building,
Norfolk, Virginia.

DEAR SIR:

Pardon me for not having heretofore replied to your letter of the 23rd ultimo, but at the time of its receipt my office force was busy preparing its briefs for the Supreme Court of Appeals at Wytheville, and the questions you ask in your letter require a certain amount of examination of the old statute law and of the present tax code.

In your letter you state that the town of Virginia Beach is having considerable difficulty in collecting its municipal taxes, and you say that you have examined chapter 98 of Michie's Code of 1924 and the supplements thereto, and that you are unable to advise your town council as to just how they are to proceed in the matter of collection of town taxes.

Practically all of chapter 98 has been repealed. The present authority for the assessment of town property is contained in section 293 of the tax law and, in addition thereto, towns are authorized to impose license taxes pursuant to section 296 of the tax code.

By virtue of section 298 of the tax code, the officer of a city or town, whose duty it is to collect city or town taxes, is given the same power to distrain the goods, chattels within his town as is given by law to county and city treasurers. I refer you to section 378 as to the goods and chattels upon which treasurers, sheriffs, sergeants, etc., may levy and the details as to how sales are to be made under these levies and certain rights given to lease premises belonging to a party in whose name the property is assessed, and you will see that under section 379

certain goods and chattels of the tenant or other person in possession of the estate assessed with taxes may be levied upon for an amount not exceeding that due by the tenant to the landlord. Under section 403 of the tax code, quite a few additional remedies are provided for the collection of State, county and municipal taxes.

Section 2457 of the Code of Virginia, chapter 99, provides as to how real estate may be sold for town taxes.

You ask in your letter as to the right of a town to enforce payment, and for advice as to the most practical procedure in order to make your collections.

I would say that the easiest and best way would be for your town collecting officer to distrain upon the personal property of each person assessed with taxes, under the provisions of sections 298 and 382 of the tax code, and that, in the event a person assessed with taxes has no personal property out of which taxes can be made and is the owner of real estate, the real estate be sold under the provisions of section 2457 of the Code.

However, you will have to examine the statutes carefully and whenever the situation is such that the last mentioned provisions of the tax code and of the Code cannot be applied, you may be able to reach the situation under the provisions of section 403 of the tax code.

I realize the fact that this letter may not meet your requirements and I will be pleased to have you write me further on the subject, and I will very cheerfully furnish you any further information and advice I may be able to give.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

CITIES AND TOWNS—Representation on school board.

RICHMOND, VA., July 2, 1928.

MRS. BLANCHE DAVIS, *Chairman,*
School Trustee Electoral Board of Fairfax Co.,
Lorton, Virginia.

MY DEAR MRS. DAVIS:

Acknowledgment is made of your request through F. S. McCandlish, Esquire, that I advise your board whether towns, which constitute separate school districts in a county, are entitled to representation on the county school board.

This matter is governed by section 653 of the Code of Virginia as enacted into law at the session of the General Assembly of 1928. This section, so far as is applicable to the question here under consideration, reads as follows:

"In each county there shall be a board, to be known as the school trustee electoral board, which shall be composed of three resident qualified voters, who are not county or State officers, to be appointed by the circuit court of each county, or the judge thereof in vacation, within thirty days after the first day of July, nineteen hundred and thirty, and every four years thereafter. The said members of the trustee electoral board shall each receive a per diem of two dollars for each day actually employed, to be paid out of the county school fund. Any vacancy occurring within the term of the said appointees shall be filled by the circuit court, or the judge thereof in vacation, within thirty days thereafter. The county school board shall consist of one member appointed from each school district in the county by

the school trustee electoral board. The members so appointed shall constitute the county school board, and every such board is hereby declared a body corporate, under the style of the county school board of----- county, and may, in its corporate capacity, sue or be sued, contract or be contracted with, and, in general, is vested with all the powers, and charged with all the duties, obligations and responsibilities imposed upon such board as such by law. The members of the county school board shall be appointed on or before July first, nineteen hundred and twenty-eight, and on or before July first of every four years thereafter, and shall hold office for a term of four years, and thereafter until their successors have been appointed and have qualified. Any vacancy in the county school board shall be filled by appointment by the trustee electoral board. The present trustee electoral board and county school boards now in office, shall continue to hold office until their successors have been appointed and qualified. All of such school trustees shall qualify before the county clerk, by taking the oath prescribed for State officers. The county school board may in its discretion provide for a per diem not exceeding five dollars per day for each member for each day he is in attendance upon meetings of the board, not to exceed twenty days in any one year, such per diem to be paid as other school expenses are paid."

You will see from an examination of the above quoted portion of this section that the county school board consists of one member appointed from each school district in the county by the school trustee electoral board. Therefore, in making your appointments each separate school district, whether it be a magisterial district or a town school district, is entitled to one member.

I am informed by Mr. McCandlish that, at the meeting of your board held prior to July 1, 1928, the electoral board selected representatives on the county school board from the six magisterial districts of Fairfax county, but that no representation was given the three towns in that county, namely, Fairfax, Herndon and Falls Church, which constitute separate school districts.

I am of the opinion that each of the above named towns is entitled to have one representative on the county school board, and that your board should proceed to appoint the members of the county school board selected from these three towns. The terms of such trustees will run from July 1, 1928, for four years and thereafter until their successors have been appointed and qualified.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

CITIES AND TOWNS—Town council: Persons eligible for police commissioner.

RICHMOND, VA., August 23, 1928.

HON. JOHN W. CARTER, JR.,
Commonwealth's Attorney,
Danville, Virginia.

DEAR MR. CARTER:

I am in receipt of your letter of the 22nd instant, concerning the eligibility of councilmen of the city of Danville to appointment as members of the police commission of that city, in which you quote me the law providing for the appointment of the police commissioners and a certain act amendatory of the charter of Danville providing for the election of city councilmen, from which letter I quote:

"The mayor of the city of Danville has requested me to advise him as to his power or right in the appointment of police commissioners for said city.

"The provision of law under consideration is found in the Acts of 1916, page 446, and is as follows:

"CHAPTER TEN

"POLICE FORCE, ALDERMEN, ETC.

"On and after the first day of September, nineteen hundred and sixteen, the board of police commissioners of the city of Danville shall consist of the mayor of said city, who shall be ex-officio chairman, and two members of the common council, to be appointed by the mayor of said city, and two qualified voters of said city, who shall be appointed from the city at large by the judge of the corporation court of said city, for a term of four years.'

"At the time of the passage of the act which then amended the city charter, there were no councilmen except those as were serving four year terms. By another amendment to the charter, Acts of 1926, page 33, it was provided that in 1928 there should be elected nine councilmen, four of whom should serve four years, the remaining five for two years. The men with the four year terms being those who had received the highest vote in the June election this year."

You then say :

"The question which presents itself is whether or not the mayor may, under the authority of the Acts of 1916, appoint councilmen as police commissioners for a term of four years as such commissioners, when as a matter of fact such appointees are only elected to the council for two years with the possibility, if not a probability, that they may not offer for re-election or be defeated at the expiration of one-half of their term as police commissioner."

Undoubtedly, the charter of the city of Danville, providing for the appointment of police commissioners, intended the appointment of four members of that commission for a term of four years, the first appointment to be made on or before the first day of September, 1916. Two of the members of this board were to be appointed by the mayor of the city of Danville. At that time the term of every councilman was for four years. By the amendment contained in the Acts of 1926, a provision having been made that in 1928 nine councilmen should be elected, four of whom were to serve for four years and five for two years, there can be no question as to the right of the mayor to appoint any one of the four who have been elected for four years. It was evidently the intention to provide for the appointment of the two members of the council to begin their term of office on the day they went into office and that the term of each should continue for four years. Five of the members elect of your council have terms of only two years each. Their term being for only two years, they could not serve a full term for which the mayor is authorized to make an appointment. Each of these five could only continue in office for four years, if at all, by virtue of a re-election and a re-appointment.

Such a situation would not, in my judgment, comply with the plain language of the charter of your city, providing for the appointment of two councilmen as police commissioners for a term of four years. Not having been elected for four years, they are not eligible to appointment for a four year term.

The appointments, from the council, of members of the police commission are, therefore, necessarily limited to the four councilmen whose terms begin on the first day of September, 1928, and continue for a four year period.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

CITIES AND TOWNS—Authority to tax corporations.

RICHMOND, VA., December 3, 1928.

MR. T. F. MASON,
Town Treasurer,
Colonial Beach, Virginia.

DEAR SIR:

I am in receipt of your letter of November 24, in which you ask certain questions concerning the right of the town of Colonial Beach to tax corporations. I quote your letter:

"There are several companies that are incorporated that own personal property here in the town and we want to be sure of our rights in regard to taxing the same and we thought it best to get you to advise us. Can the town tax the poles, wires and office equipment of a telephone company, the said property being in the corporate limits of the town?"

"The same question applies to a public service corporation that has one of its power plants here in town.

"And can we tax frigid air plants of an ice cream corporation that has two plants here in town?"

Under section 225 of the Virginia Tax Code, the State Corporation Commission assesses the property of incorporated telegraph and telephone companies, and it is the duty of this corporation to furnish the council of every town and every city and county commissioner of the revenue wherein any property belonging to such corporation is situated a copy of the assessment made by the State Corporation Commission of such company's property, which shall show the character of the property, its value and location, for the purpose of taxation, in each city, town, county and district.

Under section 228, the Corporation Commission assesses water, heat, light and power corporations, and the clerk of the Corporation Commission is required to furnish to the council of every town, etc., wherein any property belonging to such corporation is situated a certified copy of the assessment, and the council of the town is authorized to levy tax thereon.

If the town of Colonial Beach has had no report from the State Corporation Commission, I advise you to write them, as you are entitled to levy the same tax upon the property of corporations as you can levy on the property of firms or individuals.

You ask in a separate query whether you can tax the property of frigid air plants of an ice cream corporation having plants in your town. You can, the assessments of these plants being made by your local assessor.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

CITIZENS—Residence, how acquired—Students.

RICHMOND, VA., May 14, 1929.

MR. SIGMUND I. DYCKMAN,
3320 Stuart Ave.,
Richmond, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of May 10, 1929, in which you say:

"I, Sigmund I. Dyckman, born in New York State and a resident of that State until September, 1928, have come to Richmond, Virginia, for the purpose of studying dentistry. On arriving and living here for the past eight months, I have found that I prefer to make Virginia my home rather than any other State. Whereupon I paid my poll tax and in good faith registered as a resident of Virginia, swearing to uphold and obey the laws and constitution of the State of Virginia. I feel justified in doing this, since it is my intention, on the completion of my college course to settle and practice in the State of Virginia.

"Kindly advise me whether I have a right to become a citizen of this State, and whether I can now be considered as such."

In *Williams v. Commonwealth*, 116 Va. 272, the Court of Appeals held that:

"The meaning of the words 'resident' or 'residence' is to be determined from the facts and circumstances taken together in each particular case. For the purpose of voting and holding office a man cannot have more than one legal residence. A legal residence once acquired by birth or habitancy is not lost by temporary absence for pleasure, health or business, or while attending to duties of a public office. Where a man has two places of living, which is his legal residence is to be determined largely, where the right to vote or hold office is involved, by his intention. When he acquires a new legal residence he loses the old, but to effect this there must be both act and intention."

In the course of its opinion, the court said:

"The true test in cases of the kind under consideration seems to be this, that 'If a person leave his original residence *animo non revertendi*, and adopt another (for a space of time, however brief, if it be done) *animo manendi*, his first residence is lost. But if in leaving his original residence, he does so, *animo revertendi*, such original residence continues in law notwithstanding the temporary absence of himself and family. Such is the uniform language of the books, as well as the clear conclusion of common sense.' *Cadwallader v. Howell*, *supra*.

It is true that section 24 of the Constitution provides that no student in any institution of learning, be regarded as having either gained or lost a residence, as to the right of suffrage, by reason of his location or sojourn in such institution. This in my opinion, would not prevent a student from acquiring a legal residence in Virginia if he desired to do so, in accordance with the opinion of the Court of Appeals in *Williams v. Commonwealth*, *supra*.

While residence is largely a case of fact to be determined, as any other fact is determined, it would appear from the facts stated in your letter, that you have become a resident of the city of Richmond, Virginia.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

COMMISSIONERS OF THE REVENUE—Compensation for assessing and extending local levies.

RICHMOND, VA., *October 29, 1928.*

HON. ROLAND D. COCK,
Attorney for the Commonwealth.

HON. JOHN H. BOWEN,
City Attorney.

HON. ARTHUR S. SEGAR,
*Commissioner of the Revenue,
Hampton, Virginia.*

GENTLEMEN:

I have before me your joint request of recent date, in which you call attention to the case of *McGinnis v. Nelson County*, 146 Va. 170, 1926, in which the court held that commissioners of the revenue were not entitled to compensation from the locality for extending local levies on assessments made on public service corporations by the State Corporation Commission. You then say:

"This opinion appears to have been based on statutes existing at that time, since repealed by the General Assembly 1928, on the grounds that the assessment of public service corporations was not made by the commissioner of the revenue and that no provision was made for compensation to the commissioners for extending local levies on this class of property (Code, sec. 2337).

"Code section 2337 has since been repealed by an Act of the General Assembly (Acts 1928, page 1345, sec. 2).

"It is now mandatory that the commissioners of the revenue extend local levies on the assessments made by the State Corporation Commission of Public Service Corporations and certify same to the treasurer, or other collecting officer, on forms prepared and furnished by the Department of Taxation (Acts 1928, page 163, sec. 234).

"In view of the changes made in many of the Code sections referred to in the McGinnis case, on which the opinion of the court seems to have been based, and the additional legislation making it the duty of the commissioner of the revenue to extend the local levies on public service corporations and certify same to the proper collecting local officer, we respectfully request an opinion as to whether or not the commissioner of the revenue is entitled to compensation, in the form of the commissions prescribed by law, to be paid by the city or county, as the case may be, for making up on the forms prescribed by the Department of Taxation and extending local levies on the assessments of public service corporations."

The McGinnis case was decided under the law in effect prior to the enactments of the 1928 session of the Legislature. In his opinion in that case Justice Campbell refers to section 2300 of the Code, providing that where there is no State tax on personal property, or the State has otherwise provided for its assessment, such property shall not be entered upon personal property books, notwithstanding local taxes may be assessed upon such property.

He also calls attention to the fact that corporation taxes were assessed by the Corporation Commission, whose clerk was required to notify county boards of supervisors; that the board of supervisors levied a tax and that such tax was collected by the county treasurer.

Under the law as it thus stood, not only were commissioners of the revenue not authorized to enter corporation property on their personal property books, but

it was expressly provided that they should not do so. Of course, under this state of the law they were not entitled to a commission.

By section 234 of the Tax Code of Virginia, commissioners of the revenue are expressly authorized and directed to extend all county, district and city levies upon their personal property books, and they are further required to furnish a copy of the extensions made to county and city treasurers for collection.

Section 2300 of the Code is repealed by the provision of section 436 of the Tax Code of 1928, and section 2337 is repealed by an act of the General Assembly of 1928, page 1344.

It is true that the provision allowing compensation to commissioners of the revenue provides for certain commissions "in consideration of his services for the assessment and extension of local levies." I do not, however, think that such language restricts commissions upon taxes levied upon personal property actually assessed by him and upon which he extends local county, district and city taxes, and I am of the opinion that it includes a commission on taxes carried in the personal property book of commissioners upon which they extend taxes, even though, as in the case of levies upon the property of corporations, the assessment is made by some other governmental agency.

My conclusion is, therefore, to the effect that commissioners of the revenue are entitled to commissions, payable out of the local treasury, upon taxes extended upon property of corporations assessed by the State Corporation Commission.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

**COMMISSIONERS OF THE REVENUE—Compensation for assessing
and extending local levies.**

RICHMOND, VA., *October 29, 1928.*

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

MY DEAR SIR:

Acknowledgment is made of your request of October 29 that I give you my opinion as to the compensation that the commissioner of the revenue of the city of Hopewell is entitled to for assessing and extending local levies.

You have called my attention to section 5 of the tax ordinance of the city of Hopewell contained in the pamphlet "License Taxes 1928 City of Hopewell." I am also informed by you that Hopewell is a city having a population of less than 10,000 according to the last preceding U. S. census or other census provided by law.

The compensation of the commissioner of the revenue in a city of this size is fixed in the following words by chapter 510 of the Acts of 1928, page 1345:

"Every commissioner of the revenue for a county, and every commissioner of the revenue for a city having a population of ten thousand or less according to the last preceding United States census, or other census provided by law, shall be entitled to receive annually in consideration of his services for the assessment and extension of State taxes, to be paid out of the State treasury, commissions on the amount of taxes lawfully assessed for the current year, as follows:

"Five per centum on the first ten thousand dollars of taxes assessed.

"Three and one-half per centum on the next thirty thousand dollars of taxes assessed.

"Two and one-half per centum on the next two hundred thousand dollars of taxes assessed; and

"One per centum on the residue of the taxes assessed."

The language of section 5 of your ordinance is as follows:

"Compensation of Commissioner of Revenue: The Commissioner of Revenue shall, for the assessment of real estate, tangible personal property, machinery and tools, receive such compensation as provided by statute, unless otherwise provided."

From an examination of your tax ordinance, I do not find any other provision with reference to the compensation of the commissioner of the revenue for the assessment of local levies on real estate, tangible personal property, machinery and tools.

In section 2 of chapter 510 of the Acts of 1928 the General Assembly has provided that the commissioner of the revenue for a city shall be compensated by such city for his services for the assessment and extension of local levies to be paid out of the local treasury, but the General Assembly has left to the council of such city the power to fix this compensation at such amount as the council may deem reasonable, in no event to be less than the scale therein specified.

The council of the city of Hopewell, therefore, under section 2 of chapter 510 of the Acts of 1928 was authorized to allow to the commissioner of the revenue compensation for his services, limited only by what it deemed reasonable.

The council of the city of Hopewell had already declared in section 5 of its tax ordinance that the compensation of the commissioner of the revenue was to be the same as that provided by the statute. By statute manifestly refers to the compensation fixed by the Acts of the General Assembly.

Section 1 of chapter 510 of the Acts of 1928 has unquestionably fixed the compensation of the commissioner of the revenue in cities having a population of 10,000 or less at five per centum on the first ten thousand dollars of taxes assessed, three and one-half per centum on the next thirty thousand dollars of taxes assessed, two and one-half per centum on the next two hundred thousand dollars of taxes assessed, and one per centum on the residue of the taxes assessed, which compensation is to be paid by the State.

Section 2 of the Act, on the contrary, does not fix the compensation of the commissioner of the revenue, but leaves it to the council to fix that compensation at what such council may deem reasonable, provided it is not fixed below certain minimum rates.

Section 2 of this Act, therefore, manifestly requires some affirmative action on the part of the council, in order to determine what compensation the commissioner of the revenue shall receive. This affirmative action is found in section 5 of the tax ordinance and manifestly refers to the compensation definitely fixed in section 1 of chapter 510 of the Acts of 1928.

It is, therefore, my opinion that when this section is construed in connection with the statute the commissioner of the revenue is entitled to be compensated for the assessment of local levies under section 5 of your ordinance

at the rate provided by statute for the assessment of State taxes, viz: five per centum on the first ten thousand dollars of taxes assessed, three and one-half per centum on the next thirty thousand dollars of taxes assessed, two and one-half per centum on the next two hundred thousand dollars of taxes assessed, and one per centum on the residue of the taxes assessed.

Trusting this gives you the desired information, I am

Yours very truly,

LEON M. BAZILE,

Assistant Attorney General.

COMMISSIONERS OF THE REVENUE—Duty to note certain information when property is sold for delinquent taxes.

RICHMOND, VA., *January 23, 1929.*

HON. W. ASHBY FRAYSER,
Commissioner of the Revenue,
2125 East Main Street,
Richmond, Virginia.

MY DEAR SIR:

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

"On page 161 of the new Tax Code, section 274, you will note that it is the duty of the commissioner of the revenue to note on his land book certain information when property is sold for delinquent taxes. I am writing to ask you who furnishes the commissioner with this information, as none of this appears on the land books for this county. Also, when property is redeemed, is it the duty of the clerk to inform this office of that fact?"

Inasmuch as the law does not impose the duty upon the treasurer or the clerk to give this information to the commissioner of the revenue, but imposes a clear duty upon the commissioner of the revenue to list land in the manner prescribed by the statute after sale to the Commonwealth for taxes, it is my opinion that it is the duty of the commissioner to obtain this information either from the treasurer's office, or the records returned by the treasurer to the clerk's office.

Trusting this gives you the desired information, I am

Very truly yours,

JNO. R. SAUNDERS,

Attorney General.

COMMISSIONERS OF THE REVENUE—Transfer fees.

RICHMOND, VA., *April 15, 1929.*

HON. JAMES ASHBY, *Clerk,*
Stafford, Virginia.

MY DEAR MR. ASHBY:

Acknowledgment is made of your letter of April 13, 1929, in which you say in part:

"The question has arisen as to whether I should collect for the commissioner of revenue a transfer fee of \$1.00 on each tract of land when a

deed is offered for record. For instance I have a deed to record, in which deed seven different tracts of land are conveyed. These tracts are carried on the commissioner of revenue's land books on separate lines showing the acreage of each, and I would thank you to advise me if I should collect \$1.00 for each tract of land to be transferred, or should I collect \$1.00 for the transfer fee on the deed, which conveys the seven tracts."

The answer to your question depends on whether or not the tracts referred to are to be carried on the land books, after the recordation of the deed referred to, as separate tracts, or as one tract. If the tracts should properly be assessed as separate tracts, then I am of the opinion that the commissioner is entitled to a fee of \$1.00 for each tract, but, if the tracts of land are all contiguous and belong to the same person, I am of the opinion they are to be properly assessed as one tract, in which event a fee of \$1.00 should be collected for the commissioner of the revenue. See sections 276 and 272 of the Tax Code.

Trusting this gives you the desired information, I am

Very truly yours,

JNO. R. SAUNDERS,
Attorney General.

COMMON CRIER—Privileges of.

RICHMOND, VA., *January 11, 1929.*

HON. J. M. PARSONS,
Independence, Virginia.

MY DEAR SENATOR PARSONS:

Acknowledgment is made of your letter of January 1, 1929, in which you say in part:

"I conduct a real estate auction company under the name, firm and style of Cornett-Parsons Auction Company, located at Independence, Va., and I am writing you and asking you to give me your opinion and construction of sections 175 and 196 of the Tax Code of Virginia.

"First, any one taking a license known as a common crier as to what section 175 will allow him to do. Can he sell real estate for the owner, if so under what conditions and circumstances?

"Second, the owner of a tract of land desiring to sell the same at auction, can he employ a common crier and legally sell same at auction; if so under what circumstances?

"Now as to section 196, does an auction company first have to have broker's license through Richmond before he can obtain a license from the commissioner of revenue of the county or city?

"Fourth, a license obtained under section 196 as real estate agents or auction company, will this license authorize him to sell any where in the State of Virginia, or only in the county in which they are taken?"

Section 175 of the Tax Code referred to in your first question provides in part:

"A person licensed as a common crier may, except in cities, cry for sale at any place in the county or city in which his license issued, any property, real or personal, for an auctioneer, fiduciary, or the owner of the property, when such owner is authorized to sell the same by auction, but he shall not conduct a sale otherwise than under the present and immediate direction of the property owner or other person authorized to sell the same, nor shall he cry such property or conduct such sale by an agent."

This section further provides that the crier shall not collect any of the proceeds of sale, or grant acquittances. It further provides that he may receive a stated, or fixed, compensation for his services, but it prohibits him from receiving any commission or percentage on the amount of the sale, or from having any contingent interest in the sale, either directly or indirectly, as a compensation for his services.

Answering your first question specifically, one having a common crier's license under section 175 of the Tax Code is authorized to cry both real and personal property. The condition and circumstances under which he may do so are outlined above, namely, he may sell it for an auctioneer, a fiduciary, or the owner of the property, but when cried it must be under the present and immediate direction of the owner of the property, or other person authorized to sell the same. The property must be cried by the person licensed as a crier, and not by an agent, and his compensation for such services must be stated or fixed, and not based on a commission, percentage or contingent in any way. His services are limited to the crying of the property, and he cannot collect from the purchaser, or grant any acquittances.

Answering your second question specifically, the owner of such a tract of land may legally employ a common crier to sell the same at auction, under the circumstances stated in my answer to your first question.

As to your third question, the law does not provide which of the licenses referred to must be first obtained. I am of the opinion, however, that where an agent has procured a revenue license under section 196 of the Tax Code that he is prohibited from doing business in this State until he has procured the necessary license from the Virginia Real Estate Commission, sections 4359(77) and 4359(91) of the Virginia Code of 1924, as amended, Acts 1924, page 691, as amended.

Responding to your fourth question, I am of the opinion that your firm may sell real estate anywhere in this Commonwealth under the revenue license obtained in Grayson county, provided such real estate is sold in Grayson county. If you go out of Grayson county to make the sale, I am of the opinion that a revenue license must be obtained for each county, or city, in which you make sales.

Sincerely your friend,

JNO. R. SAUNDERS,
Attorney General.

COMMONWEALTH'S ATTORNEY—Fees.

RICHMOND, VA., *September 21, 1928.*

HON. ROLAND D. COCK,
Commonwealth's Attorney.
Hampton, Virginia.

MY DEAR MR. COCK:

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

"Section 3505 of the Code, as amended by Acts 1928, chapter 521, page 1364, fixes the fees to be allowed us in misdemeanor and felony cases, both in the circuit and in the justices' courts. It also provides for fees for enter-

ing nolle prosequi in felony cases and for fee in scire facias on forfeited recognizance, and contains the following phrase,—‘provided, however, that in no case shall the attorney for the Commonwealth in any county or city receive in *such fees* from the State Treasury for the prosecution of criminal cases more in any one year than the amount hereinafter stated.’ Then follows the limit set in the several counties, which in Elizabeth City is \$800.00.

“A reading of this statute shows that no reference is made directly to prohibition fees and the inference would be that they were included in the reference to misdemeanor and felony fees.

“Subsection 47 of section 4675, outlines the duties of the officials charged with the enforcement of the prohibition laws, including attorneys for the Commonwealth, and goes on to say that they ‘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.’

“Subsection 93 of section 4675, in its third paragraph has the following provision: ‘For the purpose of carrying this act and all other prohibition laws of this State into effect, there is hereby appropriated out of any moneys in the treasury of Virginia, not otherwise appropriated for the use of the Attorney General, the sum of seventy thousand dollars, -----, &c.’

“Chapter 110 of the Acts of 1928, page 445, continues this appropriation.

“In submitting our bills to the Comptroller we itemize them on the forms furnished us by the State into the three general heads of felony, misdemeanor and prohibition.

“What I wish to ask is whether, in your opinion, the Legislature has limited the attorneys for the Commonwealth to the sums set out in Section 3505 for all services rendered by them in the prosecution of criminal cases, felony, misdemeanor and prohibition, or whether this act applies only to the two former and that in addition they are entitled to receive the fees provided for under the prohibition law from the special fund provided for the enforcement of that law?”

It is my opinion, and the auditor and comptroller have so held, that section 3505 of the Code as amended applies to all fees payable to an attorney for the Commonwealth out of the public treasury, including fees in prohibition cases. The appropriation made for the enforcement of the prohibition law was for the administration of the prohibition department, including the employment of the necessary inspectors and special attorneys and, in my opinion, could not be used for the payment of fees to the attorneys for the Commonwealth in the several counties and cities.

Trusting this gives you the desired information, I am

Sincerely yours,

JNO. R. SAUNDERS,

Attorney General.

COMMONWEALTH'S ATTORNEY'S LIBRARY—Whether considered expense of office or private property.

RICHMOND, VA., October 5, 1928.

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

MY DEAR MR. COMBS:

I have your letter of October 4, 1928, with which you send me letter of Honorable C. C. Lee, Commonwealth's Attorney of Franklin county, under date of October 2, 1928, in which he requests my opinion on the following statement of facts:

"On August 1, 1928, you notified him that the expenditures authorized by this office would be \$600.00, and further notified him that interest on investment in the office library was not considered a proper item of deduction as expense of office. I wish you would get the Attorney General's opinion on this matter, as it certainly seems to me that the cost of a law library used mostly in connection with the Commonwealth's Attorney's office should be allowed as a deduction."

I have examined subsection 6 of section 3516 of the Code, as amended by the Acts of 1926, with care and it is my opinion that, if the books are purchased for the State or the county, they would be a deductible item of expense but, if they are the personal property of Mr. Lee, they would not be a deductible item under this section of the Code. You will observe that the section authorizes the commission to make allowances to officers "for office expenses and premiums on official bonds." If the books are personal property of Mr. Lee, they are not an office expense in my opinion. If, on the other hand, they were purchased for the county or the State, they would be a deductible item of office expense.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

COMMONWEALTH'S ATTORNEY—Fees—Appearance before justice of peace in misdemeanor cases.

RICHMOND, VA., *September 19, 1928.*

HON. ROLAND E. CHASE,
Clintwood, Virginia.

MY DEAR ROLAND:

Acknowledgment is made of your letter of September 17, 1928, in re the fees of Honorable Earle P. Rose, former Commonwealth's attorney for Buchanan county.

On Mr. Rose's account, I regret to say that I must concur in the position taken by the Auditor. A Commonwealth's attorney is not entitled to any fee out of the public treasury for his appearance before a justice of the peace or trial justice in any misdemeanor case, except such misdemeanor cases as he is required by law to appear in. There are some few cases in which an attorney for the Commonwealth is required to appear in before a justice of the peace, but it does not appear from the court orders sent me, which I am herewith returning, whether these misdemeanor cases were cases in which the Commonwealth's attorney was required by law to appear before the trial justice.

I do not think that section 4864 of the Code, quoted on the second page of your letter, can be construed as requiring the attorney for the Commonwealth to appear in cases before justices of the peace. There is nothing to prevent him from proceeding by indictment in the circuit court in penal cases.

Trusting this gives you the desired information, I am

Yours very sincerely,

JNO. R. SAUNDERS,
Attorney General.

COMMONWEALTH'S ATTORNEYS—Fees in prosecutions before mayors.RICHMOND, VA., *December 28, 1928.*

HON. W. W. G. DOTSON,
Commonwealth's Attorney,
Wise, Virginia.

DEAR MR. DOTSON:

Your letter of the 26th inst. has been received. In this letter you give me certain information concerning the Sergeant car seized by V. W. Warren, for which I thank you.

You then ask certain questions concerning fees of the attorney for the Commonwealth in prosecutions before mayors, and ask for an opinion by return mail.

You are undoubtedly correct in construing section 37 of the Layman Act as allowing attorneys for the Commonwealth the same fees, upon final conviction, as are taxed in prosecutions by the Commonwealth in courts of record, but, I do not just understand how you may be in disagreement with anyone concerning the section fixing those fees. As section 46 is the only one in which fees are specifically mentioned and fixed, and as to fees that section controls the amount allowable for prosecutions under different provisions of the prohibition law.

In all prosecutions before mayors, except for the offences of being drunk, or taking a drink in a public place, an attorney for the Commonwealth upon final conviction, whether upon a plea of guilty, or upon a trial, is entitled to a fee of \$25.00. These fees apply to all prosecutions except such ordinances as are based upon the offences enumerated in sections 17 and 18 of the Layman Prohibition Act. For prosecutions under ordinances of the character embraced therein attorneys for the Commonwealth are entitled, where a trial and conviction is had, to a fee of \$5.00, as against each defendant. Where the accused pleads guilty to one of such offences, I do not think an attorney for the Commonwealth is entitled to any fee.

I do not think that the provision in section 46 limiting the fees of the attorney for the Commonwealth to \$10.00 upon a plea of guilty before a justice of the peace embraces pleas of guilty before mayors.

I may not have made myself understood and will be pleased to give you further information should what I have written not cover the thought you had in mind.

I am sending you a few appraisement and bond blanks, and will try to get you off some more shortly.

Mail for me should be addressed to the Attorney General's Office, Library Building.

Yours very truly,

EDWIN H. GIBSON,
Assistant Attorney General.

COMMONWEALTH'S ATTORNEYS—Fee in trial before mayor's court.RICHMOND, VA., *July 27, 1928.*

HON. T. H. CRABTREE, *Mayor,*
Abingdon, Virginia.

DEAR SIR:

I am in receipt of your letter of the 24th instant, in which you ask my opinion as to the fees of an attorney for the Commonwealth in certain cases, to-wit:

"1. A person is tried and convicted before me as mayor and fine and costs are paid by defendant, what is the amount of fee to which the Commonwealth's attorney is entitled?"

"2. A person enters a plea of guilty and pays the fine and costs, what is the amount of fee to which the Commonwealth's attorney is entitled?"

These two questions can be covered in one reply.

Mayors of towns, under section 34 of the prohibition law, have jurisdiction to try all violations of city or town ordinances enacted pursuant to section 37 of that law. Fees of an attorney for the Commonwealth in all cases in which he appears and prosecutes are, upon final conviction, the same as those to which an attorney for the Commonwealth is entitled in prosecutions in courts of record. An attorney for the Commonwealth is entitled upon a final conviction in your court in a trial both upon pleas of guilty and not guilty to a fee of \$25.00 in each case. While there is some uncertainty as to the fee of the attorney for the Commonwealth in prosecutions under sections 17 and 18, I am of the opinion that his fee as against each person prosecuted is \$5.00 where there is a trial. Upon a plea of guilty the attorney for the Commonwealth is entitled to no fee.

I will also call your attention to the fact that an attorney for the Commonwealth is not required to attend in cases under sections 17 and 18.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

COMMONWEALTH'S ATTORNEYS—Of counties have jurisdiction of towns in their counties.

RICHMOND, VA., *October 10, 1928.*

HON. ROBERT A. RUSSELL,
*Commonwealth's Attorney,
Rustburg, Virginia.*

MY DEAR MR. RUSSELL:

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

"As I construe the statute, the mayors of Altavista and Brookneal in this county have jurisdiction in prohibition cases that are violations of the town ordinances. I know that Altavista has, and I assume that Brookneal has, adopted the Layman Prohibition Law as a town ordinance.

"Neither town has a Commonwealth's attorney and it occurs to me that in prohibition violations inside of the towns (section 4675(34), Acts 1928) the commissioner of prohibition and the attorney for the Commonwealth should be notified. I do not know whether it has been the custom to notify your office or not, and there is some question in my mind whether, as Commonwealth's attorney for the county, I am such for the town.

"I wish you would write me your construction of this, for, as it stands, I do not like to advise them that they have to notify me."

I think there is no doubt about the fact that both the Attorney General and the attorney for the Commonwealth must be notified in such cases. The language of the second paragraph of section 34 of the prohibition law is as follows:

"In any prosecution before a mayor or police justice, the commissioner of prohibition and the attorney for the Commonwealth of the city or town shall be notified by the said mayor or police justice, in time to attend said

trial, and the said attorney for the Commonwealth and the commissioner, his deputies and inspectors, shall have the same power in respect to such cases that they have in cases before the circuit or corporation court."

While cities in Virginia are separate political jurisdictions from the county or counties in which they may be located, a town is not, it being a part of the county in which it is located. Therefore, the attorney for the Commonwealth for the county in which a town is located is the Commonwealth's attorney of such town within the meaning of section 34 of the prohibition law.

It, therefore, follows that in all prosecutions under the prohibition ordinance of the towns of Altavista and Brookneal notice must be given to you as required by section 34 of the prohibition law.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

CONSTITUTIONAL AMENDMENT—Relative to trial by juries of less than twelve men.

RICHMOND, VA., July 26, 1928.

FRANK L. WILSON, *Esquire*,
Attorney at Law,
Portsmouth, Virginia.

MY DEAR SIR:

I am in receipt of your letter of the 24th instant, in which you say:

"This is to acknowledge with thanks your favor of recent date with reference to the Constitutional amendment concerning the trial of felony cases with juries of less than twelve men. I showed your letter to His Honor, but we are still in doubt as to the procedure with reference to the challenges to which each side is entitled and as to whether further legislation is necessary to clear up that point."

The provision in section 8, article 1, of the new Constitution of Virginia, providing for juries in criminal cases, is not self-executing as to the provision for a smaller number of jurors and the method of the selection of a jury in a case of felony, nor indeed in a case of misdemeanor. Unless the number and the method of selection is agreed upon by the accused and the attorney for the Commonwealth, I am of the opinion that the panel for a felony jury must consist of twenty qualified persons and the accused must be tried by a jury of twelve, each side being entitled to four peremptory challenges.

The Legislature may prescribe the number of jurors and may provide the method of their selection.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

CONSTITUTIONAL AMENDMENTS—Ratification of when effective.

RICHMOND, VA., July 26, 1928.

MR. M. A. JOHNSON, *Registrar*,
110 *Municipal Building*,
Roanoke, Virginia.

MY DEAR MR. JOHNSON:

I beg leave to acknowledge receipt of your letter of the 20th, in which you ask when the amendments relative to the time of residence required in Virginia in order to vote become effective.

In reply, I will state that all amendments to the Constitution were ratified on the 19th day of June, 1928. I would say that they became effective on the 20th of June, the day after their ratification. You then cite the following case for an opinion:

"John Smith came to Virginia March 2nd, 1927. Can he pay one year tax now and register and vote in November Election 1928? Or, should he have paid 6 months before the election? If so what year must he pay?"

I am of the opinion that if John Smith has resided continuously in Virginia since March 2, 1927, that he came to Virginia with the avowed purpose of making this State his residence, and, unquestionably, he has met the requirements of the Constitution so far as residence is concerned in order to vote. I do not think he is required to pay any capitation tax, but it will only be necessary for him to register.

My reason for stating that he is not required to pay any capitation tax is due to the following provisions found in the Constitution, section 20, which provides who may register:

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

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

You will see from this provision of the Constitution that in order for a person to register, in addition to having the qualifications of age and residence, he must pay all poll taxes assessed or assessable against him for three years next preceding that (year) in which he offers to register. Taxes are assessed in Virginia on the first day of January of each year.

If John Smith came to Virginia in March, 1927, no poll tax was assessed or assessable against him for the year 1927. The first capitation tax with which he is assessable is for the year 1928. As 1928 is not one of the three years preceding the year 1928, which is the year in which John Smith proposes to vote, therefore, it is not one of the years, under the Constitution, he is required to pay capitation tax; hence, if John Smith meets all other requirements of the Constitution he can register without paying any capitation tax and vote in the coming August primary, and the fall election of November 1928.

You will observe in reading section 20 of the Constitution that a provision is made as to a young man who came of age at such time that no poll tax was assessable against him, but this provision would not apply to John Smith.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,

Attorney General.

COSTS—Felony cases—Enforceable when sentence suspended.

RICHMOND, VA., *April 20, 1929.*

HON. W. L. PRIEUR, JR., *Clerk,*
Norfolk, Virginia.

MY DEAR MR. PRIEUR:

Acknowledgment is made of your letter of April 18, 1929, in which you say:

"Floyd Anderson was convicted in the corporation court of this city on an indictment charging grand larceny. Judge Sargeant sentenced him to one year in the penitentiary and suspended said sentence, after the defendant had been in confinement in the city jail for sixty days, with the requirement that the costs of the court be paid.

"I am asking for a ruling, at the request of Judge Sargeant, as to whether or not the defendant can be made to pay the costs in a felony case."

Under authority of section 4964 of the Code, and the decisions of the Court of Appeals in *Commonwealth v. McCue*, 109 Va. 302, and *Angela v. Commonwealth*, 10 Gratt. (51 Va.) 696, I am of the opinion that the defendant can be made to pay the costs in a felony case. The fact that his sentence was suspended would not relieve him from the payment of costs any more than a pardon from the Governor would do so. As you will see from *Angela v. Commonwealth*; *supra*, the court held that a pardon would not relieve one convicted of crime of the costs of his prosecution.

Yours very truly,

JNO. R. SAUNDERS,

Attorney General.

COSTS—Not to be paid out of public treasury unless expressly authorized.

RICHMOND, VA., *September 10, 1928.*

HON. R. W. PEATROSS,
City Attorney,
Norfolk, Virginia.

MY DEAR MR. PEATROSS:

Acknowledgment is made of your two letters of recent date with reference to the payment of costs in the suit of *Lucy B. Brooke v. City of Norfolk and Commonwealth of Virginia*. You request me to advise the Comptroller to pay the costs assessed in connection with this litigation.

I regret to say that there is no authority existing in law for the payment of these costs, or any part thereof by the State. Section 3537 of the Code expressly provides:

"In no case, civil or criminal, except where otherwise specially provided, shall there be a judgment for costs against the Commonwealth."

Section 3493 of the Code provides as follows:

"No clerk, sheriff, sergeant or other officer shall receive payment out of the treasury for any services rendered in cases of the Commonwealth, except where it is allowed by this or some other chapter."

This office has always taken the position that no authority exists for the payment of costs out of the State treasury, except in those cases where they are authorized by law. Report of the Attorney General for 1916, page 61.

I, therefore, regret to say I am of the opinion that the Comptroller is not authorized to pay the costs in this case.

Very truly yours,

JNO. R. SAUNDERS,
Attorney General.

COUNTIES—Bond issues, refunding bonds.

RICHMOND, VA., *April 23, 1929.*

HON. R. E. WOOLWINE,
Commonwealth's Attorney,
Stuart, Virginia.

MY DEAR MR. WOOLWINE:

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

"On June 1, 1924, Patrick county issued \$50,000 6% road improvement bonds, under authority of chapter 227, Acts of 1920, which bonds will mature on June 1, 1929. The funds not having been provided for, for their liquidation, refunding bonds in an equal amount were sold to Magnus and Company, Cincinnati, Ohio, to be dated June 1, 1929, maturing serially from 1934 to 1958.

"Magnus and Company are anxious to complete the transaction on June 1, as is Patrick county just as anxious to have it completed, rather than subject themselves to a default in the payment of their obligations that will inevitably occur if the funds for the payment of the 1924 bonds are not realized from the proceeds of the refunding bonds.

"Magnus and Company's counsel, nevertheless, require an opinion from you that section 2735 of the Code of 1919 authorizes the refunding of the bonds herein, and that the interest thereon and the amount required for sinking fund purposes to redeem the principal at maturity may be provided for out of the general levy, having included therein each year an annual tax sufficient for such purposes."

This section of the Code unquestionably authorizes the board of supervisors of your county to issue new bonds at the same or lower rate of interest for the purpose of retiring the present outstanding bond issue. It further authorizes the board to make the new bonds payable or redeemable at such time or times as the board of supervisors may deem best, in no event to exceed fifty years from their date. Having authorized the board of supervisors to issue new bonds, to contract for their payment, and for the payment of interest thereon, it is my opinion that this section necessarily carries with it the authority and duty on the part of the board to assess a sufficient tax with which to pay the interest when due, and to create a fund for the redemption of the bonds at their maturity.

It is true that the statute does not specifically authorize the levying of such a tax, but to place any other construction on it than that indicated in this opinion would render such statute meaningless and absurd. The Legislature, in enacting this statute, never intended any such result. The very fact that the statute requires such new bonds to recite certain facts "preserving the identity of the debt" shows that the board of supervisors has exactly the same power, with reference to raising funds for the payment of the interest and principal, as it had under the original act.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

COUNTIES—Sale of road material by.

RICHMOND, VA., *April 12, 1929.*

HON. WILSON M. FARR,
*Attorney for the Commonwealth,
Fairfax, Virginia.*

DEAR MR. FARR:

I am in receipt of your letter of April 9, 1929, in which you ask as to the legality of contracts made by the county of Fairfax with incorporated towns and the State Highway Commission for the sale of road material from the county quarry.

First: I fully agree with you that there can be no question as to the legality of the sale of road material to incorporated towns.

Under section 1 of chapter 159, page 569, of the Acts of 1928, the board of supervisors of a county is authorized to expend a portion of the county funds upon permanent road improvement, partly or wholly within such town. Without that section, the county is authorized under section 11 to make sale of road material to the various road districts of the county, and, as you write, every incorporated town which takes care of its own roads is made a distinct and separate road district of the county in which the incorporated town is situated.

Second: There may be some question as to the legality of sales by a county to the State Highway Commission. However, the general scope of the act allowing the manufacture and sale of road materials contains the purpose of securing the construction and maintenance of improved hard surface roads in each of the counties of the State, and such general purpose is undoubtedly splendidly served by the construction of hard surface roads by the State Highway Commission.

Under such circumstances it would be a very strict and narrow construction of chapter 159 to exclude sale of road materials to the State Highway Commission.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

DEEDS—Recordation of deed of trust on personal property.

RICHMOND, VA., May 23, 1929.

HON. JOHN L. YATES,
County Clerk,
Lunenburg, Virginia.

DEAR SIR:

I am just in receipt of yours of the 22nd, in which you desire to be advised in what book you should record a deed of trust on personal property—whether in your regular deed book, a deed of trust book, or a miscellaneous lien book.

In reply I will state that in accordance with the provisions of section 3393 of the Code of Virginia, to which I refer you, you should record this deed of trust in your miscellaneous lien book and not in the deed of trust book.

The Supreme Court decided at its March session of this year, in Richmond, in the case of *Peoples Bank of Southampton v. The Merchants and Farmers Bank* that a writing must be recorded in the proper book in order that the same may be a valid lien against purchasers.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

DIVORCE—Defendant subject to criminal prosecution for non-payment of alimony.

RICHMOND, VA., August 9, 1928.

HON. JAMES HOGE RICKS, *Justice,*
Juvenile and Domestic Relations Court,
Richmond, Virginia.

MY DEAR JUDGE:

I am in receipt of your letter of July 26, in which you include the following statement of facts:

"On August 6, 1926, the Hustings Court, Part II, of the City of Richmond, granted Sallie B. Ryals a divorce a vinculo on the grounds of adultery on the part of the defendant husband, Charles C. Ryals. She was awarded sole custody of the two infant children and the defendant was ordered to pay \$15.00 per week for their support. The defendant made irregular payments and finally left the State of Virginia and since his removal from the State has failed to make payments at all. The plaintiff appealed to the divorce court for relief and was advised that she would have to seek her remedy under the desertion and non-support act, since the divorce could only proceed against defendant for his contempt, which is not an extraditable offence. She has now appealed to my court for relief under the desertion and nonsupport act."

You then state that there is a difference of opinion as to whether, a court of equity having in the divorce proceedings made provision by its decree for the support and maintenance of the minor children of the couple, and the father having failed to comply with the decree of the court and having gone beyond the jurisdiction of the court, he may be prosecuted under the provision of chapter

80 of the Code in criminal proceedings for the desertion or willful neglect, refusal or failure to provide for his children.

I am of the opinion that the parent is subject to a criminal prosecution.

At common law, divorce proceedings were had in the ecclesiastical courts. These courts had no authority to provide for the maintenance and support of minor children. The authority of a court to make such provision is a creature of statute. Statutes in Virginia were adopted long prior to the adoption of laws making it a criminal offense to desert and fail or refuse to support minor children. The primary purpose of statutes making desertion or failure to support a criminal act is undoubtedly the protection of the public against the necessity of supporting the children of a father who is financially able, but who refuses or neglects to support them. The public is interested on account of the fact that persons who are not otherwise provided for become a public charge and the State is put to the expense of taking care of those who are unable to care for themselves, and to this extent the burden is shifted from the person legally obligated to the taxpayer. These considerations, briefly stated, evidently induced the Legislature to make the desertion and willful failure of a parent to provide for his children a criminal offense. It did so, notwithstanding the fact that the Legislature had already provided for taking care of the same situation in divorce decrees. The statute conferring such authority upon the divorce courts made no special provision for the enforcement of its decrees, the power of the courts being limited, so far as criminal or quasi criminal proceedings were concerned, to punishment for contempt of the court's orders.

No case has been found in which prosecutions have been had under desertion and non-support statutes for the failure of a father to perform decrees of courts making allowances for the support and maintenance of children, nor has any case been found where a prosecution has been carried on against the husband for failure to carry out decrees for alimony to a wife.

However, there are a number of cases in which the courts have sustained prosecutions of husbands under non-support statutes, where agreements had been entered into by husbands and wives providing for the support of the wife, where the husband has failed to comply with the agreement or contract in which he has entered with the wife. These cases hold that the marriage relation is no more a contract than "fatherhood" or "sonship," and that, though a fair agreement entered into between husband and wife may preclude a wife from proceeding directly against her husband, even though he has not fulfilled the terms of his contract, it is not a defense where the criminal proceeding is by complaint preferred on behalf of the State for the punishment of one who has violated the penal laws of the State. *State v. Karagavoorian*, 25 Am.-Eng. Ann. Cas. 1092, 32 R. I. 477, 79 Atl. 1111.

To the defense that the agreement between the husband and wife for her support and that of their child was binding upon her, that there could be a civil proceeding by the wife against the husband, but that he could not, after such an agreement, be held in a criminal proceeding, the court held:

"That is a matter for the husband and wife to settle; but the matter of interest for the taxpayers of this city is that they should not be called upon to pay the legal obligation of the husband. The fact that the husband and wife voluntarily separated under an agreement that he should pay her a stipulated weekly sum, and he violates that agreement and then sets it up as a

bar to the prosecution to compel him to support his wife, is a contention against law and reason, and, if sustained, would enable him to take advantage of his own wrong." *Pepple v. Meyer*, 33 N. Y. Sup. 1123.

The doctrine is laid down in R. C. L. that, where there has been a separation agreement between husband and wife, although it has been fully performed by the husband, such an agreement cannot operate as bar to a prosecution for non-support.

"The basis of such holding is that the legal obligation of the husband to support the wife according to his means or ability is an inseparable incident of the relation of husband and wife, which cannot be contracted away in such manner as to release the husband from liability to criminal prosecution at the instance of the State, any more than by agreement between husband and wife either can be released from criminal liability for the commission of adultery, although either one may condone the offense and thus be precluded from maintaining a civil action for divorce." 8 R. C. L. 335.

By analogy, it would seem plain that a father who had failed to comply with the orders of a court, directing him to contribute to the support and maintenance of his minor children, cannot successfully avail himself of the order of the court, as a defense to the criminal prosecution for non-support, where he has neglected, refused and failed to comply with the orders of the court. Children, although they may be provided for by orders of court, are not parties to a suit. The provision for them is not made separately, but is usually made by way of an increase in the monthly or weekly sum directed to be paid to the wife, the lump sum being for the periodical alimony of the wife and the amount included for the support and maintenance of the child.

Unless the father is a man of means, whose estate may be reached by execution, there is no way to secure a benefit to the child. The father may be punished for contempt of court. That means that he may be lodged in jail, thus adding to the public burden, the public not only having to care for the indigent and neglected child, but to support the parent in the county jail.

Contrasted with the provisions of section 1936, the remedy provided by a court of equity is poor and unsubstantial. The father may be punished by a sentence to the State convict road force for not less than ninety days and for as much as twelve months. If not needed upon the State convict road force, he may be employed in county or city work houses or city farms, and, when confined in either the road force or city or county work houses or farms, it becomes the duty of the board of supervisors of the county or the council of the city to make an allowance of not less than 50 cents and as much as \$1.00 for the wife and 25 cents per day for each child, not exceeding \$1.75 per day, and where there is no wife an allowance of not less than 50 cents and as much as \$1.00 a day may be made for the first child and 25 cents for each additional child, but not exceeding \$1.75 per day. If employed in the State convict road force or other public work of the State, this allowance shall be made by the State Highway Commission out of funds provided for the construction and maintenance of the public roads or other public work, as the case may be. The provisions quoted are much more advantageous and efficacious where the parent is an able-bodied person and means a substantial benefit to his neglected children.

To allow a parent, who has defaulted in his moral and legal obligation to his children, to hide behind an ineffectual decree of a court, would cast a burden

upon the public and render nugatory and vain the enlightened and meritorious provisions of the desertion and non-support law, which was evidently passed with the express purpose of a more certain, sure, speedy and liberal method of dealing with recreant parents.

Notwithstanding the decree of the Hustings Court making provision for his infant children, Ryals is, in my opinion, where he has failed to fulfill the orders of the court, liable to a criminal prosecution under section 1936 of the desertion and non-support law.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Absent voter's law.

RICHMOND, VA., *June 26, 1929.*

MR. T. W. FOLKES,
Richmond, Virginia.

MY DEAR MR. FOLKES:

Acknowledgment is made of your request of this morning that I advise you on the following statement of facts:

"A number of persons will be out of the city for one day on August 6, 1929, attending a Sunday school picnic, which will be the only vacation that a majority of them will have. A number of these persons are duly qualified voters. Please advise me whether they can vote as absent voters in the election to be held on August 6, 1929, in view of the fact that their absence is occasioned not by business, but a vacation."

Section 202 of the Code, as amended by the Acts of 1928, reads as follows:

"Any duly qualified voter who will, in the regular and orderly course of his business, profession, occupation, or other personal affairs, or on vacation, or his attendance as a student at any school or institution of learning, be absent from the city, town, or from the precinct in which he is entitled to vote, if in a county, and any such voter who may be physically unable to go in person to the polls on the day of election, may vote in any primary or general election, in accordance with the provisions of the following sections of this chapter, as amended."

You will see from this that a duly qualified voter who is absent from his city, town, or precinct, on a vacation is entitled to vote as an absent voter. The length of the vacation, in my judgment, is immaterial and, therefore, it is my opinion that the persons referred to in your letter, if otherwise qualified, would be entitled to vote as absent voters.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Absent voter's law. Fees of registrar.RICHMOND, VA., *December 5, 1928.*

HON. H. B. GILLIAM,
Chairman of Electoral Board,
Petersburg, Virginia.

MY DEAR MR. GILLIAM:

Acknowledgment is made of your letter of December 4, 1928, in which you say:

"One of the local registrars has requested me to obtain a ruling from you on the points mentioned herein.

"He wishes to know whether he is entitled to charge for the addresses of voters applying under the Absent Voter's Law, lists of which voters he is required to post. Is the registrar entitled to charge for the addresses of voters, counting each number of the house address and the name of the street as words? Of course, I would thank you to advise me whether he is entitled to charge in the same way for a list which he has to post of new registrations."

The fees to be paid registrars are provided for by sections 96, 98, 200 and 216 of the Code, and in answering the specific questions submitted by you it is also necessary to consider section 205 of the Code, as amended. This latter section requires the registrar, three days before the election, to make out in duplicate a list of the names and addresses of all persons to whom he has sent or delivered ballots under the Absent Voter's Law, and he is required to post one copy of such list in a conspicuous place at the polls of his precinct, the other copy to be filed with the clerk of the court. Section 96 provides that a registrar shall receive a compensation of \$1.00 for posting notices. Section 98 of the Code, as amended, provides that a registrar, for making and certifying the list required by that section, shall be allowed three cents for every ten words, counting initials as words. Section 200 of the Code, as amended, has amended by implication section 96 of the Code, so far as the registrar's compensation for sitting is concerned, but has made no change in the compensation to be paid him for posting notices. Section 216 of the Code provides that the registrar "shall receive for each voter * * * the same fee that he receives for registering a voter, and the compensation for posting notices shall also be governed by the general election laws."

The law, therefore, specifically allows a registrar a fee of \$1.00 for the posting of the absent voters list. It does not specifically provide any compensation for a registrar for making up such list, his compensation being limited to the same fee that he receives for registering a voter and for posting notices for the performance of his duties with reference to absent voters.

The law is well settled that a person accepting a public office with a definite compensation is bound to perform the duties pertaining to the office for the prescribed compensation and cannot legally claim extra or additional compensation for the discharge of any of the duties of the office, even though the compensation be a very inadequate remuneration for the service.

Norfolk v. Pollard, 94 Va. 279;
Johnson v. Black, 103 Va. 478, 489;
Field v. Auditor, 83 Va. 882, 887.

It is, therefore, my opinion that no provision is made for any compensation for a registrar for making up the list of persons applying for ballots under the Absent Voter's Law, except the fees mentioned in section 216 of the Code.

Trusting that this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,

Attorney General.

ELECTIONS—Return of improperly marked ballot to absent voter.

RICHMOND, VA., November 3, 1928.

MR. B. I. GRIGG, *Registrar,*
Amelia Court House, Virginia.

MY DEAR SIR:

I am in receipt of your letter of today, in which you state a case and ask my opinion as to whether or not any relief can be granted the voter referred to. Your letter is quoted:

"I have in my possession an absent voter's ballot, legally ordered, delivered and returned, also placed in sealed box by me in accordance to law. Upon receipt of same I received a letter from the voter stating he had by ignorance or mistake marked his ballot by criss-crossing all the names of those he desired to vote against, leaving his choice unmarked. The law directs that the absent voter's law shall be liberally construed. Therefore, I am of the opinion that, if he will appear before the judges on election day and explain to the judges that he had improperly marked his ballot, he can withdraw his ballot and procure another and vote."

The law covering voting by mail does not provide relief for a person who has received an absent voter's ballot, marked and returned the same to the registrar of his precinct, because of the fact that he has afterwards arrived at the conclusion that his ballot was improperly marked.

It is true that one voting in person may, upon request, return his ballot to the judges and obtain another, but in the case of an absent voter there is no provision covering this situation. You cannot return a ballot to a voter after you have once received the same from him, and you are required to post a list of persons voting by mail at your voting precinct on the morning of the day of election, to deliver their ballots to the judge of election, who, at the close of the regular balloting, opens the box in which all absent voters' ballots are kept and delivered to the judges, and as each envelope containing a ballot is removed from the box, the name of the voter is called and checked as if the voter were voting in person.

As I understand the law, no person who votes an absent voter's ballot by mail can secure the return of the ballot under any circumstances, no more than a person can secure the return of a ballot which has been deposited in a ballot box.

Yours very truly,

JNO. R. SAUNDERS,

Attorney General.

ELECTIONS—Meaning of word “voters.”RICHMOND, VA., *January 30, 1929.*

MR. H. F. STOKES,
39 Tazewell Avenue,
Roanoke, Virginia.

DEAR SIR:

I have your letter of January 29, in which you make inquiry concerning the construction of the word “voters” as occurring in section 145 of the Virginia Election Laws, as amended June 17, 1928. I quote from your letter.

“Kindly let me know if ‘voters’ means those who are qualified to vote by payment of taxes and registration, or those who have actually voted in the previous election. The part of section 145 referred to reads as follows: ‘but so there shall not be less than one election district for every one thousand voters or fractional part thereof above five hundred.’

“To be specific, if a precinct has 1,500 residents fully qualified to vote, and only 700 actually voted, would it be the duty of the council to divide the precinct under section 145?”

In my opinion, the word “voters” as used in the election law has reference to qualified voters and there should be an election precinct for every thousand persons who have qualified to vote, whether they vote or not.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Pay of judges, clerk and commissioners of special elections.RICHMOND, VA., *July 26, 1928.*

HON. W. POTTER STERNE,
*Attorney for the Commonwealth,
Dinwiddie, Virginia.*

DEAR MR. STERNE:

I am in receipt of your letter of the 19th instant, in reference to the pay of election judges and clerks and commissioners of election for the special election held on the 19th day of June of this year.

Section 1 of chapter 205, page 637, of the Acts of 1928 in part provides:

“ * * the said election to be held and conducted in the manner prescribed by law for holding and conducting special elections, and by the regular election officers, except that the services of the regular clerks of election shall be dispensed with and one of the judges of election at each voting precinct shall perform the duties of clerk.”

Ordinarily, in addition to the other election officers, participating in the holding of elections, two clerks for each election precinct are provided by law, but you will notice from the quotation that in the special election of June 19 no clerks are provided for and that one of the judges of election is to act as clerk.

Further on it is provided:

“ * * the said judges of election shall be paid out of the State treasury the per diem fixed by law for the holding of the election herein provided for, and an amount sufficient for such purpose is hereby appropriated

therefor out of any monies in the State treasury, not otherwise appropriated, the same to be paid by the State Treasurer into the several county and city treasuries, on the warrant of the Comptroller, upon the proper voucher, or vouchers, required by the Comptroller, approved by the chairman of the several boards of supervisors and the several mayors of the cities."

This office has held that the per diem of the judges of election for the day upon which the election is held is payable out of the State treasury, that the pay of the judge returning the ballots and the commissioners of election canvassing the vote is payable by the county or city in which the election is held.

The pay of judges, clerks and commissioners of election, as provided by chapter 521, page 872, of the Acts of 1926, is fixed at \$5.00 for each of such officers for each day's service rendered, and, in addition to the per diem, the judge carrying the returns and tickets to and from his voting place and the commissioners of election are entitled to the mileage allowed jurors.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Ballots—Printing of names thereon.

RICHMOND, VA., June 27, 1929.

W. E. RENN, Esq.,
Secretary Electoral Board,
Portsmouth, Virginia.

MY DEAR MR. RENN:

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

"Referring to our long distance telephone conversation on yesterday, in which you advised me that it would be legal to print the names of both city and State officers on one and the same ballot for the Democratic primary to be held on August 6, 1929, I would thank you to confirm your ruling in this matter by letter."

Section 236 of the Code, which provides for the primary ballots, only authorizes the printing of one ballot for each party holding a primary which shall contain, in addition to the other matter, the names of the candidates.

Therefore, the information given you over the telephone was entirely correct.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Entrance fee of candidate for primary not included in statement of expense required of them by Democratic Executive Committee.

RICHMOND, VA., June 28, 1929.

HON. HENRY S. ELEY, *Treasurer.*
Suffolk, Virginia.

DEAR MR. ELEY:

I am in receipt of your letter of the 26th instant, in which you refer to a letter heretofore written to me, but which has not reached my attention, and in which last letter you write:

" * * In making up the expense of a candidate in the primary election is he supposed to consider in same the cost of the primary as assessed by the Democratic Executive Committee. We have been assessed \$50.00 each by the committee, * *."

I am of the opinion that a candidate for a primary nomination is not required by section 232 of the Primary Election Law to include his entrance fee assessment as an item in the statement required of primary candidates, in which they are required by that section to file an itemized, sworn statement in writing setting forth each sum of money or thing of value "paid or promised by him or anyone for him, with his knowledge or acquiescence, *for the purpose of securing or influencing, or in any way affecting, his nomination to said office.*"

In my opinion, the entrance fee required of a candidate for office is not money or thing of value or other consideration paid or promised for the purpose of securing or influencing or affecting his nomination for office. It is not a part of his campaign expense, but is a fixed and definite sum required of all candidates and not an optional or voluntary expenditure in the pursuit of his campaign.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Filing of notice of candidacy—Printing of ballots.

RICHMOND, VA., May 9, 1929.

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

MY DEAR MR. MASON:

Acknowledgment is made of your letter of May 8, 1929, in which you say:

"As secretary of the Electoral Board of Orange County, will you please give me the following information:—

"One of the candidates for the office of mayor in the town of Orange filed his notice on the 11th day of April, 1929. His notice reads as follows: 'You are hereby notified that I shall be a candidate for the office of Town of Orange of said county, to be filled by election to be held on Tuesday, the 11th day of June, 1929; and you are requested to certify my name accordingly to the Clerk of the Electoral Board of said County, as required by Section 122a Virginia Code, 1904. Given under my hand this 11th day of April, 1929. (Signed) A. J. Harlow.'

"On the 15th day of April, he attaches to the original notice a notice which reads as follows: 'To the Electoral Board of Orange County. Gentlemen: In my notice that I would be a candidate for the office of Mayor of the Town of Orange, Va., I erroneously left out in said notice the word 'Mayor,' and this is filed with said notice on this 15th day of April, 1929, to correct said error. Respectfully, A. J. Harlow.'

"Will you please advise me at your earliest possible convenience if this name is eligible to go on the ticket?

"Will you further advise me whether the Electoral Board is supposed to investigate as to whether all of the applicants for this election have paid their taxes, or whether they are supposed to have printed on the tickets all names submitted to them by the Clerk of the Court."

Both of your inquiries are governed by the provisions of section 154 of the Code, as amended. This section, so far as is applicable, reads as follows:

"Any person who intends to be a candidate for *any office*, State or national, to be elected by the electors of the State at large or of a Congressional district, shall, 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, notify the Secretary of the Commonwealth, in writing, attested by two witnesses, of such intention, *designating the office* for which he is a candidate. Such written notice shall be signed by the said candidate, but, if he be incapable of writing his proper signature, then some mark adopted by him as his signature shall be acknowledged before some officer authorized to take acknowledgments to deeds and in the same manner. *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. * * **" (Italics supplied.)

You will see from the above quoted provision of section 154 of the Code, the candidate is required to designate in his notice the office for which he is a candidate, and this notice must be given at least sixty days before the general election. Therefore, a candidate in the general municipal election, to be held on June 11, 1929, must have filed his completed declaration of candidacy not later than April 12, 1929. Section 5(8) of the Code. It is my opinion that the first notice was void and that the second notice came too late.

You will see from the last sentence of section 154 of the Code, quoted above, that the law provides that the name of a person who is not qualified to vote in the election in which he offers as a candidate, shall not be printed on the ballots provided for such election. From this, I think, it is the duty of the electoral board to ascertain whether candidates are qualified to vote in such elections, as the electoral board cannot discharge the duties imposed upon it by law, if it fails to make the investigation necessary to determine whether a candidate's name should be printed on the ballot or not.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Primary, candidates, declarations of.

RICHMOND, VA., April 30, 1929.

HON. JOHN M. PURCELL,
Treasurer of Virginia,
Richmond, Virginia.

DEAR MR. PURCELL:

I beg leave to acknowledge receipt of your letter of April 29, 1929, which is as follows:

"Section 229, Code of Virginia, as amended by chapter 65, extra session 1927, reads as follows:

"Declaration of Candidacy—The name of no candidate shall be printed upon any official ballot used at any primary unless such person is legally

qualified to hold the office for which he is a candidate, and unless he is eligible to vote in the primary in which he seeks to be a candidate, and unless, in the case of a candidate for an office filled by election by the qualified voters of the State at large, at least ninety days, and in all other cases, at least sixty days before the primary, he make and file a written declaration of candidacy, and has complied with the rules and regulations of the proper committee of his party.'

"In light of this section, there have been several inquiries as to the last day on which payment of this fee may be made to the State Treasury in order to qualify as a candidate in the Primary election to be held August 6th."

I presume your inquiry pertains to candidates for offices filled by election by the qualified voters of the State at large. Assuming this to be true, May the 8th is the last day upon which fees can be paid into the State treasury by such candidates. That date will be at least ninety days before the primary which will be held on August the 6th.

Subsection 8 of section 5 of the Code of Virginia provides for the computation of time and reads 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."

You will, therefore, see that, counting the 8th day of May and excluding the 6th day of August, the date of the primary, ninety days' notice will be given by a candidate filing his declaration of candidacy on the 8th day of May and paying his fee into the State treasury.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Declaration of candidacy, time within which same must be filed.

RICHMOND, VA., *April 22, 1929.*

L. R. BARTENSTEIN, *Secretary,*
Fauquier County Electoral Board,
Warrenton, Virginia.

MY DEAR MR. BARTENSTEIN:

Acknowledgment is made of your letter of April 13, 1929.

In response thereto, I am sending you herewith a copy of the opinion requested.

You also request me to advise you whether a candidate for councilman in the regular election to be held on June 11, 1929, has complied with the law as to the filing of his notice of candidacy where it was not filed until April 12.

Section 154 of the Code requires such declaration of candidacy to be filed at least sixty days before a general election. The statute relating to the computation of time is section 5, subsection (8), of the Code. Under this section, you count the first day and exclude the last. Counting in this way, there are nineteen days in April, thirty-one days in May and ten days in June before June 11, the

day on which the election will be held. This makes a total of sixty days prior to June 11, 1929, and it is my opinion that the declaration of candidacy referred to was filed within the proper time.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Candidates—Declaration of candidacy.

RICHMOND, VA., April 17, 1929.

HON. E. M. MCCLURE, *Chairman,*
The City Democratic Committee,
305 North Seventh Street,
Richmond, Virginia.

MY DEAR MR. MCCLURE:

Acknowledgment is made of your letter of April 16, 1929, in which you say in part:

"Will you kindly give me a written opinion defining just what officers, under section 229 of the Code, as amended, are required to file notices of candidacy ninety days before the primary and what officers sixty days."

Section 229 of the Code, as amended, so far as is applicable to the subject of your inquiry, provides as follows:

"The name of no candidate shall be printed upon any official ballot used at any primary unless such person is legally qualified to hold the office for which he is a candidate, and unless he is eligible to vote in the primary in which he seeks to be a candidate, and unless, in the case of a candidate for an office filled by election by the qualified voters of the State at large, at least ninety days, and in all other cases, at least sixty days before the primary, he make and file a written declaration of candidacy * * *."

You will see that, where one is a candidate for an office filled by election by the qualified voters of the State at large, his declaration of candidacy must be filed at least ninety days before the primary, and in all other cases such declaration must be filed at least sixty days before the primary. The only officers elected by the qualified voters of the State at large, who are nominated in primaries, are the Governor, Lieutenant-Governor, Attorney General and the United States Senators.

Trusting this will give you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Poll tax list.

RICHMOND, VA., February 20, 1929.

HON. D. R. HUNT,
Commissioner of the Revenue,
Roanoke, Virginia.

MY DEAR MR. HUNT:

Unfortunately your letter of January 25, to which you call my attention in your letter of the 19th instant, was upon Mr. Bazile's desk for attention at the time he had a very serious automobile accident, which kept him from the office until the last day or two, by which time an accumulation of matters further delayed attention to your letter.

I have noted your reasons for suggesting the elimination of listing city voters by wards, and see that there are many objections to the present plan.

Section 38 of the Constitution eliminated the requirement that the list should be arranged alphabetically by wards in cities and left the arrangement for cities to legislation by the General Assembly. This elimination having been made, the General Assembly could have adopted any plan of listing it saw fit for cities, but, having passed the act contained in chapter 211 of the Acts of 1928, page 713, it re-enacted, so far as cities were concerned, the old provision of the Constitution requiring listing by wards in cities, thereby to all intents and purposes reaffirming the former constitutional provision on the subject.

Under these circumstances, I do not see how it is possible to comply with the plain and unambiguous expression of legislative intent without making a list of city voters arranged alphabetically and by wards.

The remedy for the situation lies with the Legislature. I will be glad if you will examine the statute carefully and see if you are not of the same opinion.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Appointment of judges.

RICHMOND, VA., February 13, 1929.

HON. RYLAND GOODE,
Secretary Electoral Board,
Rocky Mount, Virginia.

MY DEAR MR. GOODE:

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

"I am secretary of the electoral board of Franklin county, and, as the time is drawing near for the appointment of election officials, I would like to have your advice on the following question: whether or not we should, as in the past, appoint two Democratic judges and one Republican, or whether, by reason of the results of the election last fall, we should appoint two Republicans and one Democrat."

Section 84 of the Code provides in part:

" * * Each electoral board shall appoint the judges, clerks, and registrars of election * * * and in appointing judges of election, representa-

tion, as far as possible, shall be given to each of the two political parties which, at the general election next preceding their appointment, cast the highest and next highest number of votes. * *"

Section 148 of the Code contains a similar provision with the additional proviso that, whenever the local party authorities of the party casting the next highest number of votes at the last preceding general election shall nominate for any voting place five qualified voters who are members of that party and qualified to act as judges of election, it shall be the duty of the electoral board to appoint at least one of such persons to serve as judge of election.

It is my opinion that these sections do not impose any mandatory duty upon an electoral board to give a majority of the judges to either party. All that is required is that representation, when it is possible to do so, shall be given to each of the two political parties which, at the general election next preceding their appointment, cast the highest and next highest number of votes. The matter is wholly discretionary with the electoral board, however, as to which party shall be given the majority of the appointments.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Ballots, how marked.

RICHMOND, VA., *October 23, 1928.*

MR. ROY L. ARMFIELD,
Palmyra, Virginia.

DEAR MR. ARMFIELD:

In your letter of yesterday you ask if it is necessary to scratch the names of presidential electors, as well as presidential candidates, when a voter desires to vote against a ticket. You say you have seen a sample ballot in which only the names of presidential candidates were scratched and that no marks were drawn through the names of electors.

Section 157 of the Code covers the query in your mind, in part providing:

" * * and the qualified voters at said election shall designate their preference for any candidates for president and vice-president by scratching the names of the other candidates for president and vice-president as is provided in section 162 and the ballots shall be counted as they would be counted if the names of the electors had been scratched."

You will see from a reading of this quotation that the sample ballot you saw was correctly marked and that persons vote for candidates of a party by scratching the names of the candidate for president and vice-president on all other tickets.

The reference to section 162 only has to do with the law requiring that, to scratch a candidate, a voter must run his pen or pencil through three-fourths of the length of the name he wishes to scratch.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Ballots, marking of.RICHMOND, VA., *October 24, 1928.*

HON. J. MURRAY HOOKER, *Chairman,*
State Democratic Committee,
Richmond, Virginia.

MY DEAR MR. HOOKER:

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

"Information is coming to us from different sections of the State to the effect that voters are being advised that, if they desire to vote for the candidate for the Senate and one of the candidates for Congress, it is necessary for them to also vote for one of the candidates for President, in order that their vote for the candidates for Congress and the Senate may be counted."

Such advice is absolutely untrue and not in accord with the law of this State.

In order for a vote to be counted for Senator Swanson, the voter has to do nothing more than cast the official printed ballot, as Senator Swanson has no opposition. In order to vote for a candidate for Congress, he must scratch the name or names of all the candidates, except the one for whom he desires to vote, in accordance with the provisions of section 162 of the Code, which requires the name to be scratched through three-fourths of the length of the same.

In other words, a voter does not have to vote for any of the candidates for President and Vice-President in order for his vote to be counted for the candidate for United States Senate and the candidate for Congress from his district.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Ballots, marking of.RICHMOND, VA., *October 25, 1928.*

MR. C. M. MOSBY,
Virginia Stationery Company,
Richmond, Virginia.

MY DEAR SIR:

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

"As judge of election I am anxious to know certain things that are connected with my duties as judge in the coming presidential election.

"Can a citizen vote for Hoover and Robertson and will the vote be valid if so cast?

"Can the voter vote for Hoover and Curtis and Montague and Swanson and will a ticket so voted be valid?"

In response to your first question, a vote for Hoover, the Republican candidate for President, and for Robinson, the Democratic candidate for Vice-President, would render the vote for the President invalid. The law does not permit one to vote for the Republican candidate for President, and the Democratic candidate for Vice-President, or vice versa.

In response to your second question, a ticket voted for Smith and Robinson and Montague and Swanson, or for Hoover and Curtis and Montague and Swanson, or for Foster and Gitlow and Montague and Swanson, or for Thomas and

Maurer and Montague and Swanson, or for Reynolds and Crowley and Montague and Swanson, will be a valid ballot.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Ballots, marking of.

RICHMOND, VA., *October 29, 1928.*

HON. JOHN W. CARTER, JR.,
*Commonwealth's Attorney,
Danville, Virginia.*

MY DEAR MR. CARTER:

Acknowledgment is made of your letter of recent date, in which you call attention to sections 74 and 157 of the Code and say:

"Section 74 provides for the election of presidential electors and apparently contemplates that I may vote for any 12 presidential electors that I choose, that is to say I could vote for four Republicans, four Democrats and four Socialists. Section 157 seems to provide a simple way by which I may vote a straight party ticket, that is to say by eliminating the names of candidates for President and Vice-President of the party against whom I want to vote, I indicate my vote for the electors for whom I do want to vote as effectually as though I had gone over my ticket and scratched the names of all of the electors I did not want to vote for. It would seem to me, however, that if I wanted to I could ignore the names of the candidates for President and Vice-President and by scratching the electors still vote for the electors whose names I allow to stand, or I could scratch the names of all candidates for President and Vice-President and still be properly marking my ballot vote for such electors as I wanted to vote for by allowing their names to stand and scratching the names of all other electors. In other words, it would seem to me that the names of President and Vice-President are simply symbols, such as party emblems in use in other states."

It is true that, under the provisions of section 2, article 2, of the Constitution of the United States and article 12 of this Constitution, we do not vote directly for the candidates for President and Vice-President, but instead we vote for the Presidential electors, and this is unquestionably the meaning of section 74 of our Code, which reads as follows:

"There shall be chosen by the qualified voters of the Commonwealth, at the election to be held on the Tuesday after the first Monday in November, nineteen hundred and twenty, and at elections to be held on the Tuesday after the first Monday in November in each fourth year thereafter, so many electors for President and Vice-President of the United States as this State shall be entitled to at the time of such election under the Constitution and laws of the United States. Each voter may vote for one elector from each congressional district of the State, as the same shall be constituted and apportioned for the election of representatives in the Congress of the United States from this State at the time when such election shall be held, and for two electors from the State at large; and, if at the time of choosing electors, the law shall provide for one or more representatives from the State at large in said Congress, each voter may at such election vote for such number of electors from the State at large (in addition to the two hereinbefore provided for) as shall correspond with the number of such representatives at large, so that the whole number of electors to be chosen at any election shall always be equal to the whole number of senators and representatives to which the State may at that time be entitled in the Congress aforesaid."

Section 157 of the Code has provided the method, however, by which the voters designate their choice of electors, the last part of this section reading as follows:

" * * and the qualified voters at said election shall designate their preference for any candidates for President and Vice-President by scratching the names of the other candidates for President and Vice-President, as is provided in section one hundred and sixty-two, and the ballots shall be counted as they would be counted if the names of the electors had been scratched."

In view of the language of section 157, I am inclined to the view that, if the names of the Presidential and Vice-Presidential candidates are scratched without other names being substituted therefor, the effect would be that none of the electors has been voted for and the Presidential ticket would have to be thrown out.

I am very clearly of the opinion, however, in view of the language of section 28 of the Constitution, that "any voter may erase any name and insert another," and the language of section 162 of the Code, which so far as is applicable provides:

"It shall be lawful for any voter to erase any or all names printed upon said official ballot and substitute thereon in writing the name or names of any person or persons for any office for which he may desire to vote."

that a voter who erased the name of Governor Smith and substituted the name of some other person and left the name of Senator Robinson as candidate for Vice-President, or even erased the name of Senator Robinson and inserted in lieu thereof the name of some other candidate, would cast a valid vote for the Democratic presidential electors, provided he also erased in the manner prescribed by section 162 of the Code the names of the candidates for President and Vice-President of the other parties.

Very sincerely yours,

LEON M. BAZILE,

Assistant Attorney General.

ELECTIONS—Ballots—Time limit fixed for receiving requests for mail ballots.

RICHMOND, VA., *November 2, 1928.*

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

MY DEAR MR. NOTTINGHAM:

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

"Kindly have your office confirm the telephone conversation held by Mr. Leon M. Bazile with Judge W. H. Sargeant and myself this P. M., in reference to the date for the closing of the receiving of requests for mail ballots. The time limit was fixed at midnight November 1, 1928.

"We desire this confirmation to have our records complete."

On yesterday Judge Sargeant called my office and, in my absence, talked with one of my assistants, Mr. Bazile. He stated to Mr. Bazile that he had ruled, in

view of section 8 of the Code, that a person who applied for a ballot as an absent voter on November 1, 1928, for the purpose of voting in the general election to be held on November 6, 1928, was within time. Mr. Bazile stated to Judge Sargeant that he fully agreed with his decision.

I am clearly of the opinion that one, who applied for a ballot on November 1, 1928, was entitled to receive the same.

Very truly yours,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Ballots, marking of.

RICHMOND, VA., November 2, 1928.

W. C. DEMING, ESQ., *Chairman,*
Hoover for President Club,
P. O. Box 493,
Front Royal, Virginia.

MY DEAR MR. DEMING:

Acknowledgment is made of your letter of November 1, 1928, in which you ask the following questions:

"In judging the qualification of a voter in the general election to be held November 6, 1928, does an error in spelling the name of a voter, as it appears on the treasurer's certified copy of those who have paid their capitation taxes, disqualify such a person from voting?

"Will a ballot, on which the Presidential candidate of one party is voted for and the Vice-Presidential candidate of another party is voted for, invalidate such a ballot; i. e., can a person vote for Alfred E. Smith for President and Charles Curtis for Vice-President?

"In the event that a qualified voter appearing on the permanent roll is unable to go to the polls on election day, and in the further event that such a person is physically unable to mark his or her ballot (received in proper order from the registrar under the absentee voters' law), who can render that person assistance?"

Speaking of an error such as is referred to in your first question, I said in an opinion given by me on October 30, 1919, to Mr. H. Babcock, of Appomattox, Virginia (Report of the Attorney General, 1919, pages 108-109):

"Where such mistakes occur it is clearly an error, and where the identity of the person is established beyond dispute, I am of the opinion that the man is unquestionably entitled to vote."

In response to your second question, I am of the opinion that a ballot marked in the manner indicated in your letter is not a regular ballot for the electors of either party, and it must be rejected (see section 157 of the Code).

In response to your third question, I am of the opinion that an absent voter, who is physically unable to mark his or her ballot, cannot vote at all, as section 208 of the Code, as amended, expressly provides that such voter must "mark and refold the ballot without assistance." Provision is made for assistance being rendered by one of the judges to a disabled voter, who appears at the polls, by section 166 of the Code, but the rule as established by section 208 of the Code, as amended, is otherwise in the case of an absent voter.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Ballot of dead man should be rejected by judge of election.RICHMOND, VA., *October 30, 1928.*MR. A. W. SUITER,
Bland, Virginia.

MY DEAR SIR:

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

"The following question has arisen here: If a voter votes by mail a week before the election and returns his ballot to the registrar according to law, and that voter should die before election day or on election day, shall the judges of election deposit and count that ballot?"

While the process of voting is begun by the voter under sections 203 and 205 of the Code by making application for and receiving a ballot, it is not finally completed under section 214 of the Code until it is deposited in the ballot box on the day of the election after the regular balloting has closed.

Section 214 of the Code requires the absent voters' ballot box to be opened by the judges of election and the ballots deposited in regular ballot boxes in the following manner:

" * * * As each envelope is removed from the box, the name of the voter is to be called and checked as if the voter were voting in person. If found entitled to cast his vote, the envelope is then, but not until then, opened, and the ballot deposited in the regular box without examination or unfolding it, and the name of the voter entered by the clerks on the poll books."

It is true that I have held that one, who has made application for a ballot as an absent voter and received the same, cannot then appear in person at the polls and vote on the day of election other than as an absent voter; but the process is not so far completed up to the time the ballot is deposited in the box but that the judges are authorized to reject any ballot of an absent voter, who is found not entitled to cast his vote. A dead man, of course, is not entitled to vote, and, therefore, in such a case the ballot should be rejected by the judges.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Ballots, marking of.RICHMOND, VA., *November 2, 1928.*MR. J. F. HOWISON,
Richmond, Virginia.

MY DEAR SIR:

I beg leave to acknowledge receipt of your letter of this date in which you submit the following question for an opinion, namely, in the event that a voter scratches the names of all of the candidates for president and vice-president save those of one party, and scratches the name of either the candidate for president or vice-president of that party, how should that ballot be counted?

In reply to your question, I would state that section 157 of the Virginia Election Laws (being the same section in the Code of Virginia) provides that the qualified voters at said election shall designate their preference for any candidates

for president and vice-president by scratching the names of the other candidates for president and vice-president, and the ballots shall be counted as they would be counted if the names of the electors had been scratched.

Of course, you understand a voter votes directly for the presidential electors of a particular party, and not for the candidates for president and vice-president. The statute provides for the scratching of the names of the candidates for president and vice-president as a matter of convenience to the voter, hence, if a voter scratches the name of the candidate for president and leaves unscratched the name of the candidate for vice-president, or vice versa, and scratches the names of all of the other candidates for president and vice-president on the ticket, unquestionably his ballot should be counted for those presidential electors whose names appear under the name of the candidate for president or vice-president, whose name is left unscratched.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS — Payment of capitation tax—Period of time treasurer obligated to keep office open.

RICHMOND, VA., May 9, 1929.

HON. H. B. SHUFFLEBARGER, *Treas.*,
Bland, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of May 7, 1929, in which you say:

"In order for me to properly receipt and handle some State capitation taxes, I would be glad if you would advise me on the following:

"At what hour was I supposed to legally close my office on May 4 past, for accepting capitation taxes of parties wishing to vote in the November election?

"Some time last Saturday night, May 4 or 5, there was mailed to me a large list of names to be placed on the voting list. This did not reach me until about 9 o'clock Monday morning, May 6. Should I accept this as having been received on May 4th?"

The last day on which capitation taxes could be paid for the purpose of registering and voting in the November, 1929, election was May 4, 1929. Section 21 of the Constitution and Report of the Attorney General, 1925-1926, page 65.

It is my opinion that, in order to qualify a person to vote, his capitation taxes must have been paid to the treasurer, that is, placed in the treasurer's hands, some time during the day of May 4, 1929, or before that time. I do not think that the placing of a check in the United States mail is equivalent to paying the tax to the treasurer, unless the check was delivered to the treasurer on the 4th of May. I do not think that the law contemplates that the treasurer shall be required to keep his office open at night, and, if any person wished to pay his capitation taxes on May 4, after office hours, it is my opinion that it was his duty to locate the treasurer and pay the money to him, wherever he could be found. In other words, I think the treasurer is obligated to keep his office open for a reasonable period each day, but even then, the failure of the treasurer to be at his office would not, in my opinion, justify the placing of the name of any person on

the tax list who did not pay his taxes on or before May 4, 1929. The provisions of sections 21 and 38 of the Constitution are mandatory.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—State capitation tax.

RICHMOND, VA., March 15, 1929.

HON. J. E. HAMMERS, *Treasurer,*
Buena Vista, Virginia.

MY DEAR SIR:

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

"Heretofore I have always kept the names of voters on my voting list for three years. If I understand the new Constitution right, I now will only have to carry two years on this list. Will you please advise me if this is correct?"

You are in error in thinking that the Constitution requires one's capitation taxes to be paid only for the two years preceding the election instead of for the three years preceding the election as a prerequisite to the right to vote.

It is true that the Commission recommended this change, but the General Assembly refused to approve it, and section 21 of the Constitution, as amended, Acts 1928, p. 256, as one of the conditions for voting, requires a voter to have personally paid, at least six months prior to the election, 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.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Capitation taxes—Tax list, when name of eligible voter not to be put on.

RICHMOND, VA., May 17, 1929.

HON. J. F. EARLY, *Deputy Treasurer,*
Stanardsville, Virginia.

MY DEAR MR. EARLY:

Acknowledgment is made of your letter of May 14, 1929, in which you ask my opinion on the following statement of facts:

"I have the case of a person moving to Greene county from Madison county, who has paid the three years capitation taxes assessable against him to the treasurer of Madison county. This person has not lived in Greene county for six months, but will have been a resident of this county for the required six months at the time of the November election."

You then ask me whether you should place his name on the voting list upon a proper certificate from the treasurer of Madison county.

It is my opinion that you should not do this. This man would be entitled to vote in Greene county upon the presentation of a certificate from the treasurer

of Madison county, as is provided by section 115 of the Code (Virginia Election Laws, page 35).

You further say:

"I have the further case of a man who has moved to this county from another state, and who has paid all poll taxes assessable against him here. Should I place his name on my certified list when he has paid one year's poll tax, which is the only poll tax assessable against him here?"

Under section 21 of the Constitution, the only capitation tax or taxes which a person is required to pay, as a prerequisite to the right to vote, are those assessed or assessable against him during the three years next preceding that in which he offers to vote. Therefore, where a person has paid all of the capitation taxes assessed or assessable against him during the three years preceding that in which he offers to vote, whether it be the taxes for one, two or three of those years, he is entitled to vote, if otherwise qualified, without paying the capitation taxes for any year for which he was not assessable.

Under the decision of the Court of Appeals in *Zigler v. Sprinkel*, 131 Va. 408, 108 S. E. 656, this man's name should go on the tax list, if he has paid all of the capitation taxes assessed or assessable against him during the past three years.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Capitation tax—Voting by mail.

RICHMOND, VA., May 23, 1929.

MR. C. C. WILLIAMS,
St. Paul, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of May 20, 1929, in which you request me to answer the following questions:

"First, a regular town voter who has paid his taxes and voted in the regular election in the fall of 1928, but has not paid his taxes six months prior to the June election of 1929, has he a right to vote in the town election in June?"

"Second, if a man has paid all taxes and is eligible to vote in a town election, but happens to be away from home, can he vote by mail in such town election?"

Your first question should be answered in the negative. See section 21 of the Constitution.

In response to your second question, I call your attention to section 202 of the Code, as amended by chapter 397 of the Acts of Assembly, 1928, page 1016. This section reads as follows:

"Any duly qualified voter who will, in the regular and orderly course of his business, profession, occupation, or other personal affairs, or on vacation or his attendance as a student at any school or institution of learning, be absent from the city, town, or from the precinct in which he is entitled to vote, if in a county, and any such voter who may be physically unable to go in person to the polls on the day of election, may vote in any primary

or general election, in accordance with the provisions of the following sections of this chapter, as amended."

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Capitation tax—Registration of voters.

RICHMOND, VA., *September 22, 1928.*

MISS EVELYN W. SHAW, *Chairman,*
Virginia League of Women Voters,
Route 4,
Charlottesville, Virginia.

DEAR MISS SHAW:

I am just in receipt of your letter of yesterday, in which you say that you find the idea current that those who become of age between now and the November 6 election may, at this late date, pay a single poll tax, register and vote in the November election. You ask if this is so.

You also call attention to the law extending the right of suffrage to women, in which they were exempted from the provision of law requiring six months prepayment of poll tax before being entitled to vote.

In section 20 (new Constitution) a person becoming of age so 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.

Persons, whether male or female, becoming of age on or before November 6 may pay one year's poll tax, register and vote. It does not matter as to the date upon which he or she becomes twenty-one, although he or she must register on or before the regular registration day in October, which is held by the registrar thirty days previous to the November election. This is the last day upon which a person may register. In order to register, however, the person desiring to do so must appear before the commissioner of revenue of the county or city, be assessed by him, go with the commissioner's certificate to the city or county treasurer and pay one dollar and fifty cents. Taking this receipt to the registrar, the person should be registered just as all others are registered.

While the first provision of law extending the right of suffrage to women omitted the requirement of prepayment of tax six months in advance, this provision is no longer operative and women and men are placed in the same position as to the payment of taxes, registering and voting.

For your information concerning the elective franchise and qualification for office, I am enclosing you a pamphlet styled "Proposed Amendments to the Constitution of Virginia." All of these amendments were adopted at the June 19 election and are now operative.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Widow of Confederate veteran entitled to vote without payment of poll tax.RICHMOND, VA., *September 24, 1928.*

MRS. FRANCES B. BERKELEY,
3205 Grove Avenue,
Richmond, Virginia.

MY DEAR MRS. BERKELEY:

Acknowledgment is made of your request of today that I advise you whether you are entitled to vote in the City of Richmond in the November 1928 election without the payment of your capitation taxes for the past three years.

You inform me that you have been a resident of the City of Richmond since the year 1922, and that your husband, the late John Lewis Berkeley, was a Confederate Veteran. You also advise me that prior to the year 1922 you were a resident of the City of Danville and a registered voter in that place; that since becoming a resident of the City of Richmond you have obtained a transfer from the registrar in the City of Danville and had your name properly transferred on the registration books of the City of Richmond.

At the election held on the Tuesday after the first Monday in November 1927, the people of Virginia ratified a proposed amendment to section 22 of the Constitution of this State, so that section now reads as follows:

"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."

You will see from an examination of this section of the Constitution that the widow of a Confederate soldier is entitled to vote without the payment of the poll taxes required by section 21 of the Constitution. You are, therefore, in my opinion, qualified to vote in the November 1928 election.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Capitation tax.RICHMOND, VA., *September 7, 1928.*

MR. LAWSON B. SANDER,
Bergton, Virginia.

DEAR SIR:

In reply to your letter of September 6, I beg to state that, if the party in question came to Virginia after January 1, 1927, he was not assessable with a capitation tax for that year. If he has been in the State for one year, he can register and vote in the coming fall election without the payment of a capitation tax. The Constitution requires the payment of three years' capitation taxes which were assessed or assessable against the party next preceding the year in which he offers to vote. This means the years 1925, 1926 and 1927. If the party was not

a resident of Virginia on the 1st of January, 1927, of course, no capitation tax was assessable against him; therefore, under the Constitution, he is not required to pay it.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Poll taxes, payment of as prerequisite to right to vote.

RICHMOND, VA., *October 19, 1928.*

MR. A. W. WALKER,
Fries, Virginia.

DEAR SIR:

I am in receipt of your letter of October 17, in which you say that you moved to Grayson county in 1927 and paid your capitation tax for 1926 and 1927 (in that county) and that you appear upon the treasurer's voting list as having paid your taxes for 1926 and 1927, but that you did not furnish such treasurer with evidence of the fact that you had paid your 1925 poll tax. You ask if you are qualified to vote in the November election.

Your case is covered by section 115 of the Code, which I quote:

"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. Any treasurer who shall give a false certificate, so as to show that the taxes have been paid six months before any election when in fact they have not been so paid, shall be guilty of a misdemeanor. The granting of each false certificate shall constitute a separate offense."

There is no question but that, your name appearing upon the treasurer's voting list of your county as having paid your capitation taxes for 1926 and 1927, you are entitled, upon furnishing the judges of election with a certificate of the treasurer of the county from which you removed to Grayson, showing the payment of your 1925 capitation taxes six months prior to the 6th of November, 1928, to vote in the November, 1928, election.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Inmates National Home, B. P. O. E., not eligible to vote unless they have acquired a residence in Virginia.

RICHMOND, VA., August 29, 1928.

MR. W. L. BABCOCK,
*National Home of B. P. O. E.,
Bedford, Virginia.*

DEAR MR. BABCOCK:

Your letter of August 28th just received, to which I will reply at once.

In this you make inquiry as to whether the 75 per cent of the two hundred and fifty inmates of the National Home for Elks in Bedford, who have been in Virginia for more than two years and were voters before deciding to make Virginia their home, can qualify and vote in the State of Virginia. I regret to advise you that they cannot.

In connection with this, I call your attention to section 24 of the Constitution of Virginia, which I quote in full:

"No officer, soldier, seaman, or marine of the United States army or navy shall be deemed to have gained a residence as to the right of suffrage, in the State, or in any county, city or town thereof by reason of being stationed therein; nor shall an inmate of any charitable institution or a student in any institution of learning, be regarded as having either gained or lost a residence, as to the right of suffrage, by reason of his location or sojourn in such institution."

You will, therefore, see from this provision of the Constitution that the inmates of an institution like the National Home for Elks, Bedford, do not acquire a residence in the State as to the right of suffrage by reason of his sojourn in such institution.

Of course, you understand I have to construe the law as it is written.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Eligibility to vote.

RICHMOND, VA., July 23, 1928.

MR. F. S. McCANDLISH,
*Attorney at Law,
Fairfax, Virginia.*

MY DEAR SHIELD:

I am in receipt of your letter of the 21st instant, in which you say:

"Mr. Conrad Murat Strong came to Fairfax county from Washington in August, 1927, since which time he has been a resident of and domiciled in the county, and will continue to reside here. He has paid no capitation tax, nor has he been assessed with any, except for the year 1928, which in due course will be paid this fall.

"In view of the change in the Constitution which requires one year residence instead of two years, can he vote in the August Primary for Congress and the November election? He is about fifty years of age, and therefore meets the requirements as to age and residence. I confess the problem is somewhat knotty, and should be very glad to have your opinion. Could he now pay his 1928 taxes and register and vote?"

Under the old Constitution, considering the fact that a person was required to have resided in Virginia for two years in order to have become entitled to vote, he or she must necessarily have paid one year's capitation tax. The necessity for the payment of a year's capitation tax was not because of a positive requirement in so many words of the payment of such tax, but because of the provision of law that a person cannot vote unless he or she has paid his or her capitation taxes which were assessed or assessable for the three years previous to the year in which he or she offers to vote.

Although the Constitution has been changed as to the number of years of residence required of a voter, no change has been made as to the requirements of the payment of poll taxes.

The only exception requiring the prepayment of a poll tax which has not been assessed or is not assessable applies to a person becoming 21 years of age since the previous year's poll tax was assessable. In the case of such a voter the statute requires the prepayment of one year's poll tax.

I am of the opinion that a person moving to Virginia since the first day of January, 1927, who has resided in the State for one year prior to the 7th day of November, is entitled to register and vote without having paid a poll tax for any year.

With kindest regards and best wishes, I am

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Persons eligible to vote.

RICHMOND, VA., July 19, 1928.

MR. J. H. HURT,

Gardners, Virginia.

MY DEAR MR. HURT:

In reply to your letter of July 18th, I beg leave to state that under the Constitution as amended, and which was ratified by the voters at the special election held on June 19th, a person desiring to vote in this fall's election is governed by the provisions of section 18, namely, "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 hereinafter required, shall be entitled to vote."

A person who became of age in November 1926 was not assessable with any capitation tax for that year. The first capitation tax which was assessable against him was for the year 1927. That capitation tax should be paid six months prior to the fall election, hence it follows that he cannot pay this capitation tax now in time to vote.

A person who has been out of the State of Virginia for more than a year, and who has acquired his residence in some other State, is not entitled to vote in the coming fall election.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Eligibility to vote.RICHMOND, VA., *August 6, 1928.*

MR. L. J. SPIVEY,
165 *Liberty Street,*
South Norfolk, Virginia.

MY DEAR SIR:

I am in receipt of your letter of August 3, 1928, in which you submit the following for an opinion:

"I have a son becoming of age August 22nd, 1928. Can he pay his State capitation tax and vote in the November election? If so, please advise me as soon as possible."

In reply to your letter, unquestionably he can do this.

It will only be necessary for your son to see the commissioner of the revenue, have himself assessed with one year's capitation tax, and then go to the treasurer and pay this. He can then apply to the registrar for registration and if he meets the other requirements, he can register and vote. A special provision for a case of this kind is contained in paragraph 1, section 20 of the Constitution of Virginia.

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

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Who qualified to vote.RICHMOND, VA., *July 31, 1928.*

MRS. MARY M. HUDGINS,
City Treasurer,
-- Portsmouth, Virginia.

MY DEAR MRS. HUDGINS:

I am in receipt of your letter of July 28, 1928, enclosing clipping from the *Virginian Pilot*. You ask if this clipping correctly reports an opinion recently furnished by me to Mr. F. S. McCandlish, of Fairfax, Virginia.

It does. Section 18 of the Constitution, as amended, relating to qualification of voters, provides in part:

"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 hereinafter required, shall be entitled to vote * * * ."

The second paragraph of section 20 of the Constitution, as amended, relating to who may register, provides in part:

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

The second paragraph of section 21 of the Constitution, as amended, relating to conditions for voting, provides:

"That unless exempted by section twenty-two, 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."

My ruling is based upon my interpretation of these three sections of the Constitution, as amended. Section 18 makes every person eligible to vote, who has resided in the State for one year; section 20 allows him to register, if he has paid all State poll taxes assessed or assessable against him for the three years preceding the year in which he offers to vote, and section 21 contains practically the same provision as to voting that section 20 contains as to registration.

No capitation tax being assessed or assessable against a person, who comes into this State after the first day of January, 1927, for that year, there is no tax due by him for the year 1927—the year preceding the year in which he offers to vote. Being otherwise qualified to vote under the Constitution, and no capitation tax having been assessed or assessable against him, which the Constitution requires to be paid before he can register and vote, he is entitled to register and vote without the payment of any capitation tax. To hold otherwise would be reading into the Constitution a provision that he must have paid a capitation tax before he can register and vote. Such a provision was inserted in the Constitution in the case of a person becoming of age.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Eligibility to vote.

RICHMOND, VA., *August 17, 1928.*

MR. R. D. HOLLAND, *Registrar,*
Hopewell, Virginia.

DEAR SIR:

In reply to your letter of the 16th instant, in which you request an opinion as to—

1. The right of "non-residents of Virginia who have been here one year prior to the next election, who have not paid their poll taxes."
2. "Whether one becoming of age since January 1, 1928, may register and vote in the November election without the payment of any poll tax."

Just what you mean by non-residents of Virginia who will have been in the State one year before the November election, I am unable to determine. Persons coming into the State for the purpose of establishing a residence cannot be considered non-residents. The qualification of such persons to vote is covered by an opinion furnished Mrs. Mary M. Hudgins, City Treasurer, Portsmouth, Virginia, on July 31, 1928, a copy of which I am enclosing.

Your second inquiry is covered by section 20 of the Constitution of Virginia, providing:

" * * * if he become 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; * * * "

A person becoming of age since the 1st day of January of this year must pay one year's capitation tax and register at least thirty days prior to the November election. The tax paid is to be credited to the capitation tax assessed against him for the year 1929.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Eligibility to vote.

RICHMOND, VA., *August 14, 1928.*

MRS. CECIL R. WILLIAMS,
Box 102,
Stony Creek, Virginia.

DEAR MADAM:

I am in receipt of your letter of August 7, in which you write:

"I have been living in Virginia for the last four years. I have paid my poll tax this year in May. Will I be allowed to vote this fall if I am registered? I saw one of your announcements in the News Leader, but it did not exactly suit my case."

Under our law, in order to be entitled to vote, one must have paid, six months prior to the November election, all poll or capitation taxes assessed or assessable against him for the three years next preceding the year in which he offers to vote.

You say that you have lived in Virginia for four years. If so, you will have been assessable with capitation taxes for the years 1925, 1926 and 1927, all of which you must have paid on or before the 5th day of May, 1928, in order to qualify yourself to vote in the November election. Not only must you have paid your capitation taxes for the three years, but your name must have appeared upon the treasurer's list of your county as having paid your taxes for those three years, provided you have lived in the same county all of the time you have been a resident of Virginia. If you have lived in different places and have paid your capitation taxes in different places, you can vote in your present precinct and county upon the presentation of a certificate from the treasurer or treasurers of the other counties in which you have lived, showing payment in the aggregate for the three years with which you should have been assessed with capitation taxes.

It is very difficult to explain the law to a person unless one has all of the facts before him. I may not have made myself plain to you, and I advise you to consult your Commonwealth's attorney or your local election officers. If you are not satisfactorily advised by them and will write me fully your situation, I will be pleased to be of further service to you.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Eligibility to vote.RICHMOND, VA., *August 22, 1928.*MR. LUTHER B. RICE,
Reedville, Virginia.

DEAR MR. RICE:

I am in receipt of your letter of the 20th instant, as to whether or not a person becoming of age any time during the year 1927 may now pay his poll tax for 1928, register and vote in the November election.

Provided the person becoming of age in 1927 became of age on or before the 6th day of November, 1927, he may apply to the commissioner of the revenue for his district to be assessed with a capitation tax for the year 1928, carry his certificate to the county treasurer, pay his poll tax for 1928, apply to the registrar of his precinct for registration, carrying with him to the registrar the treasurer's receipt for his capitation tax.

The registrars should then register such person just as others are registered.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Eligibility to vote in an incorporated town.RICHMOND, VA., *June 7, 1929.*HON. E. L. BLANKENSHIP, *Mayor,*
Boone Mill, Virginia.

MY DEAR SIR:

In further reference to your letter of the 27th ult., I would say that I only returned to Richmond last night and this is my first day in the office.

You ask quite a few questions concerning the rights of persons to vote in your town. It is very difficult for one to give a definite reply to questions of the character asked, and I think it best to let you know my opinion of the law as applicable to the right of persons to vote in an incorporated town, and leave it to the judges of the election to say whether or not any individual is, or is not, entitled to vote.

First—A person must have paid all State capitation taxes assessed or assessable against him or her, during the three years next preceding that in which he offers to vote. The payment of a town capitation tax is not a prerequisite to vote. It does not matter where a person was assessed with capitation taxes, if he or she did live in the limits of an incorporated town, but has permanently removed therefrom; that person is not entitled to vote in the town, irrespective of the payment of capitation taxes therein, or the payment of property taxes by persons on whose land such person lives.

Section 2997 of the Code of Virginia provides that voters of the town shall be "actual residents." That provision has not been construed. A person may be an "actual resident," but temporarily absent. A person who has permanently removed from a town cannot come within the classification of "actual resident."

Second—There is no statute allowing registration by mail, though a person who is registered may vote by mail. In order to register, the applicant must appear

in person before the registrar and comply with the registration law before he can register.

Third—Persons who are actual residents of Boone Mill, and who have registered in the precinct in which Boone Mill is situated, should be put upon the registration books of the town, and this may be done on any date up to and including the day of the town election.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Eligibility to vote.

RICHMOND, VA., February 5, 1929.

HON. C. T. GUINN, *Clerk,*
Culpeper, Virginia.

DEAR MR. GUINN:

Your letter of January 22, enclosing a letter from Miss Mary G. Smith, 808 Thirteenth Street, S. E., Washington, D. C., was received, but on account of press of business I have not been able to give it attention before this.

Miss Smith desires to know whether or not she is entitled to vote in Virginia. She states the particulars of her birth, residence and present employment in that part of her letter which I quote:

"I was born of Virginia parents, February 16, 1893, in Fayette, Howard county, Missouri. After the death of my father I came to Culpeper December 24, 1900, with my mother. I received my early education in Culpeper. I left there in August, 1909, and came to Washington and in May, 1911, I entered the Government Service from the State of Virginia."

Her right to register and vote in Virginia is a mixed question of law and fact.

Born in Missouri, she was originally a resident of that State. Upon the death of her father, her mother, who was then a resident of Missouri, if she moved to Culpeper with the intention of making that place her permanent home, became a resident there. Miss Smith, not having been of age when her mother left Culpeper in August, 1909, and went to live in Washington, the intention of the mother to continue Virginia as her home governed the domicile and right to vote of Miss Smith when she became of age. If Mrs. Smith retained her domicile or legal residence in Virginia, and Miss Smith entered the Government Service in May, 1911, from Virginia, I am of the opinion that her domicile, residence and right to vote are in Virginia.

However, should Mrs. Smith not have established a domicile or residence in Virginia when she returned from Missouri or, having then established it, she left with no present intention of ever returning to Virginia and of making Washington her permanent domicile or home, then Miss Smith is not entitled to register and vote in Virginia.

I am mailing you a copy of my letter, that you may have it to forward to Miss Smith should you so desire.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Eligibility of voters—Registration of voters.

RICHMOND, VA., May 17, 1929.

E. L. PAISLEY, Esq., *Registrar,*
Mouth of Wilson, Virginia.

MY DEAR MR. PAISLEY:

Acknowledgment is made of your letter of May 14, 1929, in which you request my opinion on the following statement of facts:

"In case a person is not yet 21 years of age but will become 21 before election time, and has not yet paid his poll tax, is it lawful for him to pay his tax and register and vote in the election this fall?"

"Is there a new law allowing a voter moving into Virginia from another State to register and vote, without having been a citizen of Virginia for one year?"

The young man coming of age prior to the day on which the November, 1929, election will be held can pay his capitation tax for one year in advance and register at any time prior to the closing of the registration books for the general election. If he desires to vote in the primary, to be held in August of this year, he can do so by paying his capitation tax for one year in advance and by registering prior to the holding of the primary. Section 26 of the Constitution, as amended, provides as follows:

"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 section 18 of the Constitution, as amended, any person who will 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, will be entitled to register prior to the closing of the registration books. He also, under the provisions of section 26 of the Constitution, quoted above and section 35 of the Constitution, would be entitled to vote in the primary to be held in August, if otherwise qualified to do so.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Eligibility of voters.

RICHMOND, VA., October 19, 1928.

MR. J. P. JENKINS,
Sperryville, Virginia.

DEAR SIR:

I am in receipt of your letter of yesterday, in which you ask my opinion upon the following statement of facts:

"A man became 21 years old June 11, 1927, registered and paid his capitation tax on October 1, 1928. Is he entitled to vote in the coming election November 6, 1928?"

The person to whom you refer, provided he is at present a resident of the county and the election district in which he offers to vote and has been a resident

of the State for one year, the county six months and the election district in which he offers to vote thirty days, is entitled to vote in the November, 1928, election.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Eligibility to vote.

RICHMOND, VA., *October 23, 1928.*

MR. J. M. RICE,
Salem, Virginia.

DEAR SIR:

The Democratic Headquarters forwarded me yesterday for reply your letter of the 15th instant, in which you ask:

“How about those coming into the State since January 1, 1927, and their qualification to vote, and about capitation tax, etc.? Will judges have to take the plain statement of such persons as to how long they have been here and from where they came?”

Under section 20 of the Constitution, every person, male or female, is entitled to register, and under section 21, to vote who has six months prior to the 6th day of November, 1928, paid his or her capitation tax *during the three years preceding the year 1928.*

No person coming into the State after the first day of January, 1927, is assessable with State capitation tax for 1927, and 1927 is the only one of the three years preceding 1928—the year in which he or she offers to vote—in which he might have been assessable, and this being true, the person is entitled to vote without the payment of a capitation tax.

So far as the facts are concerned as to when a person came into the State, that is a question which the judges will have to determine. Unless the judge knows that the statement of a person offering to vote is untrue, he or she should be allowed to vote unless challenged, and then the judges should hear the evidence as to when the person offering to vote actually came into the State with the intention of making a home here.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Eligibility to vote.

RICHMOND, VA., *October 25, 1928.*

HON. WILLIAM F. MOFFETT,
*Commonwealth's Attorney,
Washington, Virginia.*

DEAR SIR:

I am in receipt of your letter of the 19th instant, in which you write concerning the right of General Barnett to vote in your county. I quote your letter in full:

“General Barnett, I am informed, desires to vote in Rappahannock county in the coming election.

"The facts are as follows, to-wit:

- "1. He is assessed with no property, real or personal in this county.
 - "2. His wife is assessed with, or has an interest in property both real and personal in this county.
 - "3. For a number of years General Barnett has been coming back and forth from Washington, D. C., to the home of his wife here in the county.
 - "4. General Barnett has never paid nor has he ever been assessed with a capitation tax in this county.
 - "5. Some time prior to October 6, 1928, General Barnett applied to the registrar of the precinct in which his wife's residence is located for registration; he was allowed by the registrar to register, regardless of the fact that he produced no evidence of the fact that he had ever paid a capitation tax in the county or anywhere else.
 - "6. General Barnett's name does not appear on the list of qualified voters as made up by the treasurer of this county as by law provided.
- "Under these conditions, what is your opinion as to his right to vote in the coming election in this county?"

In order to vote, a person who has lived in Virginia for a number of years, say since the first day of January, 1925, must have paid at least three years capitation taxes for the years 1925, 1926 and 1927, on or before the 5th of May, 1928, and his or her name must appear upon the county treasurer's voting list.

I take it that General Barnett, who you say has been going back and forth from Washington, D. C., to the home of his wife in Rappahannock county, was doing the same thing in about the same way previous to the first day of January, 1927, i. e., that there has been absolutely no change in his manner of going and coming since that date, and, so far as you understand the facts, if he is a legal voting resident now, he was prior to that date and certainly during the years 1925, 1926 and 1927.

Under these circumstances, I do not think that General Barnett should be allowed to vote in your county, certainly not unless he can explain to the judges that he has resided in Virginia in the sense that a real resident resides in the State for at least one year prior to the 6th of November of this year, and that a change in his status as a resident has occurred since the first day of January, 1927.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Eligibility to vote.

RICHMOND, VA., *October 25, 1928.*

MISS PERLE RECTOR,
Sperryville, Virginia.

MY DEAR MISS RECTOR:

Acknowledgment is made of your letter of October 23, 1928, in which you say:

"I became 21 years of age on June the 11th, 1927, paid my capitation tax on September the 25th, 1928, and registered September the 26th, 1928. Am I entitled to vote in the coming election on November the 6th, 1928?"

So far as the payment of your capitation tax and registration is concerned, you are eligible to vote in the November, 1928, election, assuming, of course, that you were properly registered.

You do not state any facts as to residence, but, if you have been a resident of the State at least one year prior to November 6, 1928, of your county at least six months prior to that date, and of the precinct thirty days, you will be eligible, so far as residence is concerned, to vote.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Eligibility of voters.

RICHMOND, VA., *November 1, 1928.*

THOMAS E. DIDLAKE, ESQ.,
Attorney at Law,
Manassas, Virginia.

MY DEAR MR. DIDLAKE:

Acknowledgment is made of your letter of October 31, 1928, in which you say:

"I was recently at Quantico, Va., and the judges of election there requested me to write to you and get your opinion in regard to the right to vote at the approaching election of certain people in Quantico, who are connected with the United States Marine Corps. It seems that a number of the officers connected with this Post, and a number of enlisted men have had themselves assessed for poll taxes and have paid them, and that they expect to vote at the approaching election. The judges wish to be advised in the following particulars:

"(1) Is a member of the Marine Corps, who lives upon the Federal Reservation at Quantico, eligible to vote, assuming that he has been there the requisite period of time and paid his capitation tax?

"(2) Is a member of the Marine Corps, who lives off the reservation, eligible to vote?

"(3) Is a civilian employed by the Federal Government in connection with its Post at Quantico, Va., who lives upon the Government Reservation eligible to vote?

"The first two classes referred to above, it seems to me, are clearly within the provision of section 82 of the Code. As regards those falling in the third class, our court has repeatedly ruled in divorce cases, and I think correctly so, that persons living upon the Federal Reservation at Quantico are not residents of the State of Virginia. However a great many votes will be involved in the approaching election and the judges of election are exceedingly desirous of having the benefit of your views. I would appreciate it, therefore, if you will write me a letter, setting out your opinion in connection with these matters, that I can forward to them prior to the date of the election."

In all three of the classes mentioned in your letter, it is my opinion that under the decision of the Court of Appeals in *Bank v. Byrum*, 110 Va. 708; 67 S. E. 349, that persons either military or civilian residing on a government reservation, such as Quantico, are not residents of Virginia. This being true, none of these persons would be eligible to vote in this State, unless, of course, prior to moving on such reservation they were bona fide residents of the State, and retained their legal residence at such former point when they moved to Quantico to perform their military or civilian duties. See *Williams v. Commonwealth*, 116 Va. 272.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Person convicted of felony not entitled to vote.RICHMOND, VA., *October 17, 1928.*MR. H. L. STALLARD,
Dungannon, Virginia.

DEAR MR. STALLARD:

I am in receipt of your letter of October 16th, in which you desire to be advised whether or not a party who has been convicted of manslaughter in the circuit court of Scott county, and his punishment fixed at three years in the penitentiary, can vote in the coming election. You further state that the party took an appeal to the Supreme Court, but that court did not disturb the verdict.

In reply, I will state that this party is not entitled to vote, due to the following provision which is contained in section 23 of the Constitution:

“Persons convicted after the adoption of this Constitution, either within or without this State, of treason, or of any felony, bribery, petit larceny, obtaining money or property under false pretenses, embezzlement, forgery, or perjury.”

This party having been convicted of a felony is therefore not entitled to vote. Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,
*Attorney General.***ELECTIONS—Conviction of misdemeanor violation of prohibition law does not disqualify one from voting.**RICHMOND, VA., *October 24, 1928.*CECIL BOLLING, ESQ., *Chairman,*
Wise County Republican Committee,
Pound, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of October 23, 1928.

All persons excluded from voting in Virginia, on account of conviction of crime, are thus specified in section 23 of the Constitution of Virginia:

“ * * persons who, prior to the adoption of this Constitution, were disqualified from voting, by conviction of crime, either within or without this State, and whose disabilities shall not have been removed; persons convicted after the adoption of this Constitution, either within or without this State, of treason, or of any felony, bribery, petit larceny, obtaining money or property under false pretenses, embezzlement, forgery or perjury; * * ”

Conviction of a misdemeanor violation of the prohibition law does not disqualify one from voting in Virginia.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Right of person to vote whose name is not on registration book.RICHMOND, VA., *November 9, 1928.*

HON. ALBERT V. BRYAN,
Attorney for the Commonwealth,
Alexandria, Virginia.

MY DEAR MR. BRYAN:

Acknowledgment is made of your letter of November 5, 1928, in which you say in part:

"For my files will you kindly write me a letter confirming our telephone conversation of this evening in which you gave it as your opinion that no person whose name does not appear on the registration books shall be permitted to vote even though he may have actually cast his ballot in former elections in this city, or, in other words, that the registration books are conclusive on the question of whether he has or has not registered. This is my opinion and is clearly the law, but I would like to have some memorandum confirmatory of our conversation. I am told, as I repeated to you over the telephone, that there are a number of people here who have voted in prior elections (just how they could vote I do not know), but whose names are not upon examination at this election found on the registration books."

From a careful examination of section 20 of the Constitution, and of section 98 of the Code, it is my opinion that registration of a voter consists not only of the application of the person applying for registration, but the actual registration or entry of his name on the official registration book. It follows from this that the registration book must be conclusive of the question as to whether a person is registered or not, and, therefore, where the name of a person does not appear on the registration book, the judges of the election should decline to permit him to vote.

Yours very truly,

JNO. R. SAUNDERS.
Attorney General.

ELECTIONS—Eligibility to vote.RICHMOND, VA., *November 13, 1928.*

MR. J. B. GRAVATT, *Registrar,*
Hanover, Virginia.

DEAR SIR:

I am in receipt of your letter of November 10, from which I quote:

"I would appreciate very much your advice and ruling on the following:
"A woman 21 years old the 1st day of January, 1928, on the 4th day of October, 1928, paid to the treasurer of her county \$1.50 poll tax for this year and registered in accordance with the Virginia Election Laws.
"Was she entitled to vote on November 6, 1928, and if not, why?"

Section 116 of the Code provides for the prepayment of capitation taxes of persons becoming of age after the 1st day of February—now probably January—of the year preceding the year in which he offers to vote. That section does not require such prepayment six months in advance of the election.

I am of the opinion that a person who became of age on the 1st day of January, 1928, who paid capitation taxes on the 4th day of October and registered on that day, was entitled to vote. Of course, she must have been a legal resident of the State, county and precinct in which she offered to vote, as provided by law.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Fee of registrars.

RICHMOND, VA., *November 19, 1928.*

HON. H. B. GILLIAM, *Chairman,*
Electoral Board,
Petersburg, Virginia.

DEAR SIR:

I am in receipt of your letter of November 16th, in which you say:

"One of the registrars here has made a charge for the list of absent voters and of new registrations made by him in accordance with the law. He has made a charge for the posting of a list of absent voters and also for another list of the absent voters filed with the clerk of the court, and has made a charge for a list of new voters posted by him and also for another list thereof filed with the clerk of the court. In short, he has charged for four lists, two of which you will observe from what is stated above are duplicates.

"The question has arisen as to whether the registrar is entitled to charge for each of the four lists according to the number of names thereon, or whether he can only charge for one of each of these lists and not for the copies thereof, which he filed with the clerk of the court."

In my opinion, registrars are entitled to a separate fee for the list of new voters registered by him, and which he furnished to the clerk, and for the list required by section 98 of the Code of Virginia, concerning the registration of voters. There is a difference concerning his fees for the lists required of him by the provisions of the Absent Voters Law. Under section 205 of the Code, a registrar is required to make duplicate lists of persons voting by mail, and is required to post one copy in a conspicuous place at the polling place of his precinct and transmit the other, either by mail or in person, to the clerk whose office returns of election are to be made. His compensation for this service is provided for by section 216 of the Code. Under this section, the registrar receives for each voter availing himself of the provisions of the law concerning absent voters, the same fee that he receives for registering a voter, and his compensation for posting notices shall also be governed by the general election laws.

In my opinion, a registrar is entitled under these two sections to the compensation provided for in section 205. This last section making the same allowance for a list furnished the clerk as for posting a list of voters.

Although lists in each case are necessarily duplicates, they are not usually made by the same process and each one is generally written out separately by registrars. Certainly, under these circumstances, registrars should be entitled to fees for each separate list made by him as required by law.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Judges of election, how appointed.

RICHMOND, VA., August 13, 1928.

MR. L. R. BARTENSTEIN, *Secretary,*
Fauquier County Electoral Board,
Warrenton, Virginia.

DEAR MR. BARTENSTEIN:

I am in receipt of your letter of the 11th instant, concerning the appointment and removal of judges of election. I am quoting your letter in full:

"I am informed that there are a good many instances in this county in which the regular judges of election appointed by this board as Democratic judges for the coming November election have stated their intention of supporting the Republican nominee at said election and not the Democratic nominee.

"It has been stated also that this board should take cognizance of this fact and remove said judges in order that there may be two judges supporting the Democratic nominee and one supporting the Republican.

"Please advise me if electoral boards have any authority or any duty in this connection and, if the electoral board cannot handle the situation, who is the proper person to do so and what procedure they should follow."

The law providing for the appointment of judges of election is contained in sections 84 and 148 of the Code. Both of these sections provide for the appointment of judges belonging to the two political parties which, at the general election preceding their appointment, cast the highest and next highest number of votes. In addition, section 148 provides that appointments shall be made in May of each year, that the term of office begins on the first day of June and runs for one year. There is no law which authorizes an electoral board to remove a judge during his term of office because of the fact that he has changed his party allegiance or has stated his intention not to support the nominee of the party to whom the judge was supposed to have belonged at the time of his appointment. There is certainly no authority for the removal of any judge in order to appoint others in his place, so that there may be two judges supporting the Democratic nominee and one the Republican nominee. The law contemplates the appointment of two members of one of these parties and one member of the other party, but it does not provide as to which party shall be represented by two judges and which by one judge.

The situation stated in your letter is one over which neither your electoral board nor any other authority has control and, although the situation is unfortunate from a political standpoint, it is one without present remedy.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Polls must be closed at sunset.RICHMOND, VA., *October 30, 1928.*

MR. C. J. HUDSON,
Judge of Elections,
Luray, Virginia.

MY DEAR MR. HUDSON:

Relative to your letter of October 26, 1928, to me and my reply thereto on October 27, 1928, in which reply I expressed the opinion "that it was the intention of the General Assembly that all persons, who are eligible and who are present at the polling places before closing time waiting their turn, are entitled to vote, even though the hour of sunset passes before such persons, in the ordinary time allotted for voting, are able to do so, and for this purpose the closing of the polls should be delayed until such persons have cast their ballots."

Since writing that letter, I have given a more careful consideration to this subject, and I am convinced that I was in error in the opinion expressed, and that section 152 of the Code is mandatory and should be strictly construed, and the polls must be closed at sunset, as is required by the statute.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Town charter requiring elective officers of town to act as judges of election is in conflict with section 31 of Constitution.RICHMOND, VA., *January 2, 1929.*

HON. JOHN F. BETHUNE, *Mayor,*
Falls Church, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of December 22, 1928, in which you request me to advise you whether a provision in a town charter requiring the members of the town council, and other elective officers of the town, to act as judges at the annual municipal election is valid in view of the provisions of the last paragraph of section 31 of the Constitution. This paragraph reads as follows:

"No person, nor the deputy of any person, holding any office or post of profit or emolument, under the United States government, or who is in the employment of such government, or holding any elective office of profit or trust in the State, or in any county, city, or town thereof, shall be appointed a member of the electoral board, or registrar or judge of election."

It is my opinion that this section of the Constitution relates to municipal elections as well as to State elections, and that, therefore, a charter containing a provision of the kind referred to in your letter would be in conflict with this section of the Constitution.

As to section 123 of the Constitution, I doubt whether this section applies to a town. It would seem that the General Assembly had construed it as applying to a city only. See section 3013 of the Code.

Trusting this gives you the desired information, I am

Very truly yours,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Registration of voters.RICHMOND, VA., *August 10, 1928.*

MR. LUTHER RICE,
Reedville, Virginia.

MY DEAR SIR:

I am in receipt of your letter of August 8th in which you say:

"Will you kindly advise me where I can secure printed forms that will give the necessary instructions how to prepare the forms used by those desiring to register in Virginia.

"Kindly advise me if registrars have the right to instruct those who apply to him for registration in the filling out of the necessary forms."

Section 93 of the Code of Virginia provides as follows:

"Each registrar shall register every male citizen of the United States, of his election district, who shall apply to be registered at the time and in the manner required by law, who shall be twenty-one years of age at the next election, who has been a resident of the State two years (now one year), of the county, city, or town one year (now six months), and of the precinct in which he offers to register thirty days next preceding the election, who, at least six months prior to the election, has paid to the proper officer all State poll taxes assessed or assessable against him for three years next preceding such election, or if he come of age at such time that no poll taxes shall be 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, and unless physically unable to do so, shall make application to the registrar in his own handwriting, without aid, suggestion, or memorandum, in the presence of the registrar, 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; and shall answer on oath any and all questions affecting his qualifications as an elector, submitted to him by the registrar, which questions and answers thereto shall be reduced to writing, certified by the said registrar, and preserved as a part of the official records, * * *."

This quotation gives the law as to registration in as brief form as I could possibly do.

So far as I know, there are no printed forms of instructions as to how to fill out your application for registration. No registrar is allowed to assist or instruct a person in the preparation of his application for registration.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Town elections—Registration of voters, eligibility of.RICHMOND, VA., *March 14, 1929.*

L. M. RANEY, ESQ., *Cashier,*
Bank of LaCrosse,
LaCrosse, Virginia.

MY DEAR MR. RANEY:

Acknowledgment is made of your letter of March 13, in which you say in part:

"Please let me know what the requirements are for voting in a town which has no separate voting precinct.

"A question has been raised in our town as to whether or not it is necessary to have a town registrar when the town is in LaCrosse precinct, which comprises the country territory adjoining.

"A member of our electoral board told me it was not necessary to have a town registrar. My understanding was that the requirements were that he be qualified to vote in the general election and reside in the town limits, and that it would not be necessary for him to register in town, but he would have to be registered in the precinct in which the town is located."

If you will examine section 2994 of the Code, you will see that it is there provided that "in every town there shall be elected every two years, on the second Tuesday in June," a mayor and council.

Section 2995 of the Code, as amended, provides as follows:

"The electoral board of the county within which such town or the greater part thereof is situated, shall, not less than fifteen days before any town election therein, appoint one registrar and three judges of election for each voting precinct, which judges shall also act as commissioners of election. 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. The said registrars shall be governed as to their qualifications and powers, and in the performance of their duties, by the general laws of this Commonwealth, so far as the same may be applicable."

You will see from this that the town registrar or registrars must register all voters who are residents of the town who have previously registered as voters in the county. No other persons can be registered as voters in the town election.

I also call your attention to sections 2996-2999.

This being a regular municipal election, under sections 21 and 38 of the Constitution, it is necessary, as a prerequisite for one to vote in the town election, that he or she shall have paid all State capitation taxes assessed or assessable against him during the three preceding years at least six months prior to the date on which the election is held.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,

Attorney General.

ELECTIONS—Registration of voters.

RICHMOND, VA., *September 10, 1928.*

MR. JOHN T. GILBY, *Registrar,*
Wise, Virginia.

MY DEAR SIR:

I have carefully noted the contents of your letter of September 8, and the circumstances surrounding the party who desires to register and vote in the coming fall election.

I am of the opinion that he cannot register and vote, due to the fact that he has failed to pay the last three years capitation taxes which were assessed or assessable against him. I judge from the contents of your letter that this party has been a resident of Virginia for a number of years. Such being the

case, capitation taxes were assessed or assessable against him. They may not have been assessed against him in Wise county, but should have been assessed against him in whatever county he resided prior to beginning to teach in Wise. The fact that he only paid capitation taxes for 1927 would not permit him to vote, if the 1925 and 1926 taxes were assessable against him.

I am, therefore, of the opinion that you did right in declining to register this party. Of course, this opinion is based upon the statement contained in your letter.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Registration of voter—Physically unable to make application in own handwriting.

RICHMOND, VA., *September 21, 1928.*

DR. L. E. COCKRELL,
Reedville, Virginia.

MY DEAR MR. COCKRELL:

Your letter of September 19th received.

You state that you know a party at Reedville who cannot see sufficiently well to make out her application to register. You then ask if there is any law which provides how one may register under these circumstances.

I call your attention to section 20 of the Constitution, which provides who may register after 1904. One paragraph of this provides that unless physically unable, the party shall make application to register in his own handwriting, without aid, suggestion, or memorandum, in the presence of the registration officers, stating age and so forth.

In the case of the lady in question, she being physically unable to make this application in her own handwriting, I presume the registrar would permit her to register, provided she could answer on oath any and all questions affecting her qualifications as an elector.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Registration of voters.

RICHMOND, VA., *October 26, 1928.*

F. M. MURPHY, ESQ.,
Kinsale, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of October 24, 1928, in which you ask the following questions:

"1. Voter recently registered unable to make his written application for said registration.

"2. Voter living in precinct A, never lived in precinct B, newly registered in precinct A as being transferred from precinct B, according to the registrars posted list of new registrations.

"3. Voter living, registered and voting in precinct A. Moved residence to precinct B, more than a year ago. Still offers to vote in precinct A, not having been transferred from A to B.

"4. Voter newly registered in Precinct A. Has never lived in precinct A, but only in precinct B.

"A and B are two adjacent precincts."

In response to your first question, I call your attention to section 107 of the Virginia Election Laws, pages 29-30, and to the act of March 21, 1924, Acts 1924, page 718, Virginia Election Laws, pages 30-31, from which it would appear that it would be necessary, in order to prevent this man from voting, to proceed to have his name removed from the registration books. Of course, if he was unable to make his application in writing, unless he was physically unable to do so, his registration is illegal under section 20 of the Constitution, and his name should be removed from the books.

The facts with reference to question 3 are not sufficient for me to express an opinion thereon. The Court of Appeals held in *Williams v. Commonwealth*, 116 Va. 272, that where a person has a legal residence in one place and moves to another, in order for him to lose his legal residence at the first place for the purpose of registering and voting, his physical removal must be accompanied by the intention of abandoning the legal residence acquired at the first place, and to acquire new legal residence at the place to which he has moved. It is, therefore, possible for a person who has a legal residence in one precinct to move into another precinct and still retain his legal residence in the first precinct. But, this is a fact to be determined as any other fact would be determined.

With reference to question 2, while the voter in question should have registered in the first instance in precinct A, I do not think the fact that he registered in the wrong precinct would render his registration invalid, and, therefore, he would be entitled to a transfer to the proper precinct.

The same answer would apply to question 4, and the voter, in that case, should apply under section 100 of the Code of Virginia, Virginia Election Laws, pages 26-27, to the registrar of A precinct for a transfer to B precinct. These precincts being in the same county, this transfer could be obtained and made at any date prior to the election.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Registration of voters.

RICHMOND, VA., November 2, 1928.

MR. A. G. HUTCHISON, *Registrar,*
Herndon, Virginia.

MY DEAR SIR:

I am in receipt of your letter of October 31, in which you write concerning the registration of two voters by you for Herndon precinct of your county.

Provided the lady who came to America as a child eight years old, but who was never naturalized, married an American citizen on or before September 22,

1922, she became, by virtue of her marriage, an American citizen, and, all other requirements being met, she was properly registered and is now entitled to vote.

As to the other case, I am of the opinion that a woman who married an alien prior to September 22, 1922, thereby lost her American citizenship.

You ask if the two ladies to whom you refer are legally entitled to remain on your registration books.

Although they may not have been entitled to register, I am of the opinion that, so far as your authority is concerned, except for the purging of your books pursuant to section 107 of the Code and of an act approved March 21, 1924, page 718, Acts 1924, you have no authority to strike their names from the registration books. While they may have been inadvertently registered, their registration stands until their names have been legally removed from your books. You cannot yourself do this by any arbitrary action upon your own part and must follow the law concerning the purging of your registration books.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Primary, who may vote in.

RICHMOND, VA., *January 31, 1929.*

TO THE STATE DEMOCRATIC EXECUTIVE COMMITTEE,
Richmond, Virginia.

GENTLEMEN:

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

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

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

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

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

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

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

The first sentence contained in section 222 reads as follows:

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

The first sentence in section 226 is as follows:

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

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

Respectfully submitted,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Primary elections and bond issue elections must be separate and have separate judges and clerks.

RICHMOND, VA., *June 29, 1929.*

MR. R. W. TAYLOR,
New Kent, Virginia.

DEAR SIR:

I am in receipt of your letter of yesterday, from which I quote:

"Simultaneously with the August Primary, our county will vote on the question of bonding the county for the purpose of building a high school. The election laws require only two judges and one clerk for the Primary, each of which is selected from the Democratic party, and at our last meeting we did not appoint any but those above outlined. Since then my attention has been called to the fact that, owing to the fact that we are voting on the school bond issue, it is imperative that we have three judges and two clerks for this occasion. Will you please advise me what is your interpretation of the law in regard to this matter?"

Under the provisions of section 148 of the Code, your electoral board should have appointed, during the month of May, three judges and two clerks of election, whose terms of office began on the first day of June, and serve for one year or until their successors are appointed. If such appointments were not made as provided for, then the judges and clerks of election last regularly appointed, under the provisions of section 148, continue to hold office and are the judges and clerks who should hold your bond issue election.

In your letter you write that your board has appointed two judges and one clerk for the August Primary election. This was entirely proper so far as the Primary election is concerned. The appointment of these officials is provided for by section 224 of the Code and, as judges of the Democratic Primary, they are only authorized to hold the Primary election and cannot act as judges and clerks of the bond issue election.

The bond issue election and the Primary election should be held separately and by different officials, although, to save expense, I see no reason why the election officials should not sit in the same room, nor any reason why Democratic judges and clerks of the regular election should not officiate in the Primary elec-

tion, although that may mix matters, as one of the regular judges of election should belong to the Republican party and the judges of the Primary election shall all be members of the Democratic party. There should be a separate ticket for each election and separate ballot boxes, and, so far as the general election is concerned, all of the provisions of sections 2738, 2739, 2740 and 2741 should be complied with, otherwise the result of the bond issue election may be subject to question and contest.

As the Attorney for the Commonwealth of your county is more fully acquainted with the local situation, I refer you to him and am sure he will be pleased to advise you concerning any question which may arise in the conduct of the bond issue election. I do not mean, however, to indicate that I am not at all times willing to advise you and, should it be your pleasure to call on me further, I will be only too glad to respond.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Payment of costs of primary.

RICHMOND, VA., *August 31, 1928.*

MR. J. H. BAPTIST,
Box 488,
Lynchburg, Virginia.

MY DEAR SIR:

In reply to your letter of August 30th, I beg leave to call your attention to section 245 of the primary law passed by the Legislature of Virginia, which reads as follows:

"The necessary expenses incident to holding and conducting primaries, such as the payment of judges and clerks of election, necessary stationery and supplies, rent of polling places, furnishing and distributing ballot boxes and poll books, delivering poll books, printing and providing ballots, and other like expense shall be paid as expenses of elections are paid."

Section 170 of the general election laws provides that the cost of conducting elections shall be paid by the counties and cities, respectively.

It, therefore, follows that the costs of a primary are paid by the counties and cities in which the primary is held.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Primaries—Expenditures of candidates.RICHMOND, VA., *June 10, 1929.*

HON. JOHN GARLAND POLLARD,
Richmond Hotel,
Richmond, Virginia.

MY DEAR DR. POLLARD:

Acknowledgment is made of your request for my opinion as to the amount that can be legally spent by a candidate for Governor in the Democratic primary to be held in August, 1929.

The law applicable to this matter is section 234 of the Code, which provides in part as follows:

"No candidate for any office at any primary shall spend for any purpose whatever, a larger sum than an amount equal to fifteen cents for every vote cast for the candidate of his party receiving the largest vote at the last preceding gubernatorial election, within the territory, the qualified voters of which have the right to vote for the office for whose nomination such person is a candidate at such primary; * * *."

The Democratic candidate receiving the largest vote at the last preceding gubernatorial election was His Excellency, Harry Flood Byrd, the present Governor of Virginia, who received 107,378 votes (report of the Secretary of the Commonwealth, 1925-1926, pages 441-442). An amount equal to fifteen cents for every vote cast for Governor Byrd would be \$16,106.70.

I have showed this letter to Colonel Saunders and he directed me to state to you that he concurred in this opinion.

With my best wishes, I am

Sincerely yours,

LEON M. BAZILE,
Assistant Attorney General.

ELECTIONS—Primaries, who may vote in.RICHMOND, VA., *April 23, 1929.*

HON. G. WALTER MAPP,
Room 138, Murphy's Hotel,
Richmond, Virginia.

MY DEAR SENATOR MAPP:

Acknowledgment is made of your letter of April 22, 1929, in which you say in part:

"Some of my friends have submitted to me the following question:

"Can former Republicans, who are willing to pledge themselves to support the nominee in the November election, participate in the August Democratic primary?"

"I shall thank you for an official answer to this question directed to me at my headquarters, Room 138, Murphy's Hotel."

Section 228 of the Code provides in part:

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

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

"No person shall be permitted to vote for the candidates of any party in any primary unless such person is a member of such party and in the last preceding general election, in which such person participated, he or she voted for the nominees of such party ; and, upon challenge, such person shall declare on oath that he or she is a member of such party and supported such nominees as hereinbefore required before being permitted to vote."

The law of the party on this subject is found in the plan of organization of the Democratic party in the State of Virginia adopted by the Norfolk Convention on June 11, 1924. It provides in part as follows :

" * * * 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."

A Republican, of course, is not a member of the Democratic party and, therefore, cannot be permitted to vote in a Democratic primary. I am not sure that I understand just what is meant by the words, "former Republicans," as employed in your question. They would seem to indicate that such persons had previously voted the Republican ticket.

There is nothing to prevent a former Republican from becoming a member of the Democratic party, if he takes the proper steps to do so, until a former Republican or a former member of any political party other than the Democratic party becomes a member of the Democratic party, he is not, in my opinion, entitled to vote in a Democratic primary.

If you will be more specific in your question, I shall be glad to further advise you.

Yours very sincerely,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Primaries, powers and duties of local Democratic committee—Entrance fees of candidates—Date of primary.

RICHMOND, VA., April 5, 1929.

HON. R. LEE ROBINSON, *Chairman,*
Newport News Democratic Executive Committee,
Newport News, Virginia.

MY DEAR DR. ROBINSON :

Acknowledgment is made of your letter of April 4, 1929, in which you submit for my opinion three questions. Your first question is as follows :

"What date must this committee fix as the last day upon which candidates for city and State offices may file their applications to be eligible for the August primary?"

The committee, in my opinion, is without authority in this matter as section 229 of the Code expressly provides that a candidate for an office to be filled by election by the qualified voters of the State at large must file his declaration of

candidacy at least ninety days before the primary, and in all other cases such candidate must file his declaration of candidacy at least sixty days before the primary.

Your second question is as follows:

"Does section 249 of the Virginia Election Laws, 'Fees to be paid by candidates,' second paragraph thereof beginning 'In case of a candidate,' etc., mean that this committee has the power to assess (same to be paid to proper State authorities) a sum in excess of two per centum of the salary of an office when the compensation of such office is both salary and fees?"

The paragraph of section 249 of the Code to which you refer reads as follows:

"In case of a candidate whose compensation is paid in whole or in part by fees, the amount to be paid by such candidate as his contribution for the payment of the expenses of the primary shall be fixed by the proper committee of the respective parties."

When an officer receives both salary and fees, I think the purpose of the law was to permit the committee to assess his entrance fee at an amount in excess of two per centum of the salary received by him, if it were deemed necessary by such committee, so that such officer could be placed on the same basis with a candidate whose office paid only a flat salary.

Your third question reads as follows:

"Does section 222 of the Virginia Election Laws, the sentence beginning 'All nominations made,' etc., mean that this committee cannot hold a primary on a date other than the date of the State primary and under rules other than those laid down in the State Election Laws?"

The sentence to which you refer in section 222 of the Code reads as follows:

"All nominations made by a direct primary shall be made in accordance with the provisions of this chapter."

Section 223 of the Code fixes the date on which primaries shall be held.

It is my opinion that the committee is without authority to hold a primary for the nomination of candidates coming within the terms of this chapter, but that it must be held on the date fixed by law.

I am requesting the Secretary of the Commonwealth to send you a copy of the Virginia Election Laws. The sections of the Constitution printed in this edition of the Virginia Election Laws, however, are those from the old Constitution as the new edition has not been printed since June 19, 1928, the date on which the Constitution was amended.

Sincerely yours,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Legal right of registrar to serve as clerk.

RICHMOND, VA., June 21, 1929.

MR. W. H. COLLINS,
Madison, Virginia.

MY DEAR SIR:

I am in receipt of your letter of yesterday, asking my opinion as to the legal right of a registrar to serve as a clerk of election.

In reply to your inquiry, I am enclosing you copy of an opinion addressed to Mr. W. L. Kerr, Keeling, Virginia, in which I held that a registrar could not act as clerk of an election.

This opinion was based upon the provisions of section 86 of the Code to the effect that " * * such registrar shall not hold any office by election or appointment during his term * *."

Section 149 provides that "before any judge or clerk of election shall enter upon the performance of the duties imposed upon him by law he shall take an oath * *." The provision requiring a clerk to take an oath makes him an officer, and, as no registrar is eligible to appointment to an office, he is not eligible to appointment as clerk of a regular election.

However, for your information, I will say that this provision preventing you as registrar from acting as clerk of an election applies to regular and not primary elections, and that under section 224 of the Code you may be appointed as judge or clerk of a primary election.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Registrar acting as judge or clerk of primary.

RICHMOND, VA., May 29, 1929.

HON. H. B. GILLIAM, *Secretary,*
Electoral Board,
Petersburg, Virginia.

DEAR SIR:

I understand the question has arisen, and you desire the opinion of the Attorney General's Office, as to whether or not a registrar of your city may act as a judge or clerk at the coming primary election. In Colonel Saunders' absence, I have been requested to give an opinion, as the appointment of judges and clerks will be made before his return to the office.

By section 86 of the Code of Virginia no registrar is eligible to any office by election or appointment, during his term of office as registrar. There may be some question as to the eligibility of a registrar to act as judge at a primary election, as every judge appointed for such an election must, before entering upon the duties of his office, take an oath to "faithfully discharge the duties of his office." It will be noticed that no such oath is required of a clerk of an election. His duties are entirely clerical. He has no authority to act even in the absence of a judge.

I take it, therefore, that a registrar is eligible for appointment as clerk of an election. This is certainly so in those cases in which, under the provisions of section 224 of the Code, in the discretion of the electoral board, such board appoints three judges and two clerks.

Yours very truly,

EDWIN H. GIBSON,
Assistant Attorney General.

ELECTIONS—Registrars—Compatibility of offices.RICHMOND, VA., *April 2, 1929.*

A. M. NICHOLS, ESQ.,
Secretary Electoral Board,
318 Lafayette Avenue,
South Norfolk, Virginia.

MY DEAR MR. NICHOLS:

Acknowledgment is made of your letter of April 1, 1929, in which you request me to advise you whether a registrar, who has been appointed a police officer for a city of the second class, is entitled to continue to hold the office of registrar after accepting such appointment.

A police officer is a State officer (*Burch v. Hardwicke*, 30 Gratt. 24). This being so, section 86 of the Code applies to the subject of your inquiry. This section provides in part:

“ * * * such registrar shall not hold any office, by election or appointment, during his term. * * The acceptance of any office, either elective or appointive, by such registrar during his term of office shall, ipso facto, vacate the office of registrar. The electoral board shall fill any vacancies that may occur in the office of registrar.”

I am, therefore, of the opinion that the acceptance of the office of police officer by the man in question ipso facto vacated the office of registrar, and that a vacancy exists in the office of registrar which it is the duty of your board to fill.

I regret that I misunderstood the question submitted by you in your previous letter.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Registrar, fees of.RICHMOND, VA., *October 24, 1928.*

MR. L. S. MARSHALL,
Williamsville, Virginia.

MY DEAR SIR:

I am in receipt of your letter of the 19th instant, concerning the transfer of voters from one precinct to another in the same county. I note what you say about the difficulty of issuing or receiving transfers upon election day.

I have just written a letter to Miss Annie M. Stribling, Registrar, Berryville, Virginia, which I think covers your question, copy of which I enclose.

In my opinion, a registrar is entitled to a fee of \$5.00 for each of the days he sits as registrar, besides the fees for the registration of each voter at other times, and for certifying a list of registered voters to the clerks. I do not think there is any provision of law allowing a registrar to sit on the day of election or, in other words, to be present at a voting precinct and receive his per diem for that day's service.

There is undoubtedly conflict between section 96, allowing \$2.00 per day, and section 200, allowing for \$5.00 per day, but as section 200 was passed as amended

by the 1928 session of the Legislature, while 96 is an old section, I think section 200 undoubtedly governs the pay of registrars.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Legal resident—Capitation tax.

RICHMOND, VA., *October 5, 1928.*

HON. G. W. SETTLE,
Flint Hill, Virginia.

MY DEAR MR. SETTLE:

Acknowledgment is made of your request that I advise you whether a person who left Virginia some years ago, moved to the city of Washington and became a legal resident of that place, but who moved back to Virginia after January 1, 1927, some time during that month, is entitled to vote in the November, 1928, election without the payment of a capitation tax.

If the gentleman in question, when he moved from Virginia, became a bona fide resident of the city of Washington, no capitation tax or taxes could be assessed against him, as capitation taxes are only assessed against residents of this State.

It would follow from this that, if the gentleman in question became a resident of Washington, he could vote in the November, 1928, election of this State on the facts stated by you without the payment of a capitation tax, as section 20 of the Constitution does not require a new resident who is an adult to pay a capitation tax in advance as a prerequisite to the right to vote, as it does in the case of a young person just coming of age.

In this connection, I call your attention to *Williams v. Commonwealth*, 116 Va. 272.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Residence—Qualification of judges.

RICHMOND, VA., *June 6, 1929.*

MR. J. W. LARGE,
Appalachia, Virginia.

MY DEAR SIR:

In further reply to your letter of May 31, 1929, I would say that the construction of section 2997 of the Code of Virginia restricting voters of towns to "actual residents" has not been construed.

The permanent removal of persons from a town to

- (1) Other parts of the State of Virginia,
- (2) To another State disqualified them as voters in the original town.

It is impossible for me to say as to when a person removing from a town is considered to have lost his voting privilege, should he not admit that he has actually permanently removed from the town. Should he not have lost his right to vote in the town, he has the privilege of voting by mail.

You also ask an opinion concerning the qualification of judges of election.

In paragraph (a) it is assumed that an employee or deputy of an unincorporated business owned by two men, one of whom is a candidate for office, cannot act as a judge or clerk of the election. In this conclusion, I think you are correct.

In paragraph (b) you ask as to the effect of a temporary removal of an employee from his duties a few days prior to the election.

This is another very hard question to answer. Should the employee discontinue his business relations, I should say that he was eligible to act as judge or clerk, but, if he did not really give up his employment, then he is disqualified.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Residence.

RICHMOND, VA., *October 10, 1928.*

REV. N. C. RICE,
Greenville, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of October 8, 1928, in which you say in part:

“Not being familiar with the election laws of the State, I am writing you for the following information:

“I have recently been transferred from my charge in Highland county, Virginia, to Rockingham County, Virginia. I will move from Highland county on the 11th of October, just 26 days before the coming election, and will not be in Rockingham county sufficient time to get a transfer.

“Can I come back to my voting precinct in Highland county and cast my ballot on the 6th of November?”

Section 18 of the Constitution requires as a prerequisite to the right to vote residence in the State one year, in the county, city or town six months, and in the precinct in which a person offers to vote thirty days preceding the election.

The Court of Appeals decided in *Williams v. Commonwealth*, 116 Va. 272 (1914):

“The meaning of the words ‘resident’ or ‘residence’ is to be determined from the facts and circumstances taken together in each particular case. For the purpose of voting and holding office a man cannot have more than one legal residence. A legal residence once acquired by birth or habitancy is not lost by temporary absence for pleasure, health or business, or while attending to duties of a public office. Where a man has two places of living, which is his legal residence is to be determined largely, where the right to vote or hold office is involved, by his intention. When he acquires a new legal residence he loses the old, but to effect this there must be both act and intention.”

I would, therefore, say that if, when you moved from Highland county to Rockingham county, Virginia, you intended to change your legal residence, under the decision of the court in the above case, you would not be eligible to vote anywhere in the November, 1928, election. If, on the other hand, when you moved from Highland county to Rockingham county, you did not intend to change your legal residence from Highland county, you can return there and vote.

In *Williams v. Commonwealth*, *supra*, page 279, the court said:

"The true test in cases of the kind under consideration seems to be this, that 'If a person leave his original residence *animo non revertendi*, and adopt another (for a space of time, however brief, if it be done) *animo manendi*, his first residence is lost. But if in leaving his original residence, he does so, *animo revertendi*, such original residence continues in law notwithstanding the temporary absence of himself and family. Such is the uniform language of the books, as well as the clear conclusion of common sense.' *Cadwallader v. Howell*, *supra*."

Trusting that this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Residence—Voting by mail.

RICHMOND, VA., October 25, 1928.

MR. W. H. LANKFORD, *Registrar*,
Franklin, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of October 24, 1928, in which you request my opinion on the two following questions:

"1st. A person moving from one county to another county in June, 1928, now applying to me for ballot to vote by mail. This person is a man of a family and has changed his residence from one county to another and has not been in the county to which he moved six months; therefore is not entitled to registration in county to which he has moved. Before issuing ballot for him to vote by mail, I am awaiting your opinion.

"2nd. A voter that is an invalid, or sick, in the precinct and applying for ballot to vote by mail, provided application is received five days prior to the election, can I issue an absent voter's ballot for them to vote by mail?"

As to your first question, it is impossible for me to give you a definite opinion on the facts stated. If this man moved from your county into another county in June, 1928, with the intention of abandoning his legal residence in your county and acquiring a new legal residence in the county to which he moved, he is not entitled to vote in the November, 1928, election, either in person or as an absent voter. If on the other hand, when he moved from your county he did not intend to change his legal residence to the new county in which he moved, but intended to retain it in your county, he would have a right to vote in the last mentioned county if otherwise qualified. In this connection, see *Williams v. Commonwealth*, 116 Va. 272.

In response to your second question, I call your attention to section 202 of the Code of Virginia, as amended by chapter 397 of the Acts of 1928, Virginia Election Laws, page 65. You will see from an examination of this section that one who is physically unable to go in person to the polls on the day of election may vote as an absent voter, provided he complies with the provisions of this chapter of the Code by making application in time, and so forth.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Residence.RICHMOND, VA., *October 27, 1928.*

HON. O. V. HANGER, *Secretary,*
State Democratic Headquarters,
Richmond, Virginia.

MY DEAR MR. HANGER:

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

"I have just received information to the effect that quite a number of students at Sweet Briar College, Sweet Briar, Amherst County, Virginia, have registered.

"I will thank you to advise me at once as to whether a student can gain residence while attending a school. I think section 24 of the Constitution covers this, as well as the Virginia Election Laws. However, it is necessary that we have a ruling from you on this matter at once."

Section 24 of the Constitution provides as follows:

"No officer, soldier, seaman, or marine of the United States army or navy shall be deemed to have gained a residence as to the right of suffrage, in the State, or in any county, city or town thereof by reason of being stationed therein; nor shall an inmate of any charitable institution *or a student* in any institution of learning, be regarded as having either gained or lost a residence, as to the right of suffrage, by reason of his location or sojourn in such institution." (Italics supplied.)

It follows from this that students at Sweet Briar College, unless residents of Amherst County prior to attending such college, have not become residents of that county by attending college, and such registration would be invalid.

Trusting this gives you the desired information, I am

Very truly yours,

LEON M. BAZILE,
Assistant Attorney General.

ELECTIONS—Voters—Residence.RICHMOND, VA., *March 19, 1929.*

MAJOR G. B. COLLINGS,
Newport News, Virginia.

DEAR MAJOR COLLINGS:

I have just had called to my attention your letter of even date, in which you make certain statements concerning the place of your residence since July, 1917, and your payment of poll taxes in Virginia for the years 1926, 1927 and 1928.

The question of your eligibility to participate as a voter in Virginia, you having moved to Virginia from Ohio in 1917, is to be measured by the law of Virginia as succinctly stated in *Williams v. Commonwealth*, 116 Va. 272, in which the court held:

"The meaning of the words 'resident' or 'residence' is to be determined from the facts and circumstances taken together in each particular case. For the purpose of voting and holding office a man cannot have more than one legal residence. A legal residence once acquired by birth or habitancy is not lost by temporary absence for pleasure, health or business, or while attending to duties of a public office. Where a man has two places of living,

which is his legal residence is to be determined largely, where the right to vote or hold office is involved, by his intention. When he acquires a new legal residence he loses the old, but to effect this there must be both act and intention."

I understand from your letter that you had not declared your intention to become a permanent resident of Virginia until the 21st day of February, 1928, or very soon thereafter, at which time I understand you publicly declared yourself a permanent resident of Virginia, and have resided in Virginia and held yourself as a resident since that time.

Two things must occur when a person changes his residence from one State to another:

First, actual removal from the old into the new State.

Second, an intention to make the new home a permanent place of residence.

It, therefore, follows that, inasmuch as you have been a resident of the State of Virginia since the 21st of February, 1928, and that you have resided in the City of Newport News during all of this time, and have paid all capitation taxes which were assessed or assessable against you, you are entitled to vote in the coming August primary of this year and in the general election to be held November, next.

Of course, you understand that each and every case of this character depends upon the facts and circumstances connected therewith, but, from the statement of facts contained in your letter to me, unquestionably you are now a resident of Virginia and entitled to vote.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Residences of voters.

RICHMOND, VA., *February 9, 1929.*

MRS. SUE HEARN CHRISTIE,
Port Royal, Virginia.

DEAR MADAM:

I am in receipt of your letter of yesterday, in which you state certain facts concerning your residences up to August, 1928, at which time you say you settled in Port Royal, Virginia. You also say that, although you have moved continuously since your marriage, you have never given up your residence in the State of Virginia.

You wish to become a candidate for councilwoman of your town and ask to be informed as to the requirements and as to whether or not you are eligible to such office.

Never having given up your residence in Virginia, you are eligible to election as councilwoman of your town, provided you have paid your capitation tax as required by law for the three years preceding the year of the election. I take it that you desire to become a candidate for councilwoman in June of this year. If so, you must have paid your capitation taxes six months prior to election day,

in order to render you eligible for election as a town official, as only persons who are entitled to vote are eligible for election.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Residence.

RICHMOND, VA., *August 23, 1928.*

MRS. MARY VAUGHAN BOISSEAU,
Buchanan, Virginia.

MY DEAR MRS. BOISSEAU:

In reply to your letter of August 22nd, which I have just this moment received, I beg leave to state that it is provided by section 1 of the act conferring the right of suffrage on women, Acts of 1920, page 588, as amended by the Acts of 1922, page 462:

“ * * * For the purpose of registering and voting, the residence of a married woman shall not be controlled by the residence or domicile of her husband.”

It, therefore, follows that if you are otherwise qualified to vote, the fact that your husband resides in Roanoke has nothing to do with your right to vote in Buchanan County.

Trusting this gives you the desired information, I am

Yours very respectfully,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Residence.

RICHMOND, VA., *October 23, 1928.*

MISS AZELLE T. CARUTHERS,
Ferrell, Virginia.

DEAR MISS CARUTHERS:

I am in receipt of your letter of the 21st instant, in which you inform me that you have been appointed a judge of election at Shiloh precinct of your county, and asking me certain questions concerning the right of persons to vote at your precinct.

First—You ask does the word “resident” used in section 18 of the Constitution of Virginia mean the place where a person makes his home and actually sleeps, or does it mean a matter of intent—where he intends to make his home. For instance, a man who has lived in this county and precinct for years moved into another county in May, 1928. Is he entitled to vote in the precinct from which he has moved?

Answer. The right of a person to vote in your precinct depends entirely upon whether or not when he moved from your county to another county in May, 1928, he gave up your county as his place of permanent residence and established a permanent residence in the other county, that is, whether when he left your county to move to another he left it with a mind to make his future home in such other county and did not intend to return to King George county. A person who

leaves a place of residence temporarily, even though he may live a long time at another place, if he intends at some future date to return to his former place of residence, he is under the law entitled to vote in his former place of residence.

Second—You ask what do the words “actual resident” as used in section 175 mean? Is a person who works and sleeps in Washington, D. C., but owns property and pays taxes on same and pays his poll tax in Virginia an actual resident of Virginia and entitled to vote here? If a judge knows this and it is unlawful, what should a judge do should such a person apply to vote or votes by mail?

Answer. In my opinion, the definition I have given as to the right of a person to vote describes an “actual resident” and it is not necessary for a person to have in person actually been in a county for the last year, as applicable to a non-resident, or six months, as applicable to a person in another county.

The question as to what a judge should do is fully covered by section 174 of the Code, this section making it the duty of a judge who knows or suspects a person not to be a qualified voter to challenge such person's vote, and this is true whether the voter offers in person or to vote by mail.

Third—You ask as to my interpretation of section 228 of the State primary law providing persons who are qualified to vote at primary elections.

Section 228 has nothing to do with the qualification of voters in the November election. The question cannot arise before next year.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Residence.

RICHMOND, VA., *October 29, 1928.*

LAWRENCE T. BERRY, ESQ.,
*State Office Building,
Richmond, Virginia.*

MY DEAR MR. BERRY:

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

“At the last general State election there was a move on to challenge my right to vote at Luray, because of my residence in Richmond.

“Since my employment in the Department of Agriculture, some twenty odd years ago, I have retained my citizenship at Luray, Page county, Virginia, and have paid all taxes assessable against me by the State in that county for each of the years and have never voted at any other place, even though I have been and am at the present temporarily residing in Richmond. It is my understanding that I have a perfect right to retain my citizenship at Luray and vote there, if I so elect.

“In this contest there is a possibility that my vote may be challenged. I will appreciate it, therefore, if you will kindly give me your written opinion as to my rights in this matter so that, should the occasion arise, I may be fortified against any effort to prevent my voting in the election on November 6.”

On the facts stated in your letter, there is no doubt about the fact that you have the right to retain your citizenship in the town of Luray, county of Page, and vote there. *Williams v. Commonwealth*, 116 Va. 272.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Residence.

RICHMOND, VA., *October 31, 1928.*

MR. T. V. CHALKLEY,
*c/o State Highway Commission,
Richmond, Virginia.*

MY DEAR MR. CHALKLEY:

Acknowledgment is made of your communication of October 31, 1928, in which you say:

I lived for twenty-eight years in Jefferson ward, and voted at the precinct located at Jefferson Park. On account of the health of my children I was compelled to move to another part of the city, but when I did so I did not move with the intention of abandoning my residence at this precinct in Jefferson ward, but intended, and now intend, to return there at such future time as I am able to do so.

I am duly registered on the books of my precinct in Jefferson ward, and have always voted there in the past and continue to vote there.

Please advise me if on the above facts I am entitled to vote at the above mentioned precinct.

On the above statement of facts, it is my opinion that under the decision of the Court of Appeals in *Williams v. Commonwealth*, 116 Va. 272, 279, 1914, the place of your legal residence for the purpose of voting is the above mentioned precinct in Jefferson ward, Richmond, Virginia, and that you are entitled to vote there so far as your residence qualifications are concerned.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Residence.

RICHMOND, VA., *October 30, 1928.*

MR. JOHN B. JACKSON,
Austinville, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of October 28, 1928, in which you say in part:

"We have some parties registered here who came into the State in the summer or fall of 1926 and have been living here since that time, with the exception of a few weeks vacation the past summer. We are of the opinion they should have paid their 1927 poll tax six months prior to the coming election, and even then we do not think they would be entitled to register and vote under the amendment as coming into the State after the first of January, 1927."

Any person, who became a resident of this State in the summer or fall of 1926, as a prerequisite to the right to vote in the November, 1928, election, must have paid his capitation tax for the year 1927 at least six months prior to the 6th of November, 1928 (see section 21 of the Constitution). Of course, the Constitution as amended would apply to such persons, if their capitation taxes have been paid (see section 18 of the Constitution, which became a part thereof on June 19, 1928).

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Residence.

RICHMOND, VA., *November 1, 1928.*

MR. R. E. HUGHES,
*The Penitentiary,
Richmond, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of October 31, 1928, in which you say:

"For more than twenty years prior to 1924, my wife and I resided in the city of Richmond where we registered and have voted for many years. During the year 1924, and the first part of 1925, my wife suffered a nervous breakdown and I was advised to take her out of the city. We then moved to Sandston, which is in Henrico county, and have lived there ever since, although we have continued to pay our poll taxes in the city of Richmond and have never transferred to Henricb county. As long as it is necessary to my wife's health, we expect to remain in Sandston, Virginia. Of course, I cannot tell how long that will be, but, as soon as the condition of her health permits, we expect to return to the city of Richmond. In view of the above, we have always claimed our legal residence in Richmond, and am asking you to give me an opinion as to whether or not we can do this."

On the above stated facts, I am of the opinion that you and your wife are both legal residents of the city of Richmond and entitled to vote there. *Williams v. Commonwealth*, 116 Va. 272.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Residence.

RICHMOND, VA., *November 1, 1928.*

DR. R. A. BENNETT, *Chairman,
Democratic Committee,
Bedford, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of October 30, 1928, in which you say:

"Please render your decision to me by return mail, as to the legal rights of the inmates of the Elks National Home here in Bedford, Va., voting in this election November 6, 1928.

"We have a few here who have voted in our local elections, but I am under the impression they cannot participate in this election."

In response thereto I call your attention to section 24 of the Constitution, as amended (Acts 1928, pages 642-643), which reads as follows:

"No officer, soldier, seaman, or marine of the United States army or navy shall be deemed to have gained a residence as to the right of suffrage, in the State, or in any county, city or town thereof by reason of being stationed therein; nor shall an inmate of any charitable institution or a student in any institution of learning, be regarded as having either gained or lost a residence, as to the right of suffrage, by reason of his location or sojourn in such institution."

You will see from this section that inmates of charitable institutions shall not be deemed to have gained or lost a residence, as to the right of suffrage, by reason of his location or sojourn in such institution.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Residence.

RICHMOND, VA., November 1, 1928.

HON. WILMER L. O'FLAHERTY, *Secretary,*
Richmond Electoral Board,
Richmond, Virginia.

MY DEAR SIR:

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

"A great many persons in Richmond who are renters, possibly several thousand, moved on September 1, 1928, to other houses. In many instances the parties moved into the lines of a different precinct from that in which they had acquired their legal residence, registered and voted. In other instances the parties moved into different wards in the city of Richmond, and some of them even moved beyond the city limits into the county. All the parties to whom I refer, however, were at that time legal residents of the city of Richmond, duly registered at some precinct, and otherwise qualified to vote. When these people moved, desiring to retain their legal residence in the precincts in which they were registered, they did not apply for transfers to the new precincts, but allowed their names to remain on the books at the precincts where they were registered, expecting to return there to vote. Indeed, there are many people in the city of Richmond who, having acquired a legal residence at one precinct, have registered and continued to vote there for many years, although they have moved into different precincts each year.

"It has been rumored that an effort will be made to challenge the right of all such persons to vote in the election to be held on November 6, 1928, on the sole ground that they are not legal residents of the precincts where they are registered, and, therefore, not entitled to vote. Will you please give me your opinion on this matter, so that I may advise the election officials of this city, what they shall do if the persons referred to are challenged?"

In the case of *Bruner v. Bunting*, decided by Judge Kelly, later president of the Supreme Court of Appeals of Virginia, while judge of the corporation court of the city of Bristol, 15 Va. L. Reg. 514, 516 (1909), cited and approved by the

Supreme Court of Appeals of this State in *Towson v. Towson*, 126 Va. 640, 653 (1920), and *Cooper's Adm'r v. Commonwealth*, 121 Va. 338, 346, 348 (1917), it is said:

"The word 'residence' has more than one meaning in law, depending upon the connection in which it is used. For example, it is well settled that one may be a resident of a place for the purpose of voting there, and at the same time a non-resident of that place within the meaning of the attachment laws. (4 Min. Inst. 3rd Ed., p. 412.)"

In determining the very issue raised by your inquiry, the court said (pp. 517-518):

"In a comprehensive note to *Berry v. Wilcox*, 48 Am. St. Rep. 711, the annotator shows by a strong array of authorities too numerous to be repeated here, that every person must for all purposes have a legal residence or domicile somewhere; that he can have but one; that a domicile once acquired continues to exist until another is acquired elsewhere; that to effect a change of domicile there must be an actual abandonment of the former one coupled with an intent not to return to it, and also a new domicile acquired at another place, which can only be done by the union of intent and personal presence that mere change of dwelling place, however long continued, does not of itself constitute change of domicile; and that the burden of proving the abandonment of the old and the acquirement of the new is upon the party making the charge. (See also to same general effect *Pendleton v. Commonwealth*, -- Va. --, decided at Staunton, Sept. 16, 1909, 65 S. E. 536.)

"Mr. Raleigh Minor, in his work on Conflict of Laws, at page 114 (Sec. 59), says:

"It must be observed that neither presence alone, nor intention alone will suffice to create a domicile of choice. Both must concur, and at the very moment they do concur the domicile is created. As it is sometimes expressed the *factum* (presence) and the *animus* (intention) must unite. And thereafter no change of locality alone (there being no change of intent), or, *vice versa*, no change of intention (there being no change of locality) will effect an alteration of the domicile of choice, which remains where it was, until the *factum* and the *animus* again unite."

"It is also settled law that where the intention of the party is in doubt, the fact of his returning regularly to vote, and the fact of his continuing to serve on juries at the place of former domicile, are among the best evidences that there has been no abandonment of the old, and no purpose to acquire a new one—*Mitchell v. United States*, 21 Wall. 14 Cyc. 862-3; *Minor on Conflict of Laws*, sec. 64; *Murry v. McCarthy*, 2 Munf. 393; *Shelton v. Tiffin*, 6 How. (U. S.) 184."

The court further said (pp. 518-519):

"It is earnestly contended on behalf of contestants that the very authorities above quoted in this opinion show that some of the persons whose votes are contested by them are illegal because the persons casting them had left the city and were out of the city at the time without any proof of a fixed or definite intention to return, and, therefore, according to the very rules laid down in these authorities, had no domicile here. It is at this point that contestants, as the court thinks, have fallen into error by failing to attach the proper importance to the fact that these persons had already acquired a legal residence, a domicile, in Bristol, Va., and that having done this, the domicile so acquired could not thereafter be lost by a mere change of place, however long continued. A change of place without the intent to abandon the old and acquire a new domicile will not work a change of legal residence. It is true that a change of dwelling is one of the facts to be considered in determining the intention of the party, but the authorities are practically a unit upon the proposition that a domicile, or a legal resi-

dence, once acquired in accordance with the requirements of the law of the place cannot be lost without the intention of the party, and that continuing in good faith and without fraudulent intent to vote in the old place after removal therefrom is one of the best tests of the intention. In other words, after the domicile has once been perfected, the *bona fide* intention of the voter is thereafter decisive of the question whether it is or not to be changed, and the only difficulty which can arise about it is as to what such *bona fide* intention is. The actual situs of the person thereafter becomes of no importance except as an element in the determination of the party's real intention. This proposition is established by the overwhelming weight of authority, and when once clearly in mind will go far towards removing the confusion frequently surrounding the question of legal residence."

It is, therefore, my conclusion, and I have so held in repeated opinions given in previous years, that any person, who has acquired a legal residence for the purpose of registering and voting at one place, can retain his legal residence at that place so long as he intends to do so, although he moves from that precinct, ward, county or city into some other precinct, ward, county or city, and that, in order for any person who is duly registered as a voter in any precinct to lose his legal residence for the purpose of voting there, he must do two things: first, physically remove from such precinct; second, with the intention of abandoning his legal residence or domicile at the place where acquired with the intent of acquiring a new legal residence or domicile at some other place.

As was well said by Judge Kelly in *Bruner v. Bunting*, *supra*, "mere change of dwelling place, however long continued, does not of itself constitute change of domicile."

As bearing on the subject of your inquiry, I am of the opinion that the residence referred to in the oath prescribed by section 175 of the Code means legal residence or domicile as defined by Judge Kelly in *Bruner v. Bunting*, *supra*, and approved by the Court of Appeals in the above cited cases.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Capitation tax.

RICHMOND, VA., October 5, 1928.

P. F. LUMBYE, ESQ.,
2706 Stuart Avenue,
Richmond, Virginia.

MY DEAR SIR:

Acknowledgment is made of your communication of this morning, in which you state that on April 10, 1928, you became a naturalized citizen of the United States. You further state that you became a resident of the United States in 1924, moving to Kentucky in that year, and that during the latter part of January, 1926, you moved from Kentucky to Virginia and became a resident of the city of Richmond, where you have resided ever since. You further state that on December 3, 1926, you paid a State capitation tax of \$1.50 for the year 1926, and that on December 1, 1927, you paid a State capitation tax of \$1.50 for the year 1927. You ask me to advise you if on these facts you are qualified to register and vote in the November, 1928, election.

Not being a resident of Virginia prior to the latter part of January, 1926, no State capitation tax was assessed or assessable against you for any year prior to 1926. Your poll taxes for 1926 and 1927 having been paid more than six months prior to November 6, 1928, you are entitled to register and vote in the city of Richmond, Virginia, in the November, 1928, election, so far as the payment of your capitation taxes and your residence are concerned, provided, of course, that you register prior to the closing of the registration books on October 6, 1928.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Taxes—Retired members of Virginia Volunteers not exempt from payment of.

RICHMOND, VA., *October 27, 1928.*

CAPTAIN ROZELL R. YODER,
1324 *Bedford Avenue,*
Lynchburg, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of October 25, 1928, in which you request me to advise you whether retired members of the Virginia Volunteers are permitted to vote in this State without the prepayment of the capitation taxes assessed or assessable against them.

The Constitution does not make any exemption in the case of retired members of the Virginia Volunteers. The only exemptions from the payment of capitation taxes, as a prerequisite to the right to vote, are in the cases of veterans of the armies of the Confederate States and of the United States, and the widows of such veterans (see section 22 of the Constitution).

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Transfer of voters.

RICHMOND, VA., *October 29, 1928.*

T. A. ENGLISH, ESQ., *Registrar,*
Hague, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of October 26, 1928, in which you request me to advise you whether you can at this time issue a transfer to a voter from your precinct for registration in another county.

Under section 100 of the Code (Virginia Election Laws, pages 26-27), you are not authorized to issue a transfer for this purpose after October 6, 1928, until after the election.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Transfer of voters.RICHMOND, VA., *November 2, 1928.*MR. C. C. SAUNDERS,
Altavista, Virginia.

DEAR SIR:

I am in receipt of your letter of the 31st of October, in which you write in part:

"For the past three years I have been living and voting at Altavista, Virginia. I have been paying my capitation taxes to the treasurer of Halifax county, where my parents live."

Your case is presumably covered by section 115 of the Code of Virginia, concerning the prepayment of State poll taxes by voters transferred from one city or county to another city or county, which reads as follows:

"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. Any treasurer who shall give a false certificate, so as to show that the taxes have been paid six months before any election when in fact they have not been so paid, shall be guilty of a misdemeanor. The granting of each false certificate shall constitute a separate offense."

If I am correct in assuming that the section quoted covers your case, you are undoubtedly entitled to vote.

Yours very truly,

JNO. R. SAUNDERS,
*Attorney General.***ELECTIONS—Special elections, cost of.**RICHMOND, VA., *April 30, 1929.*HON. FRED C. PARKS,
Commonwealth's Attorney,
Abingdon, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of April 27, 1929, in which you say:

"A magisterial district in this county held an election on the question of issuing district road bonds under authority of chapter 513 of the Acts of Assembly of 1922. Please advise whether the expense of holding this election should be paid out of the general county fund appropriated for elections or whether it should be paid out of the district road fund in which the election was held."

Chapter 513 of the Acts of 1922, in my opinion, authorizes the holding of a special election for the purpose of approving or disapproving the issuance of bonds

authorized by this act. Chapter 13 of the Code relates to both general and special elections. I especially call your attention to sections 140 and 141 thereof.

Section 170 of the Code, which is found in chapter 13 thereof, provides as follows:

"The cost of conducting elections under this chapter shall be paid by the counties and cities, respectively."

From this it would appear that the cost of the election is to be paid by the county and not by the magisterial district.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Transfer of voters—Time limit.

RICHMOND, VA., *November 2, 1928.*

T. W. Ross, Esq., *Registrar,*
Gordonsville, Virginia.

MY DEAR SIR:

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

"Please inform me by return mail whether there is any time limit for a voter to ask for or get his transfer from one precinct to vote in another precinct."

The answer to your question depends upon whether or not the precincts are in the same county. If the precincts are in the same county, a transfer may be furnished and entered at any time. If the precincts are not in the same county, a transfer cannot be given after the closing of the registration books, or, if given, it cannot be entered (see section 100 of the Code, Virginia Election Laws, pp. 26-27).

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Transfer of voters from one precinct to another.

RICHMOND, VA., *October 19, 1928.*

HON. R. E. L. WATKINS,
Commonwealth's Attorney,
Franklin, Virginia.

DEAR MR. WATKINS:

I am in receipt of your letter of yesterday, in which you say:

"The law requires the registration books to be closed thirty days before the election. This question has arisen: Can a person be transferred in that period from one county to another. I do not think the statute is very clear on this point, unless we shall treat transfer the same as registration. Your opinion will be greatly appreciated."

In my opinion, the law covering this subject contained in section 100 of the Code is very clear to the effect that "whenever a registered voter changes his place of residence from one county * * to another county * * " he may apply to the registrar of his former election district "at any time up to and including the regular days of registration, in person or in writing, to furnish a certificate that he was duly registered. * * And the name of every such person shall be entered at any time up to and including the regular days of registration, by the registrar, on the registration books of the election district in which said person resides * *."

Yours very sincerely,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Transfer of voters from one precinct to another.

RICHMOND, VA., *October 23, 1928.*

MR. O. B. BARKSDALE,
Broadway, Virginia.

DEAR SIR:

I am in receipt of your letter of yesterday, in which you ask whether or not a person legally transferred from one precinct to another on October 1 is entitled to vote in the November election.

He is, provided he shall have lived in the precinct to which he has transferred for the time prescribed by law in order for him to acquire the right to vote in that precinct.

Where he removes from one county to another, he must have lived in the county to which he has removed six months prior to the 6th day of November; if from one precinct to another in the same county, it is only necessary for him to have resided thirty days in his new precinct.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Transfer of voters.

RICHMOND, VA., *May 17, 1929.*

JAMES C. QUARLES, ESQ., *Registrar,*
Toshes, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of May 11, 1929, in which you say:

"I am registrar in Staunton District, Bedford county. A man who lives in my district, and is entitled to register, went to Pittsylvania county and registered. His transfer was sent to me. Knowing the facts, I refused to accept the transfer as he should have lawfully registered in the county of his residence. He did not reside in Pittsylvania county.

"Has he a right to be transferred and vote on this transfer in Bedford county?"

From an examination of sections 18 and 20 of the Constitution and sections 93 and 98 of the Code, Virginia Election Laws, pages 23 and 25, I am of the opinion

that the only place where a voter can lawfully register is in the election district of which he is a legal resident. I am, therefore, of the opinion that you properly refused to accept the transfer of the gentleman in question, if the facts stated by you are correct.

With my best wishes, I am

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Transfer of voter from one precinct to another.

RICHMOND, VA., *October 23, 1928.*

MR. B. M. JONES,
P. O. Box 2034,
Lynchburg, Virginia.

DEAR SIR:

I am in receipt of your letter of yesterday, in which you state:

"I was a registered, qualified voter in the city of Lynchburg until the past 15 days, when I asked for a transfer to the county where I live, and when I presented my transfer on October 7 to the registrar for this district it was refused. She said the books were closed until after November 6. Is this correct? If so, can I prevent my transfer back to original precinct and vote?"

Unfortunately, you have lost your vote in the November election. Section 100 of the Virginia Code provides:

" * * Whenever a registered voter changes his place of residence from one county or city to another county or city, it shall be lawful for him to apply to the registrar of his former election district, at any time up to and including the regular days of registration * *"

for a transfer, and the registrar must erase his name from his registration books upon granting such transfer. It is further provided:

" * * and the name of every such person shall be entered at any time, up to and including the regular days of registration, by the registrar, on the registration books of the election district in which said person resides, * *"

Saturday, October 6, was the last day upon which you could have left your transfer with the registrar of your county election district. She was only following out the law when she refused to accept your transfer and register you on—you say—October 7.

You cannot return to your former precinct and vote because of the facts that your name has been erased from the registration books of the city precinct and you have removed from that precinct into the county.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Transfer of voters.RICHMOND, VA., *September 25, 1928.*

MR. I. T. WERNER,
Justice of the Peace,
Buckner, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of September 24, 1928.

Where a voter transfers from one precinct to another in the same county, all that is necessary is that his name shall be upon the treasurer's tax list for that county showing that he has paid all of the taxes assessed or assessable against him during the three years preceding the year in which he offers to vote. Naturally, his name would be listed in the district from which he was transferred where he had resided only a short time in the precinct to which he transferred. The judges, of course, should examine the tax list for the district where he formerly lived in order to ascertain whether he was entitled to vote. If the tax list for the whole county is not furnished to the judges in the various precincts of the county, he should apply to the treasurer or the clerk for a certificate stating that his name appears on the tax list for the district from which he moved and the years for which his taxes have been paid. This, when presented to the judge, will be all that is necessary.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Transfer of voters.RICHMOND, VA., *November 2, 1928.*

MR. H. B. GILLIAM,
Chairman Electoral Board,
Petersburg, Virginia.

DEAR SIR:

I am in receipt of your letter of yesterday, in which you say in part:

"I would like to have your ruling on the right of a person to transfer from one voting precinct to another in the same county or city from this time up to and including election day."

I have heretofore ruled in a number of cases that a person transferring from one precinct to another in the same county is entitled to apply for and receive his transfer from the registrar of the old precinct and have his name entered upon the registration books of the new precinct up to election day, and have expressed the further opinion that, so far as election day is concerned, the statute does not govern and that it is largely a matter of discretion with registrars and judges of election as to whether transfers may be obtained and entered upon that day. Registration books must be delivered to registrars and judges of election at sunrise on election day and they remain in the hands of the judges until sundown of that day and, consequently, without the consent of the judges, registrars may not have registration books either for the purpose of granting or entering transfers.

Your question couples the right to transfer from precinct to precinct in the same county with the right to transfer in the same city. While I am of the

opinion, as above expressed, that they may transfer from one precinct to another in counties, in my judgment, they have no such right in cities and towns containing over 2,500 inhabitants and that, as to transfers in such cities and towns, a person cannot transfer from one precinct to another and have his or her name entered by the registrar of the new precinct after the regular registration day provided in section 98 of the Code, that day, as you know, being set thirty days prior to a November election.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Transfer of voters.

RICHMOND, VA., October 24, 1928.

MISS ANNIE M. STRIBLING, *Registrar,*
Berryville, Virginia.

DEAR MISS STRIBLING:

I am in receipt of your letter of yesterday, in which you write concerning your duties as registrar.

Under section 100 of the Code, registration books for the registration of voters or for the giving or receiving of transfers from out of the county precincts closed thirty days previous to the November election, registrars having had authority at any time previous to register voters or to accept out of town transfers and put the voter on the registration books of the county.

However, "whenever a registered voter changes his place of residence from one election district to another, in the same county or city, it shall be lawful for him to apply for, in person or in writing, and it shall be the duty of the registrar of his former election district, *at any time*, to furnish a certificate that he was duly registered * * * and the name of every such person shall be *entered at any time*, by the registrar, on the registration books of the election district to which the voter has removed." (Italics ours.)

This provision of law very plainly allows a voter changing from one precinct to another in the same county to obtain his transfer from the registrar of his old precinct at any time up to the day of election and requires the registrar of the new precinct to enter his name on the registration books of such district up to the day of the election. The law does not make express provision either for or against obtaining transfers upon the day of election and having the transfer accepted and the name put upon the registration books of the new district on election day, but, as the registration books are, by law, turned over to the judge of election and are thus out of the hands of registrars on election day, though they may give and receive transfers, they are certainly not compellable to do so.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Voting list.RICHMOND, VA., *October 19, 1928.*

MR. J. E. POLLARD, *Registrar,*
Farrington, Virginia.

DEAR SIR:

I am in receipt of your letter of yesterday, in which you ask:

“Please advise me if a voter, who can on the day of election show his tax receipts, paid six months before the election, and properly registered, but whose name is not on the voting list, should be allowed to vote?”

No person is entitled to vote unless the treasurer's voting list of his county contains his name, except in cases of a young man becoming of age at such a time that he will not have paid or been assessed with three years capitation tax, or a person moving into the State since the first day of January, 1927, or a person moving from one county to another.

I take it that the person to whom you refer has been a resident of the county in which he will offer to vote for three years, paid his capitation tax six months prior to the November election, but whose name has been inadvertently omitted from the treasurer's voting list.

If this be true, he is not entitled to vote.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Special election, cost of.RICHMOND, VA., *September 10, 1928.*

HON. HENRY RATLIFF,
Deputy Sheriff,
Davenport, Virginia.

DEAR MR. RATLIFF:

Acknowledgment is made of your letter of September 7, 1928, in which you refer to chapter 205 of the Acts of 1928, and request me to advise you whether the State is authorized to pay for any expenses in connection with the holding of the special election for the ratification or rejection of the constitutional amendments, other than the compensation of the judges.

If you will examine the three paragraphs of section 1 of this act, found on page 637 of the Acts of 1928, you will see that the only provision made for the payment of the election expenses out of the State treasury was the per diem fixed by law for the judges of election “for the holding of the election herein provided for.” Section 6 of this act, found on page 701 of the Acts of 1928, provides:

“The expenses incurred in conducting this election shall be defrayed as in the case of election of members of the General Assembly; excepting as herein otherwise provided.”

Therefore, the only compensation authorized to be paid out of the State treasury is the per diem of the three judges for their services rendered in holding the election on the 19th of June, 1928. All other expenses must be borne by the locality.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,

Attorney General.

ELECTIONS—Special school bond issue, who may vote in.

RICHMOND, VA., May 13, 1929.

C. G. MASON, Esq.,

Judge of Election,

Luray, Virginia.

MY DEAR MR. MASON:

Acknowledgment is made of your letter of May 11, 1929, in which you state that there will be held in your county on May 21, 1929, a special election on a school bond issue. You request me to advise you as to the persons entitled to vote in such election.

This matter is governed by section 83 of the Code (Virginia Election Laws, pp. 18-19). So far as is applicable, this section reads as follows:

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

You will see from this that all persons who were qualified to vote at the November, 1928, election, and those who are otherwise qualified to vote and have personally paid at least six months prior to the second Tuesday in June, 1929, all State poll taxes assessed or assessable against them during the years 1926, 1927 and 1928, are entitled to vote in your special election.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,

Attorney General.

ELECTIONS—Eligibility of school trustee to serve as judge of election.

RICHMOND, VA., May 14, 1929.

HON. THOS. W. BLACKSTONE,
Accomack C. H., Virginia.

MY DEAR MR. BLACKSTONE:

Acknowledgment is made of your letter of May 10, 1929, in which you say:

“Is a school trustee eligible for judge of election?”

Chapter 499 of the Acts of 1928, so far as is applicable to the subject of your inquiry, reads as follows:

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

In view of this, it is my opinion that the same person should not act as a member of the county school board and judge of election.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—School teacher not restricted in vote.

RICHMOND, VA., October 29, 1928.

MR. LOUIS F. POWELL,
David M. Lea and Company, Inc.,
Richmond, Virginia.

MY DEAR MR. POWELL:

Acknowledgment is made of your letter of October 25, 1928, in which you request me to advise you, first, if any political qualification is required of an applicant for a position as a teacher in the public schools of Virginia; second, if any law in this State requires a school teacher to vote for the nominee of any party for president, and third, whether a school teacher would be subject to discharge if he or she voted against the nominees of the Democratic party.

In response to your first question, no political qualification is required of a person applying for a position as a teacher in the public schools of Virginia.

In response to your second question, the statutes of Virginia make no requirement as to how public school teachers shall vote.

It, therefore, follows, in response to your third question, that public school teachers are not subject to discharge for voting for the nominees of any political party.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Voting lists—Treasurer not required to have street address opposite names.

RICHMOND, VA., *January 21, 1929.*

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

MY DEAR MR. NEWMAN:

I beg leave to acknowledge receipt of your favor of recent date in which you submit to me the first page of your list of persons who have paid their capitation taxes, which list you were required to make by virtue of the provisions contained in section 38 of the Constitution, and section 109 of the Code of Virginia, as amended. You then ask me to advise you whether or not this list complies with the law.

The sample sent me, in addition to the usual information required by the Constitution and section 109 of the Code of Virginia, as amended, has opposite the name of each elector his street address. In this connection I beg leave to state that this information, namely, the street address, is not required either by the Constitution, or by section 109 of the Code of Virginia, as amended. In 1926 the Legislature, in amending section 109 of the Code of Virginia, added the following language—"in cities shall state the street address where assessed for each year paid."

On May 6, 1927, this office rendered an opinion to the effect that the Legislature of Virginia had no right to impose this duty upon the treasurers of the cities. This opinion was based on the decision of the Supreme Court of Appeals in *Richmond v. Lynch*, 106 Va. 324, 325, 326 (1907).

In 1928 the Legislature of Virginia again amended section 109 of the Code of Virginia, and eliminated the above language, which was inserted in its amendment to section 109 at its session of 1926.

In your conversation with me a few days ago in my office, you stated that the city council of Newport News requested you to add to your list of voters the street address opposite the name of each voter, and that that body had agreed to allow you compensation for this extra work. As to the right of the city council to do this, I would not express an opinion, because the City of Newport News has an attorney, and by virtue of his office is the legal adviser of the said council, therefore, I would suggest that you consult with him as to the legality of the expenditure, and your right to receive the same.

I am frank to say, however, that I do not think that the placing of the street address, or residence, opposite the name of the voter on the tax list invalidates the list. It would be regarded as a mere surplusage, and any error as to this cannot effect the right of the elector to vote. The only matters in the tax list which are conclusive evidence of one's right to vote is whether or not the elector has paid his capitation taxes as is required by law.

To impose upon the treasurers of cities the duty of stating in said list "the street address where assessed for each year paid" is null and void as seeking to change or super-add to the requirements of section 38 of the Constitution, there being nothing in the Constitution which either expressly, or by necessary implica-

tion, confers upon the General Assembly the power to change or add to the duties required of the treasurers by that section of the Constitution.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ELECTIONS—Woman marrying alien does not lose right to vote.

RICHMOND, VA., *November 13, 1928.*

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

DEAR SIR:

I am in receipt of your letter of November 10, in which you ask:

"1. If an American woman marries a foreigner and he is not a naturalized citizen, will that disqualify his wife from voting?

"2. Does a person over 21 years of age have to pay taxes six months in advance in order to register and vote?"

In reply I will say:

First, an American woman who married a foreigner who had never been naturalized before the 22nd day of September, 1922, was thereby disqualified to vote, as she became a citizen of her husband's nationality. An American marrying a foreigner since the 22nd day of September, 1922, does not thereby lose her American citizenship and, having other qualifications, is entitled to register and vote.

Second, every person becoming 21 years of age after January 1, 1927, may register and vote at any election held during 1927 or 1928 upon the payment of one year capitation tax, but such capitation tax need not be paid six months in advance. A person becoming of age before January 1, 1927, in order to vote, must have paid all capitation taxes assessed or assessable against him during the three years preceding the year 1928 six months in advance of any election held in 1928.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ESCHEATS—Proceeds from belong to the Literary Fund.

RICHMOND, VA., *December 12, 1928.*

HON. E. R. COMBS,
AND
HON. JOHN M. PURCELL,
*Sinking Fund Commissioners,
Richmond, Virginia.*

GENTLEMEN:

I am in receipt of your letter of the 6th instant, in which you write concerning a certain fund accruing to the State from the estate of Andrew Morrison, by

virtue of the provisions of section 5275 concerning the distribution of the personal estate of persons dying intestate.

It is my understanding that Andrew Morrison left no distributee. Your question is as to the fund to which credit should be given.

I take it that it should go to either the Sinking Fund or the Literary Fund. Section 2191 provides:

"All bonds of this State which are received by the Auditor of Public Accounts in the settlement of claims of the Commonwealth against the sureties of treasurers, sheriffs, or other officers, or in settlement of any other claim, shall be turned over to him to the commissioners of the sinking fund, who shall cancel the same according to law."

Section 632 of the School Code, Acts of 1928, pages 1195-1196, continues provision of law for a Literary Fund and provides:

"There shall be set apart as a permanent and perpetual Literary Fund, the present Literary Fund of the State, the proceeds of all public lands donated by Congress for public school purposes, and all escheated property
* *."

Under the provisions of section 4127a, concerning unclaimed bank accounts, the funds are escheated to the State.

The question arises as to whether the funds derived from Morrison's estate, because of total failure of distributees, is included within the definition of escheated property and goes to the Literary Fund under section 632, or is such property as goes into the Sinking Fund under section 2191.

At the common law and under our statute, all lands, upon total failure of heirs, revert to or escheat to the Commonwealth. Section 5275 makes the same provision in case of failure of distributees of personal property.

In my opinion, while personal property may not strictly come within the definition of common law escheats, our statute as to distribution of personal property upon failure of distributees is analogous to the statute concerning the escheats of lands, and funds accruing to the State under the statute of distribution are in the nature of escheats and should go into the Literary Fund, as it would seem that legislation in Virginia has treated personal property and real estate in the same manner.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ESTATES—Appraisers of decedent's estates, when to be appointed.

RICHMOND, VA., June 10, 1929.

HON. J. DONALD RICHARDS,
Attorney at Law,
Warrenton, Virginia.

DEAR MR. RICHARDS:

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

"The clerk of the court is in doubt as to the law with reference to the appointment of appraisers when a will from another State is recorded here

and there is no qualification on the estate in Virginia. The matter came up here with reference to the will of Mr. R. Penn Smith, Jr., whose will was probated in New York State and a certified copy recorded in Fauquier county but no qualification was had on the will in this county.

"The will of Mr. R. Penn Smith, Jr., especially authorizes his executor, William R. Mooney, to sell and make deed to his real estate, and this was the object of recording the will in Fauquier county as Mr. Smith owned three valuable tracts of land in this county.

"My view about the matter is this, that upon application to the clerk he should appoint appraisers even though there is no qualification under the will in Virginia, and I further believe that section 5376 makes it obligatory on the clerk to appoint such appraisers."

I owe you an apology for not replying to your letter earlier, but it came at a time when we were engaged in preparing the Commonwealth cases for the Court of Appeals on the Wytheville docket and this is the first opportunity I have had to examine your question.

The only statutes that I have been able to find, which are applicable to the question under consideration, are sections 5249 and 5376 of the Code. Section 5249 of the Code provides in part:

"The clerk of any circuit court may appoint appraisers of estates of decedents * * *"

Section 5376 of the Code provides, in part, as follows:

"Every court or clerk by whose order any person is authorized to act as a personal representative shall, except where a testator directs his estate not to be appraised, or, though he so directs, if the court or clerk deems it proper, appoint three or more appraisers in every county or corporation in which there may be any goods or chattels of the deceased, or in case of a will in which there may be any real estate which the personal representative is authorized to sell, or of which he is authorized to receive the rents and profits. * * *"

These sections are not absolutely free from doubt, but, in my opinion, section 5376 requires the clerk to appoint appraisers in the case "of a will in which there may be any real estate which the personal representative is authorized to sell, or of which he is authorized to receive the rents and profits." You will observe that the statute does not limit its provisions to a domestic will that has been probated, but is general in its application to all wills which authorize the sale of the real estate by the personal representative, etc. I am, therefore, of the opinion that you have correctly construed this section of the Code.

Yours very truly,

JNO. R. SAUNDERS,

Attorney General.

FEDERAL RESERVATIONS—Jurisdiction of State over.

RICHMOND, VA., December 14, 1928.

HON. JOSEPH A. BILLINGSLEY,

Commonwealth's Attorney,

King George C. H., Virginia.

MY DEAR MR. BILLINGSLEY:

Acknowledgment is made of your letters of recent date, with reference to the jurisdiction of the State over the Federal reservation at Dahlgren, Virginia, formerly a part of King George county.

I have been unable to find how this particular tract of land became a government reservation. If it was acquired by the government under chapter 382 of the Acts of 1918, you will see that section 2 of that act vested exclusive jurisdiction in the Federal government for all purposes, "except the service upon such sites of all civil and criminal process of the courts of this State, which right of service of said process within the bounds of said lands and sites is reserved to this State." It would appear from this that any reservation acquired under authority of this act was taken by the Federal government subject to this reservation by the State, and that, therefore, the officers of this State would have the authority to go upon the reservation for the purpose of serving civil or criminal process on persons found thereon.

In the case of a man in the military or naval services of the United States government and, therefore, primarily subject to the control of an independent sovereignty, comity would demand that the State officer, going upon such reservation for the purpose of serving a criminal writ attaching the body of the accused, first take the matter up with the representative of the United States government in charge of such reservation. I am sure that, where the matter is handled properly by the State officers, no difficulty will be had with the officers of the Federal government who are only too glad to cooperate with the State government in enforcing its laws and punishing persons who have committed crimes within the jurisdiction of the State courts.

In response to your last question, I am of the opinion that, if a State officer is assaulted while on a Federal reservation acquired under the provisions of chapter 382 of the Acts of 1918, that offense can only be punished in the Federal courts as the State is without jurisdiction over acts committed on such reservation.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

FEES—Board of supervisors of county responsible for fees of clerk for recording delinquent lands.

RICHMOND, VA., November 22, 1928.

HON. T. W. CARPER, *Clerk,*
Franklin County Circuit Court,
Rocky Mount, Virginia.

DEAR MR. CARPER:

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

"On page 217 of the Acts of 1928, sec. 390 requires the clerk to record delinquent lands. The old law, which I am sure you are familiar with, paid the clerk ten per cent per tract for recording. I don't find any repeal of this law paying the clerk for recording delinquent lands. Please let me know if the State is required to pay this or the county."

Under the Segregation Act of 1926 and section 171 of the Constitution, as amended June 19, 1928, no State tax is or can be levied on real estate.

Therefore, delinquent taxes assessed against lands in this State when recorded are recorded for the benefit of the locality, and the requirement of section 390 of the Tax Code is for the benefit not of the State but of the locality.

It is my opinion that the Segregation Act and the Constitutional provision have by implication repealed the statute authorizing the State to compensate the clerk for recording such liens. The work being done for the benefit of the county, however, should be compensated for by the board of supervisors.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

FEES—Sheriff allowed fifty cents for each justice summoned to be associated with the trial justice.

RICHMOND, VA., November 13, 1928.

H. F. Fox, Esq.,
Justice of the Peace,
R. F. D. No. 2, Box 108,
Luray, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of November 10, 1928, in which you request me to advise you whether the justices trying a case can allow the sheriff a fee of one dollar for summoning two justices associated with the justice issuing the warrant on motion of the defendant.

Section 6022 of the Code requires the justice of the peace who issued the warrant and before whom it is returnable, on motion of the defendant at any time before trial, to associate with himself two other justices of the peace of the county for the trial of a case. The law does not expressly require a justice of the peace to travel all over his district to summon the two associate justices, and, in the absence of such a requirement, it seems to me reasonable that he should direct the sheriff or constable to summon the two justices to be associated with him in the trial of a case. For this service, it is my opinion that the provision of subsection 12 of section 3487 of the Code, as amended, is broad enough to allow the justices to tax in the costs a fee of fifty cents for each justice summoned by the sheriff to be associated with the trial justice.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

FEES—Sheriff, clerk of court, Commonwealth's attorney—Services rendered in criminal cases.

RICHMOND, VA., November 13, 1928.

HON. WILSON M. FARR,
Commonwealth's Attorney,
Fairfax, Virginia.

MY DEAR MR. FARR:

Acknowledgment is made of your letter of recent date with reference to the fees allowed the sheriff, clerk of court and the Commonwealth's Attorney for services rendered in criminal cases.

In your letter you refer to the provisions of section 3504 of the Code, as amended by the Acts of 1928, which requires execution to be issued and returned before fee bills can be presented against the State by the above named officers in criminal cases, other than prosecutions for violating of the prohibition law. You call my attention to *Anglea v. Commonwealth*, 10 Gratt. (51 Va.) 696 (1853), and *Commonwealth v. McCue*, 109 Va. 302 (1909), and say that the court held in Anglea's case that the only costs which the Commonwealth is entitled to recover are "jail fees, charges for dieting, guards and transportation accruing before conviction, compensation to witnesses and jurors, fees to constables for arresting accused and summoning witnesses but not fees to the officers of either court, the attorney for the Commonwealth, the clerk and the sheriff." You then ask, in view of this ruling, what could be the object of the General Assembly in requiring the execution to be issued and returned before the sheriff, clerk or Commonwealth's attorney can present his account for allowance.

It is true that the court did hold as stated in Anglea's case, but it said (p. 705) "the costs and expenses for which the convict's estate was thus made liable, were those with which the Commonwealth was chargeable," after which follows the language quoted above. Immediately following the language quoted by you, the court said:

" * * * The act of 1848, before cited, sec. 18, expressly provided that the Commonwealth should not be liable to any attorney, clerk or sheriff for his fees in any criminal prosecution, but that the same should be deemed to be included in the allowance made to such attorney, clerk or sheriff for public services, unless where otherwise provided by law. By the Code of 1849, * * * it is expressly provided that no fee to any attorney for the Commonwealth, clerk, sheriff or sergeant shall be payable out of the treasury, except where expressly provided. * * *"

It is thus shown that no provision was made by law at that time for the ordinary fees of clerks, sheriffs and Commonwealth's attorneys. Since that time, however, provision has been made for the payment of the fees of such officers out of the treasury (see sections 3504, 3505, 3508 and 3509 of the Code).

It follows from this that such fees are expenses incident to a prosecution within the meaning of section 4964 of the Code and, as such, must be taxed in the costs. *McCue v. Commonwealth*, *supra*. From this you will see that the Commonwealth does have an interest in the collection of such fees taxed as a part of the costs, which no doubt explains the provision contained in section 3504 of the Code, as amended.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

FEES—Sheriff—Attachment for rent.

RICHMOND, VA., September 19, 1928.

HON. H. S. RUCKER,
Attorney at Law,
Clarendon, Virginia.

DEAR MR. RUCKER:

I beg leave to acknowledge receipt of your letter of recent date. In this you submit the following case, and request to be advised what fee the sheriff is en-

titled to for services rendered in connection therewith, namely, an attachment for rent was sued out from the clerk's office of the circuit court, which was levied by the sheriff on one truck; the plaintiff in the attachment having given bond. The sheriff took possession of said truck. The parties got together and settled the debt for which the attachment was sued out. The attachment was dismissed and no further steps were taken by the sheriff.

I have carefully read the provisions of sections 3487 and 3488 of the Code of Virginia to which you refer in your letter. I am of the opinion that section 3488 has no bearing on the case, because that section deals with the fees of the sheriff where there is a writ of fieri facias under a judgment or decree of court.

My opinion is that the sheriff is entitled to the following fees: \$1.50 for levying the attachment, and 60 cents for docketing the bond, under subsections 10 and 22 of section 3487. This is my best judgment in the matter.

With regards and best wishes, I am

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

FEES—Commonwealth's attorney's as special prosecutor.

RICHMOND, VA., July 16, 1928.

HON. EDWARD C. BURKS,
Commonwealth's Attorney,
Bedford, Virginia.

MY DEAR MR. BURKS:

Acknowledgment is made of your letter of July 13, 1928, in which you request me to advise you whether, in my opinion, the judge would have authority to enter an order directing the payment out of the State treasury of a fee to you for services rendered as special prosecutor in the ouster proceedings against Sheriff J. P. Hodges, of Franklin County.

I have examined the Code with care and the only sections that I am able to find, which have any bearing on the matter, are sections 4960, 4970 and 4966. The last cited section provides:

"No fee to an attorney for the Commonwealth shall be payable out of the treasury, unless it be expressly so provided."

The other two sections are limited to services rendered in criminal cases. A proceeding in ouster is not a criminal proceeding. *Warren v. Commonwealth*, 136 Va. 573.

Trusting this gives you the desired information, I am

Sincerely yours,

JNO. R. SAUNDERS,
Attorney General.

FEES—Attorneys for the Commonwealth in prohibition cases.

RICHMOND, VA., *April 26, 1929.*

HON. CHARLES W. CRUSH,
*Attorney for the Commonwealth,
Christiansburg, Virginia.*

DEAR MR. CRUSH:

In the absence of Colonel Saunders I am replying to your letter of April 24, 1929, in which you desire an opinion as to your fees in certain misdemeanor cases.

In your letter to him, from which I quote, you say:

"Judge Keister disapproved my account for services to the Commonwealth because I have listed items of four prohibition cases in which I claimed fees of ten dollars each for acquittal under the following circumstances: I prosecuted each of these parties before a magistrate in different parts of the county at preliminary hearings and the cases were sent on to the grand jury, the parties either bonded or confined, the presentments against each of them was returned 'not a true bill.' As under the Layman Act I am entitled to fees for attending and prosecuting at preliminary hearings I claimed these fees—as there was not an acquittal before the magistrate and I was required to perform further duties in preparing indictments and summoning witnesses and no final disposition of the case until the grand jury failed to indict I consider the date of the final hearing is the first day of the term of court when the grand jury released the accused, and the final decision was an acquittal. Under section 47 of the act 'where there is no conviction then the fee to be paid the attorney for the Commonwealth shall be as in felony cases' or \$10—and there is certainly no conviction here, therefore, I am entitled to fees of ten dollars in each case as of the date of the final hearings. Am I not?"

"It doesn't make any difference in amount of payment from the State as the maximum amount of payments in my county is five hundred dollars per year—a sum far below the earned amount; but failure to have the account approved will delay me in receiving anything for my services due from the State for two and a half months or until my next July term of court is adjourned.

"The court has decided to leave the record unclosed until next Monday morning, April 29th, and I will appreciate it very much if you will confer with the Auditor of Accounts and advise me, if possible, before then, in order to have the account approved if in your opinion it is correct."

Complying with your request I have consulted with Mr. Day, of the Comptroller's Office, who has charge of court allowances. He and I agree that you are entitled under the provisions of section 46 of the Layman Act, section 4675 (47) of the Code, to the same fee for attending a magistrate's trial in liquor cases as you would have been entitled to in felony cases. "For official services rendered in connection with violations of this act all said officers, * * * shall be entitled to and shall be paid the same fees as are now allowed by law in felony cases, * * *."

To ascertain the fee to which an attorney for the Commonwealth is entitled I referred to section 3505 of the Code of Virginia, which is as follows:

"The attorney for the Commonwealth shall be paid out of the State treasury in all felony and misdemeanor cases, * * *."

"For each person prosecuted by him at a preliminary hearing upon a charge of felony before any court or justice of his county or city, he shall be paid five dollars."

Mr. Day and I agree that you are entitled to a fee of five dollars for appearing before justices of your county at preliminary hearings.

We further agree that the fee of ten dollars allowed Commonwealth's attorneys for felony cases in courts refers to trials, and that the preliminary work of attorneys in summoning witnesses and the preparation of indictments are not included, and no fee is provided by law for such services.

Yours very truly,

EDWIN H. GIBSON,
Assistant Attorney General.

FEES—Of Commonwealth's attorneys, in prohibition cases.

RICHMOND, VA., *January 24, 1929.*

HON. PHILIP KOHEN,
*Attorney for the Commonwealth,
Buchanan, Virginia.*

DEAR SIR:

Your letter of January 4, in which you make three inquiries concerning fees of attorneys for the Commonwealth, was duly received by the Attorney General and handed me for attention, as I have been handling prohibition matters. The delay in answering you was occasioned by absence from the office.

"(1) In general cases of misdemeanors (other than prohibition cases) such as assault and battery, petit larceny, etc., tried by justices of the peace, upon pleas of not guilty, and disposed of finally by the justices of the peace, and assuming further that the justice calls upon the Commonwealth's attorney to be present at the trial, is the Commonwealth's attorney entitled to a fee of \$5.00? Is he compelled by law to attend such misdemeanor cases when called upon by the justice of the peace? Section 3505 appears to allow a fee of \$5.00 in misdemeanor cases before a justice of the peace, *in which* the Commonwealth's attorney is required by law to prosecute. When called up by the justice of the peace to attend the trial, does this constitute a case that the Commonwealth's attorney is required by law to prosecute? (See section 3505 as amended by Acts of 1928, page 1365)."

In reply to the above, I am enclosing copy of an opinion of the Attorney General written to Honorable Charles B. Godwin, Jr., Attorney for the Commonwealth, Suffolk, Virginia, on December 31, 1924. This opinion, I think directly contains the law concerning which you write.

"(2) In misdemeanor prohibition cases before a justice of the peace, upon pleas of guilty, where the defendant pays the costs, and the case is finally disposed of before the justice of the peace upon the plea of guilty, is the Commonwealth's attorney entitled to \$10 or \$25? Under section 33 of the Prohibition Act, the last sentence under that section reads as follows: 'In entering such judgments the trial justice shall tax in the costs 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.*' Section 46 also touches on this subject, and appears to throw some doubt on the subject; there it is said also 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 \$25 * * and paid for by the defendant * *.'"

The Attorney General holds that attorneys for the Commonwealth in misdemeanor cases before a justice of the peace, upon a plea of guilty, is now entitled to a fee of only \$10, under the provisions of section 48 of the Layman Act, instead of a fee of \$25, which, until an amendment to section 46 was passed by the Legislature of 1926, was allowable to attorneys for the Commonwealth under section 33 of the Layman Prohibition Law. Section 33 contained in the prohibition act of 1924 allowed in cases before justices of the peace, upon pleas of guilty, the same fee as was allowed with the courts of record, and, under the provisions of that section, an attorney for the Commonwealth was entitled to a fee of \$25. The amendment to section 46 passed by the Legislature of 1926 was, of course, subsequent to the enactment of 1924 and, therefore, in the opinion of the Attorney General, should control. As amended, section 46 provides, among other things:

“ * * Except that in cases where pleas of guilty are entered in cases of misdemeanor before a justice of the peace, the attorney for the Commonwealth shall receive only ten dollars, * *.”

The quotation from section 46 contained in your letter to the effect that the attorney for the Commonwealth is allowed a fee of \$25 upon a final hearing controlled before the adoption of the amendment to that section, as already quoted.

“(3) Under section 20, as I understand the law, the total fee allowed the sheriff or other officer for seizing a still and making arrest is \$50 and not \$60. The extra \$10 for making arrest is not allowed as I understand it, but the total fee for seizure and arrest is \$50. Am I correct in this?”

In my opinion, you have correctly construed the law allowing an officer seizing a still, when recovered from an accused, \$50. Some of the courts before the law was amended allowed a fee of \$50 for the seizure of a still and \$10 for the arrest, but since the amendment of 1926 it has been the opinion of this office that the language “and the fee or reward of fifty dollars shall be all that the officer or officers making such seizure shall receive on account of one still” limits the fees to \$50 for each still seized.

Yours very truly,

EDWIN H. GIBSON,
Assistant Attorney General.

FEES—Of Commonwealth's attorneys, in prohibition cases.

RICHMOND, VA., January 24, 1929.

HON. W. H. JORDAN,
*Krise Building,
Lynchburg, Virginia.*

DEAR MR. JORDAN:

I am in receipt of your letter of January 23rd, in which you ask the opinion of the Attorney General's Office as to the amount of fee to which an attorney for the Commonwealth is entitled against an accused who pleads guilty to a violation of the prohibition law before justice of the peace pursuant to section 33 of the Layman Act.

Previous to the amendment of section 46 by the Legislature of 1926 his fee was \$25.00. It is provided in section 46 that upon a plea of guilty his fee shall be \$10.00. Therefore, in my opinion, the fee in the case to which you refer is \$10.00.

Yours very truly,

EDWIN H. GIBSON,
Assistant Attorney General.

FEES—Game wardens in prosecutions under dog law.

RICHMOND, VA., November 23, 1928.

HON. LEE STANLEY, *Clerk,*
Dickenson County,
Clintwood, Virginia.

MY DEAR SIR:

I am in receipt of your letter of the 21st from which I quote:

"Under section 3197 of the 1928 Virginia Game, Inland Fish and Dog Law it is provided that the game warden making the arrest and securing the conviction of the offender of the Game or Dog Law is entitled to one-half the fine imposed for such offense.

"A number of the game wardens of this county has asked me to pay them one-half the fine in such cases, and I find no law authorizing me to disburse this money in such manner. For example: Where a justice of the peace fines a person for such an offense as above stated, collects the fine and pays same to me as clerk, or should he report the fine to the clerk's office, a *capias* issue therefor and later collected in full or in part, kindly advise how and from where the game warden receives the fee due him in such cases."

As you write, section 3197 of the Code gives to game wardens one-half of fines imposed under the game laws to wardens making arrests and securing convictions of offenders. It is true that this section does not point out the way in which the fine, after it has been collected is handled.

Section 3513 of the Code directs justices of the peace collecting fees and clerks to whom fees are paid to pay these fees directly to those entitled thereto.

The simplest and most practical way to handle fines in those cases in which officers or informers are entitled to a part thereof is for the magistrate or clerk to pay their portion directly to those entitled thereto, justices making their reports to the proper authorities and clerks reporting to the Comptroller making their reports cover this manner of disbursement.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

FEES—Officers, fees of—West fee bill—Fees of officers in counties adjoining cities having a population of fifty thousand or more inhabitants.

RICHMOND, VA., February 18, 1929.

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

MY DEAR MR. COMBS:

Acknowledgment is made of your letter of February 13, 1929, in which you say:

"The county officers of Arlington county in reporting their fees, allowances, commissions, etc., for the year 1928 to my office have deducted \$7,000.00 as the maximum allowance to officers in Arlington county on the theory that Arlington county adjoins a city of more than fifty thousand population.

"Will you please advise me whether or not Arlington county comes within the provisions contained in subsection (8) of Code section 3516, as amended by chapter 198, p. 350, Acts 1926, with reference to counties adjoining a city of fifty thousand population or more?"

The third paragraph of subsection (8) of section 3516 of the Code, as amended by chapter 198 of the Acts of 1926, provides in part with reference to the compensation of fee officers:

"In cities or counties * * with a population between fifty thousand and one hundred thousand and in counties adjoining cities having a population of fifty thousand or more, such compensation shall not exceed seven thousand dollars per annum * *."

Further examination of this paragraph of subsection 8 shows that the compensation of fee officers is based upon the population in the several cities and counties, a maximum compensation being fixed in those cities and counties having a population of one hundred thousand or more and the scale is materially lowered where the population of such place is small.

In authorizing a compensation of \$7,000 per annum in those counties adjoining large cities, the General Assembly evidently had in mind the tendency of the city population to overflow into such adjoining counties, thereby materially adding to the labor and responsibility of fee officers in such counties. I think, in view of this evident intent of the General Assembly, it is immaterial whether the city which is adjoined by a Virginia county is located either within or without the State, as the same reason would exist in either case for authorizing the extra compensation. The boundary between Virginia and Maryland begins where the line between Virginia and West Virginia strikes the Potomac river at low water mark and then follows the meanderings of said river by the low water mark to Smith's Point, at or near the mouth of the Potomac. (Section 14 of the Code of Virginia.) The District of Columbia, of which the city of Washington is a part, was ceded to the Federal government by the State of Maryland. That portion of the District adjoining the Commonwealth of Virginia, therefore, possesses the same boundaries originally possessed by the territory when a part of Maryland. The city of Washington occupies that part of the District which adjoins Arlington county or a substantial part thereof.

It is, therefore, my opinion that the fee officers of Arlington county are entitled, under the provisions of subsection 8 of section 3516 of the Code, as amended, to a compensation not exceeding \$7,000 per annum.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

FEES—Witnesses attending court.

RICHMOND, VA., July 9, 1928.

HON. VERNON B. TATE,
Commonwealth's Attorney,
Wise, Virginia.

DEAR SIR:

Acknowledgment is made of your letter of July 6, 1928, in which you say:

"Under section 3512 of the Code of Virginia, all witnesses summoned by the Commonwealth shall be entitled to receive for each day's attendance fifty cents, all necessary ferriage, tolls and five cents per mile over five miles going and returning to place of trial or before grand jury.

"Where a witness must of necessity be in attendance at a trial for several days, would not the witness have to be paid the fifty cents for each day's attendance and the necessary mileage he travelled each day until he is finally released by the court from further attendance?

"I am writing you in behalf of some witnesses who have been summoned to attend court at a trial which lasted from four to five days, and the clerk took the position that he could only pay for one day's mileage and that the witnesses had to stand the loss of the mileage on other days."

Section 3512 of the Code reads as follows:

"All witnesses summoned for the Commonwealth shall be entitled to receive for each day's attendance fifty cents, all necessary ferriage and tolls, and five cents per mile over five miles going and returning to place of trial or before grand jury. All allowances to witnesses summoned on behalf of the Commonwealth shall be paid by the treasurer of the county or corporation in which the trial is had or in which the grand jury is summoned, and the amount so paid by such treasurer shall be refunded to him out of the State treasury, on a certificate of the clerk of the court in which the trial was had or before which the grand jury was summoned."

The compensation provided by this section for witnesses for the Commonwealth is not sufficient to pay for lodging away from home. Therefore, I think that it is but reasonable to assume that the General Assembly, in enacting this statute, intended that witnesses should return to their homes at night and come back to the place of trial the succeeding day, when they were needed for more than one day.

Therefore, it is my opinion that where Commonwealth's witnesses are required to attend a trial two days or more and where they return to their homes at night, they are entitled to the mileage allowed by the statute for each day's travel.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

FINES—Of persons convicted in court of incorporated town should be paid into the town treasury.

RICHMOND, VA., November 15, 1928.

HON. JOE W. PARSON, *Clerk,*
Circuit Court Grayson County,
Independence, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of November 13, 1928, in which you request my opinion on the following statement of facts:

"A person convicted in the mayor's court of an incorporated town and fined, and he appeals his case to the circuit court and the circuit court sustains the conviction, should the fine be paid into the State treasury or to the treasurer of the incorporated town?"

Under the provisions of section 3011 of the Code, as amended, such fine should be paid into the town treasury.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

FISH AND OYSTERS—Assignment of oyster planting grounds.

RICHMOND, VA., January 29, 1929.

THE COMMISSION OF FISHERIES OF VIRGINIA,
Newport News, Virginia.

GENTLEMEN:

I beg leave to acknowledge receipt of a letter of January 23rd, from your counsel, Hon. Allan D. Jones, which letter was in response to my letter to him of January 21st.

In this letter Mr. Jones states that the Commission desires my construction of section 3233 of the Code of Virginia. As a matter of convenience, I quote two paragraphs from his letter:

"What is desired by the Commission is an opinion from you as to what construction should be placed upon section 3233, considering the language of the section where it is stated, 'It shall appear that any holder without his own default and by mistake of any officer of the State has had assigned to him and included in the plat of his assignment, etc.' Under this section may the Commission receive evidence tending to show that the planter has been placed in possession of the grounds by the oyster inspector, that the oyster inspector and the county surveyor have not seen to the completion of the survey and the recordation of the same, though the planter has paid the rental and the fees to the surveyor and inspector and is without default?"

"Those opposing the petition of the planters insist upon a construction of this section, requiring the planter to show an assignment, meaning thereby that the planter shall have a survey and a plat thereof, and that the same be of record in the county wherein the oyster ground is located, and that this assignment must accurately delineate the ground, and the stakes as placed must conform to the boundaries of the survey."

In reply thereto, I beg leave to state that section 175 of the Constitution provides:

"The natural oyster beds, rocks and shoals, in the waters of this State shall not be leased, rented or sold, but shall be held in trust for the benefit of the people of this State, subject to such regulations and restrictions as the General Assembly may prescribe, but the General Assembly may, from time to time, define and determine such natural beds, rocks or shoals by surveys or otherwise."

The provisions of this section of the Constitution are so plain that it is not necessary to comment on them.

Before expressing an opinion as to the construction of section 3233 of the Code of Virginia, I deem it necessary to revert to other sections of the Code of Virginia contained in chapter 128, which sections deal with the assignment of planting grounds in the waters of this State to oyster planters.

The Legislature of Virginia at its session of 1892 provided for a true and accurate survey of the oyster beds, rocks and shoals of the Commonwealth, and further provided in the same act that when said survey and report was filed, it should be, and construed to be, in all of the courts of the Commonwealth, as conclusive evidence of the boundaries and limits of the natural oyster beds, rocks and shoals lying within the waters of the counties wherein such survey and report are filed. Acts 1891-92, chapter 511, pp. 817-818.

Sections 3224 and 3225 of the Code provide for original assignments of oyster planting grounds. These sections are long, and need not be quoted in full. They in substance provide that, upon written application for the assignment of oyster planting grounds, there shall be stated in such application as near as may be the number of acres applied for and definite location, with the name of one or more prominent points or objects adjacent to said ground, and, further provide the manner in which said application shall be posted by the inspector. It is further provided for a survey and plat as soon as practical after the completion of the survey, and for the filing thereof by the inspector in the clerk's office in his county, and to be recorded and indexed by the clerk.

Section 3226 of the Code requires oyster inspectors to report assignments of oyster planting grounds to the Secretary of the Commission of Fisheries.

Section 3227 of the Code provides that no person shall be considered a lawful renter of oyster planting grounds until he has complied with the requirements of the law and received from the inspector a receipt for the rent to the first of September following, and shall also have paid all fees due inspector, surveyor and clerk of the county in which his plat may be recorded.

These requirements having been met, so long as the rent is paid annually in advance, the State guarantees to the renter an absolute right to continue to use and occupy the grounds assigned him for a period of twenty years, and further provides that, if the applicant shall hold the grounds for the full period of twenty years and shall desire to continue to hold the same and to renew his lease, the applicant shall have priority over all other applicants for reassignment; that should such lessee have his grounds resurveyed or reassigned, such resurvey or reassignment, in part or in whole, shall not be construed to be a new assignment, but shall be deemed to be a continuation of the original assignment, subject to all limitations and conditions under which such grounds were originally assigned.

Section 3228 of the Code requires subrenting or assigning to be in writing and such writing to accurately describe the ground subrented or assigned and to be recorded in the clerk's office of the county where the original survey and plat were recorded and under the same conditions.

I am asked for a construction of certain language contained in the provisions of section 3233 of the Code of Virginia. I deem it wise to quote that part of the section which is applicable:

"When, by any resurvey of oyster-planting grounds or survey made to re-establish the lines of the State survey of natural oyster beds, rocks or shoals which shall hereafter be made under the direction of the Commission of Fisheries, it shall appear that any holder, without his own default, and by mistake of any officer of the State, has had assigned to him and included in the plat of his assignment any portion of the natural oyster beds, rocks or shoals as defined by law, and it shall further appear that such holder has oysters or shells planted on the said ground, then, before the stakes shall be removed from said ground or the same opened to the public, the said holder shall be allowed two years, which may be increased by the Commission of Fisheries, in their discretion (and duly advertised), within which to remove his planted oysters or shells from the said ground, * * *."

You particularly request an interpretation of the following language which is contained in this section:

"It shall appear that any holder, without his own default, and by mistake of any officer of the State, has had assigned to him and included in the plat of his assignment any portion of the natural oyster beds, rocks or shoals as defined by law, and it shall further appear that such holder has oysters or shells planted on the said ground, then, before the stakes shall be removed from said ground or the same opened to the public, the said holder shall be allowed two years, which may be increased by the Commission of Fisheries, in their discretion (and duly advertised), within which to remove his planted oysters or shells from the said ground."

A careful reading of this section discloses three requirements which must be met by the holder of any natural oyster beds, rocks or shoals before he can invoke the privilege of removal of his oysters from the Commission: (1) The natural oyster ground must have been assigned to him and included in the plat of his assignment; (2) It must have been so included without his fault; (3) It must have been so included by the fault of an officer of the State.

In answer to your specific question, which is: "May the Commission receive evidence tending to show that the planter has been placed in possession of the grounds by the oyster inspector, that the oyster inspector and the county surveyor have not seen to the completion of the survey and the recordation of the same, though the planter has paid the rental and the fees to the surveyor and inspector and is without default," I would say that the best evidence, of course, upon which the Commission could base its decision would be the production of the survey and plat made by the surveyor and at the request of the inspector, which would show the metes and bounds of the oyster ground originally assigned. But, if the surveyor has failed to make the plat and to have the same recorded in the clerk's office, as is required under the statute, and the holder of the oyster ground has paid all fees which the law requires him to pay, then the holder, in my judgment, should be permitted to introduce evidence aliunde, which will establish to the satisfaction of the Commission that the ground occupied by him, and upon which he has planted oysters or shells is the same which was included in his original survey.

In other words, it is my opinion that if it shall appear to the satisfaction of the Commission, either by production of the survey and plat, or evidence aliunde, that any holder without his own default and by mistake of any officer of the State

has assigned to him and included in the plat of his assignment any portion of the natural oyster beds, rocks or shoals, as defined by law, and it shall further appear that such holder has oysters or shells planted on said ground, then he is entitled to remove his oysters therefrom, as is provided for in section 3233 of the Code. But, if upon a resurvey of the said oyster planting grounds it shall appear to the Commission that a certain area of the natural oyster beds, rocks or shoals has been taken in by the holder since his original assignment, in my judgment, he is not entitled to remove oysters or shells planted on the bottom outside of the original assignment.

I have given my best consideration to this question, and in connection therewith I have carefully examined the case of *Hurley v. The Commission of Fisheries*. I do not think this case decides the question at issue, for the reason that the court held in that case the proof was conclusive that the natural oyster ground held by Hurley was never assigned or surveyed to him, or to his predecessors, and that his occupancy thereof was not due to a mistake of an officer of the State. It nowhere raises the question that the original plat was the only evidence which could be considered by the court.

Trusting I have answered your question fully, I am

Yours very respectfully,

JNO. R. SAUNDERS,
Attorney General.

FISH AND OYSTERS—Power of oyster inspectors.

RICHMOND, VA., May 3, 1929.

HON. W. W. ROWELL, *Clerk,*
Commission of Fisheries,
Newport News, Virginia.

MY DEAR MR. ROWELL:

Acknowledgment is made of your letter of May 2, 1929, in which you say:

"I am enclosing a pamphlet entitled 'Instructions to Oyster Inspectors,' in which there is an opinion of Mr. John L. Jeffries, dated May 21, 1915, concurred in by C. B. Garnett, Assistant Attorney General, June 4, 1915. Please advise us if you concur in the opinion set forth by these gentlemen."

In addition to the letter containing the instructions of the Commissioner of Fisheries to the oyster inspectors, the pamphlet contains a letter written on May 13, 1915, by Hon. John S. Parsons, then Commissioner of Fisheries, to Messrs. Jeffries & Jeffries, of Norfolk, and the reply to Mr. Parsons by Mr. J. L. Jeffries, Attorney at Law, dated May 21, 1915. It appears from the pamphlet that this correspondence was submitted to the Attorney General and in turn referred by him to Hon. C. B. Garnett, then Assistant Attorney General, under date of June 4, 1915, in which he stated, after a careful consideration of the statutes, he entirely concurred with the views expressed by Mr. Jeffries in his letter to the Commissioner of Fisheries. Since this correspondence section 2 of the General Oyster Laws, as contained in the Acts of 1910, page 543, has become section 3220 of the Code of 1919, and section 603 of the Acts of 1904 has become section 2410 of the Code of 1919 and is now section 372 of the Tax Code.

Section 3220 of the Code is in substantially the same words as section 2 of the Acts of 1910, page 543, and section 372 of the Tax Code contains the same provisions, with reference to the right of the treasurers to levy, as section 603 of the Acts of 1904, with this exception; the tax cannot be distrained until after December 5, instead of December 1, except in those cases in which it comes to the knowledge of the treasurer that a person owing taxes or levies is moving or contemplates moving from the county or corporation prior to the 5th day of December.

I have read the opinion of Mr. J. L. Jeffries and the statutes referred to as they exist at present with care, and I fully concur in the view expressed by Mr. Jeffries in his letter of May 21, 1915. I am of the opinion that the oyster inspectors have at this time, under the present statutes, the same powers as they formerly had under the statutes referred to in Mr. Jeffries' letter.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

FOODS—Cakes and pies, unnecessary to label.

RICHMOND, VA., June 6, 1929.

MESSRS. COCKE, HAZLEGROVE AND HAZLEGROVE,
Attorneys at Law,
Roanoke, Virginia.

GENTLEMEN:

Acknowledgment is made of your letter of June 1, 1929, in which you say in part:

"We are interested in behalf of one of our clients to know whether or not there is any Virginia statute requiring a baker to place on cakes or pies, or other similar confections, labels showing the name and address of the baker or manufacturer."

The only law that I have been able to find, which is applicable to the matter, is chapter 388 of the Acts of 1920, especially section 3 thereof. It is my opinion that this statute has no application to cakes or pies or other similar confections which are sold unwrapped.

I am advised that the Dairy and Food Division, which is charged with the enforcement of the law, has placed a similar construction on the statute.

Very truly yours,

LEON M. BAZILE,
Assistant Attorney General.

GAME AND INLAND FISH, COMMISSION OF—Bills for expenses incurred prior to first of March are payable out of any surplus remaining to credit of fund appropriated.

RICHMOND, VA., January 30, 1929.

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

DEAR MR. COMBS:

At your instance, your file covering opinions contained in my letters to you of February 25, 1928, and March 28, 1928, has been left with me, together with the unsigned and undated communication from which I quote:

"There is one question with respect to which we are still uncertain as to the procedure which should be followed. On the second page of your letter in the next to the last paragraph you state you are of the opinion 'that bills for expenses incurred by them or any other department, payable prior to the first of March, 1928, are payable out of any surplus remaining to the credit of any fund against which the charge may be made.' It is not clear to us whether the foregoing opinion applies to unexpended balances of appropriations existing at the close of business February 29, 1928, which, according to the language of paragraph 17, page 162, of House Bill No. 117, lapsed into the State treasury and became a part of the general fund to be used for the payment of appropriations provided for in that act."

You especially ask that I construe that part of my letter of March 28 in which I said "that bills for expenses incurred by them or any other department, payable prior to the first of March, 1928, are payable out of any surplus remaining to the credit of any fund against which the charge may be made" and you say that it is not clear to you as to whether or not that language applies to unexpended balances of appropriations existing at the close of business February 29, 1928, which according to the language of paragraph 17, page 162, of House Bill No. 117, lapsed into the State treasury and became a part of the general fund to be used in the payment of appropriations provided for in that act.

The letter referred to had reference to expenditures which had been made by the Commission of Game and Inland Fisheries prior to the close of business February 29, 1928, but which had not actually been audited and paid previous to that date.

My opinion was meant to apply and applies to unexpended balances of appropriations existing at the close of business February 29, 1928, notwithstanding paragraph 17, page 162, of House Bill No. 117, and I held, and now hold, that bills for expenses incurred which were payable and should have been paid prior to the first of March, 1928, are payable out of any surplus remaining to the credit of the fund against which the charge was made.

Trusting that I have made myself understood, I am

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

GAME AND INLAND FISH—Hunting—Anchoring floating device from blind—North Bay—Back Bay.

RICHMOND, VA., *December 7, 1928.*

HON. J. D. DEY,
London Bridge, Virginia.

MY DEAR MR. DEY:

Acknowledgment is made of your request of December 6, 1928, that I advise you how close, in my opinion, one hunting from a floating device in North Bay is entitled to anchor it from a blind on the shore of Back Bay.

This matter appears to be governed by section 7 of chapter 392 of the Acts of 1928. This section, so far as is applicable to the question here under consideration, reads as follows:

"It shall be unlawful for any person or persons owning or operating any battery, sink box, mat blind rig or other floating device, or any boat or tender used in connection therewith, to anchor, tie out, or permit the same

to lie within seven hundred yards of any licensed blind, or of any blind on shore not licensed, which is at that time occupied by the owner or member of any club owning the same or guest thereof for the bona fide purpose of shooting therefrom, *except, that the distance that said floating device shall be kept from blinds on shore occupied as above set forth, in the waters north of the south end of Big Stinger Island, known as North Bay, shall be two hundred yards. * * ** (Italics supplied.)

It is my opinion that this section clearly means that one may anchor his floating device in North Bay not less than two hundred yards north of the south end of Big Stinger Island. For instance, where a blind is located on the shore of Back Bay one hundred yards from the south end of Big Stinger Island, it is my opinion that one hunting in North Bay may anchor his floating device a distance of three hundred yards from the blind on the shore of Back Bay, or two hundred yards north of the south end of Big Stinger Island.

Trusting this gives you the desired information, I am

Yours very truly,

LEON M. BAZILE,

Assistant Attorney General.

GAME AND INLAND FISH—Killing of fowls by dogs.

RICHMOND, VA., November 9, 1928.

HON. J. KENT EARLY,

Commonwealth's Attorney,

Charlotte C. H., Virginia.

MY DEAR SIR:

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

"Please see section 2323-r of the Code and advise me whether or not, in your opinion, a dog may be killed that has been guilty of killing poultry on one occasion; or, shall the dog have the right to kill poultry on three separate occasions before he can be killed. The board of supervisors have paid for quite a number of turkeys that have been killed by dogs and, if there is any way for them to have the dogs killed, they want to take the necessary steps."

The matter referred to in your letter is governed by section 9 of chapter 209 of the Acts of 1928. This section provides in part:

" * * * The board of supervisors of any county, or any magistrate or other court, shall have the power to order the game warden or other officer to kill any dog known to be a confirmed poultry killer, and any dog killing fowls for the third time shall be considered a confirmed poultry killer. * * *

I do not think that this section means that a dog must necessarily have killed poultry on three separate occasions in order to make it a confirmed poultry killer, but, in my opinion, the statute means that any dog which kills poultry on three separate occasions shall be conclusively deemed such. However, I think that other facts and circumstances might justify the board or court in concluding that the

dog was a confirmed poultry killer, even where it had killed fowls on less than three occasions.

Trusting this gives you the desired information, I am

Very truly yours,

JNO. R. SAUNDERS,
Attorney General.

GAME AND INLAND FISH—Private ponds, right to take fish from.

RICHMOND, VA., *March 15, 1929.*

MR. MANN S. VALENTINE,
Powhatan Court House, Virginia.

MY DEAR MR. VALENTINE:

Acknowledgment is made of your letter of March 15, to which I will reply at once.

In this you ask the question whether or not it is legal for a party who owns a private pond, or leases a pond, to catch bass at any time.

I take pleasure in referring you to chapter 433 of the Acts of the General Assembly, 1920, page 633, which chapter is as follows:

"Be it enacted by the General Assembly of Virginia, That it shall be lawful for the owner, lessees or sub-lessees of ponds in Middlesex or any other county to capture pond bass, not for sale (commonly called Southern chub) in such ponds as may be stocked by such owners or lessees at any time."

It, therefore, follows that a party who leases or owns a private fish pond has a perfect right to catch bass, commonly called chub, at any time, provided such ponds are stocked by the owner.

Of course, the owner or lessee would have a perfect right to use gill nets or seins in order to do this.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

GAME AND INLAND FISH—Non-residents must obtain license to hunt bears.

RICHMOND, VA., *November 10, 1928.*

HON. W. S. DUNN,
*Commonwealth's Attorney,
Bland, Virginia.*

MY DEAR MR. DUNN:

I am in receipt of your letter of November 9, 1928, in which you say:

"The Virginia Hardwood Lumber Company owns a large boundary of land in this county, and they recently extended an invitation to several non-residents to come in and have a bear hunt on the company's property, and told them they would not have to pay a license since the bear was not protected. Will you please give me your opinion on this? I told them they would have the license to pay, but they do not agree with me."

In my judgment, you are unquestionably right in this case, and a license should be required of the parties who hunt bear on the property in question, and if they persist in doing so without a license you can have them indicted.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

GAME AND INLAND FISH—Fishing—License.

RICHMOND, VA., *April 17, 1929.*

HON. J. M. SMITH, *Clerk,*
Jonesville, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of April 15, 1929, in which you request me to advise you whether one is required to have a license to fish with a pole, line and hook as distinguished from a rod and reel.

Section 3327 of the Code, as amended, makes it unlawful "to fish, in the inland waters of this State, with rod and reel, without first obtaining a license," with certain exceptions.

It is my opinion that a pole, line and hook is a very different thing from a rod and reel, and that no license is required of a person who fishes with a pole, line and hook as distinguished from a rod and reel.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

GAME AND INLAND FISH—Non-residents required to have fishing permits.

RICHMOND, VA., *July 19, 1928.*

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

MY DEAR MR. HART:

Acknowledgment is made of your letter of July 18, 1928, in which you say:

"We would like to be advised if non-residents under sixteen years of age are required to obtain non-resident fishing licenses when fishing off of the property of their parents in the non-tidewater sections of the State—See chapter 149, Acts 1928, section 3327, as amended, also chapter 254, Acts 1928, section 3209, as amended."

Section 3327 of the Code, as amended by chapter 149 of the Acts of 1928, expressly provides that "persons under sixteen years of age shall not be required to obtain licenses to fish."

It is true that section 3209 of the Code, as amended by chapter 254 of the Acts of 1928, applies to non-residents generally and prohibits their fishing in this State without obtaining a license, but if you will examine section 3327 of the Code, as amended by chapter 149 of the Acts of 1928, you will see that this section also

mentions non-residents as well as residents, and when the two sections are read and construed together, as is proper in such cases, it is my opinion that the General Assembly did not intend to impose any license upon an infant under the age of sixteen years, whether a resident or non-resident, for the purpose of fishing in the inland waters of this State, except in those cases where the fishing is done in the waters of a public or private gun club, association or preserve of any description.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

GAME AND INLAND FISH—Members of Deep Run Hunt Club required to obtain license to hunt fox.

RICHMOND, VA., *November 22, 1928.*

MR. THOMAS B. GAY,
1003 *Electric Building,*
Richmond, Virginia.

MY DEAR MR. GAY:

I am this morning in receipt of your letter of the 21st instant.

In this you state that the Deep Run Hunt Club maintains a pack of hounds which they use for drag hunting; that occasionally, such as Thanksgiving and New Years, the club buys a live fox from some farmer which is taken to a convenient place and dropped; after a short period of time these hounds are turned loose to hunt this fox and members of the club will follow the hounds.

You further state that the State Game Department has informed the club that each member participating in this hunt will be required to obtain a hunter's license, and you desire to be advised whether or not this is a correct interpretation of the law.

Subsection 2 of section 3327 of the Code of Virginia, as amended by the Acts of 1928, undertakes to define hunting and trapping for license purposes. It reads as follows:

"Includes pursuing, shooting, killing, capturing, trapping, snaring and netting wild birds and wild animals, and lesser acts, such as wounding, placing, setting, drawing, or using any net or other device to hunt or trap wild birds or animals, whether they result in taking or not; includes also any attempt to hunt or trap and any act of assistance to any other person in hunting or trapping or attempting to hunt or trap wild birds or wild animals, provided that whenever hunting or trapping is allowed by law reference is made to so doing by lawful means and in a lawful manner."

The Department of Game and Inland Fisheries has construed this to mean that any person who follows the hounds in a fox hunt is engaged in fox hunting and should obtain a license in order to do so. The old law exempted fox hunters from having to obtain a license in order to hunt. It would seem from a reading of this section that its provisions are broad enough to cover a case of this kind, and it will be necessary for the members of your club, in order to engage in the class of sport mentioned in your letter, to obtain a hunter's license. I think you will agree with me after you have read the law.

Yours sincerely,

JNO. R. SAUNDERS,
Attorney General.

GAME AND INLAND FISH—Dog law—Sheep killed by dogs—Who responsible for damage.RICHMOND, VA., *November 15, 1928.*MR. B. I. BICKERS, *Clerk,*
Standardsville, Virginia.

DEAR MR. BICKERS:

In your letter of the 14th instant you request my opinion as to which county should pay damages for sheep assessed in one county and killed by dogs in another or adjoining county.

You say that, as you understand the law, the county in which the sheep are killed pays the damages. I agree with your construction.

The requirement that damages may only be paid where animals are assessed is to see that this class of property is assessed for taxation. While the law does not say in so many words which county shall pay, my construction of the section is that the county in which they are killed should pay the damages.

You can readily see that where sheep are assessed in one county and removed to a distant county and dogs inflict damages, the costs of proving a claim in the county where the sheep are assessed would often amount to more than the damage done.

Yours very sincerely,

JNO. R. SAUNDERS,
*Attorney General.***GAME AND INLAND FISH—Dog law—Uniform system of handling dog licenses.**RICHMOND, VA., *November 2, 1928.*MR. L. W. TYUS, *Fiscal Secretary,*
Commission of Game and Inland Fisheries,
716 State Office Building,
Richmond, Virginia.

DEAR SIR:

I am in receipt of your letter of today, from which I quote:

"Will you kindly advise this Commission if treasurers are required to use receipt books, dog license sales records and other necessary forms, as prepared by this Commission to secure a uniform system in handling dog licenses, pursuant to sections of the act above quoted?"

In my opinion, county and city treasurers are required to use the dog tax books furnished them by the Commission of Game and Inland Fisheries, and that it is not optional with treasurers and they have no right to refuse to keep their accounts upon the books furnished by the Commission.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

GAME AND INLAND FISH—Dog law—~~Kennel~~ license.

RICHMOND, VA., July 3, 1928.

MR. ANGELO HAJACOS,
 Box 573,
 Lynchburg, Virginia.

MY DEAR SIR:

I am in receipt of your letter of July 2nd in which you say:

"While I was a resident of the city of Lynchburg, Virginia, I bought a Virginia kennel license for my dogs in that city. Now, being a resident of Amherst county of course I had to have my dogs moved from Lynchburg to where I was living.

"The Amherst county proper authorities told me that I had to get me another new license from the above county.

"It looks to me like when I have a Virginia kennel license it is for the State of Virginia and therefore I have the right to move my dogs to where I am living in the State without getting a new license.

"Please advise me through your opinion about this matter and oblige."

You are entirely correct about this. If you bought a State kennel license for your dogs you are entitled to move your dogs anywhere in Virginia without paying another license. Of course, under this license the dogs cannot be separated; that is, a part of them kept in one county, and the others in another county or city.

I have advised with Mr. Hart, Secretary of Game and Inland Fisheries, and he concurs in my opinion.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

GAME AND INLAND FISH—Dog law—Killing unlicensed dog without knowing ownership by game warden.

RICHMOND, VA., July 24, 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 24th instant, in which you ask the following question:

"We would like to have your opinion as to whether a game warden who kills an unlicensed dog, without knowing ownership, will have complied with the law (chapter 209, Acts 1928, page 705, section 10), when he delivers the dead carcass of the said dog to a fertilizer factory to be ground up and made into fertilizer, taking a receipt for delivery of said dog from the manager of said fertilizer factory."

A game warden is entitled to a fee of \$2.50 for each dog killed by him, under the provisions of the law quoted by you. His fee does not depend upon the disposition of the dog. That part of section 10 which requires that the dog killed by the officer shall be burned or buried has to do with sanitary conditions and is not a condition precedent to the payment of the fee for the killing of the dog.

It is the duty of the game warden to present an itemized statement of accounts, verified by his oath, to the board of supervisors of the county, or the governing body of the city, for which he is appointed. Such a board has no option but to pay the warden's claim except upon satisfactory evidence that the items for which the claim is presented are not just and proper and that the warden did not actually kill the dog, as claimed in his account.

Of course, you will understand that the question as to whether or not each dog claimed for was killed is one of fact and not of law and that upon a determination of the truth of the claim depends the warden's right to pay for his services.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

GAMBLING—Slot machines—Gambling devices.

RICHMOND, VA., October 19, 1928.

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

DEAR SIR:

Your letter of September 7 was, as you were informed by my secretary, received while all of the attorneys of the department were in Staunton. This letter was placed upon the desk of Mr. Bazile and had been inadvertently overlooked until it was found today. After receipt of your letter of October 12, search was made in my files and it was not until inquiry was made today of Mr. Bazile, who has recently been very busy preparing briefs for the Supreme Court of Appeals, that the letter was discovered upon his desk.

You enclosed in your letter of September 7 copy of a letter written to me by Honorable S. L. Walton, Attorney for the Commonwealth of Page county, in which he described certain nickel-in-the-slot machines, and in which he asked for my advice as to the legality of the machines described. You also enclosed a copy of so much of my letter as informed Mr. Walton that, in my opinion, the machines as described in his letter were not unlawful gambling devices under the slot machine law.

I am quoting so much of your letter as describes the machines about which you wrote, also that part of your letter in which you made inquiry of my opinion upon two questions concerning the legality of the machines:

"The machine is a vendor of mints, which operates on the nickel-in-the-slot principle. It gives a package of mints for each nickel which is deposited; however, in addition to this package of mints which it gives, it also gives anywhere from one to ten checks. These checks have no cash value and the merchants will not accept them for trade. They are used solely for amusement in playing the machine for the purpose of getting your fortune told. The mints which come in this machine cost the owner of the machine \$8.50 per one thousand packages, which is about 85/100 of a cent per package. The owner of the machine puts the machine in the merchant's store and furnishes the merchant with the mints and the license to operate it. The mints, when sold through the machine, bring \$50.00 per one thousand packages, which money is divided equally between the merchant and the owner of the machine.

"Now, in the event that the merchant owns his slot machine, he purchases the mints at \$10.00 per one thousand. In other words, the merchant, by selling the mints through these machines, makes 400 per cent on his investment.

"There are two points involved: first, whether or not a machine of this type gives the equivalent in value in merchandise, when the mints cost one cent and sell for five cents; second, whether or not giving ten checks to one party and one check to another party can be said to be giving each the same thing, when the checks are used solely for amusement purposes."

Besides the fact that the Dolan machines furnish customers their "fortune" free of charge, while the machine described by you furnishes certain amusement, there is this material difference. The third paragraph of Mr. Walton's letter says "the customer always receives full value in merchandise for every coin inserted." In your letter you say that the machine receives 400 per cent profit on the merchandise sold by the slot machine you describe.

It would seem that section 4685, as amended, page 1124 of the Acts of 1928, providing that a slot machine is unlawful where "the article or thing vended is not a fair equivalent in value to the coin required to operate such machine or device" covers the machine described by you, and that such a nickel-in-the-slot vending machine is unlawful under that section. This opinion is strengthened by the further provision 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 * * shall be deemed to embody the element of chance within the meaning of this act * *."

While the evident purpose of the statute is to prohibit every character of gambling, the title of the act and the language of the statute evidently prohibit the operation of vending machines which do not return a fair cash equivalent for the money played into the machine. Vending slot machines must return reasonable equivalent in value. I do not think that mints paying 400 per cent profit can be classed as returning fair value for their purchase price, and I do not think that the statute contemplates that an inadequate return in value may be compensated by forms of amusement or fortune telling.

I am very sorry that my answer to you has been thus unduly delayed, and I hope very much that I have fully answered the questions which have been asked me.

Yours very truly,

JNO. R. SAUNDERS,

Attorney General.

GARNISHMENT—Salaries of judges not subject to.

RICHMOND, VA., April 17, 1929.

HON. LUTHER LIBBY, *Clerk,*
Law and Equity Court,
Richmond, Virginia.

MY DEAR MR. LIBBY:

Acknowledgment is made of your letter of April 16, 1929, in which you say:

"On the 27th day of January, 1927, a judgment was entered in favor of the plaintiff against a defendant who has since been elected to preside over a court of record, in the State of Virginia, and now occupies that position.

"The judgment creditor has applied for a garnishment process against the judgment debtor, subjecting funds in the hands of the Commonwealth of Virginia due the said judgment debtor as salary and demanding that I issue such garnishment process.

"A doubt having arisen as to whether I should issue the process demanded, I request you to inform me of my duty in regard to the issuance of this process."

The salary of the judge of a court of record is not subject to garnishment. Section 6559 of the Code provides in part:

"Unless otherwise exempted, the wages and salaries of all employees of this State, *other than State officers*, shall be subject to garnishment or execution upon any judgment rendered against them. * * *" (Italics supplied.)

To this section, the Revisors appended the following note:

"The act from which this section is taken permitted garnishment of the salaries of all State officials and employees. The revisors were of opinion that the State should not be garnisheed in any case, but knowing that the law had operated beneficially and effectively as to mere day laborers and employees of the State, enabling them to get credit when otherwise they could not have secured it, they struck out the provision concerning State officers and limited the revised section to employees. The places of mere employees could, in most instances, be more readily supplied than those of State officers, and if, for instance, the salaries of the Governor, Attorney-General and judges could be entirely taken away by garnishment, the State might at some time be left impotent to discharge its functions."

The judge of a court of record is a State officer (*Burch v. Hardwicke*, 30 Gratt. (71 Va.) 24). I am, therefore, of the opinion that the salary of such a judge cannot be garnisheed, and that you should refuse to issue a garnishment in such case.

Very truly yours,

JNO. R. SAUNDERS,
Attorney General.

GASOLINE TAX—Refund to Federal government.

RICHMOND, VA., July 9, 1928.

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

MY DEAR MR. HAYES:

Acknowledgment is made of your letter of July 6, 1928, in which you refer to my opinion of May 31, 1928, and request me to advise you whether you are authorized to refund to the post office department of the Federal government the tax paid by them on gasoline purchased in this State.

I am of the opinion that, if application was made within the time required by the statute, you should make these refunds. No authority in law exists for the refunding of any part of the gas tax collected unless application was made within the time fixed by the statute.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

GASOLINE TAXES—Refunds cannot be made for evaporation.RICHMOND, VA., *April 23, 1929.*VIRGINIA OIL Co., INC.,
Marion, Virginia.

GENTLEMEN:

Acknowledgment is made of your letter of April 22, 1929, in which you say in part:

"We have been advised by the Division of Motor Vehicles that there is no provision whereby we may get any refund of the taxes on gasoline, where the taxes have been paid by the refinery, and where we sell less than the amount that the taxes are paid on.

"In other words we receive about 10,000 gallons of gasoline about every ten (10) days and the tax on this gasoline has been paid by the refinery. Some times we have as high as 200 gallons of gasoline lost, and some times we do not have any loss in a car load."

Section 186 of the Constitution provides in part:

"No money shall be paid out of the State treasury except in pursuance of appropriations made by law; * *"

The only authority of law for the refund of any gasoline tax is found in section 7, chapter 107 of the Acts of 1923, as amended by chapter 470 of the Acts of 1928, pages 1185-1186. Evaporation is not one of the uses for which gasoline taxes may be refunded by the Director of the Division of Motor Vehicles. It is my opinion that the ruling of the Director of the Division of Motor Vehicles is correct.

I notice that you refer to section 4145 of the Code as authorizing a refund in this case. I cannot see any application of this section to the matter, as it relates to incorporation of trust companies, and not to refund of gasoline taxes.

Very truly yours,

JNO. R. SAUNDERS,
*Attorney General.***GASOLINE TAXES—County highway system—Expenditure of on.**RICHMOND, VA., *April 26, 1929.*MR. W. F. FRALEY,
Member Board of Supervisors,
Duffield, Virginia.

MY DEAR MR. FRALEY:

Acknowledgment is made of your letter of April 24, 1929.

Section 2154(25) of the 1926 Supplement to the Virginia Code of 1924 provides that that portion of the gas tax paid to the counties

" * * is appropriated primarily for the maintenance of the roads and bridges now embraced in or which may hereafter be added to the several county highway systems of this State * *. 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. * *"

If the roads built from the proceeds of bond issues are a part of the county highway system, the gasoline fund may be spent on such roads. If such roads are not in the county highway system, it is my opinion that such fund cannot be spent on them.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

**GASOLINE TAXES—Gasoline sold to Federal government exempt from
tax—Refunds by Director, Division of Motor Vehicles, when to be made.**

RICHMOND, VA., *April 18, 1929.*

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

MY DEAR MR. HAYES:

You will recall that on March 18, 1929, you wrote me a letter with reference to the application of the South Atlantic Oil Company, Inc., of Norfolk, Virginia, and The Pure Oil Company of Chicago, Ills., for certain refunds on account of gasoline sold by the South Atlantic Oil Company, Inc., to the Federal government, or departments of that government, free of the gasoline tax.

Immediately on receipt of your letter I wrote the South Atlantic Oil Company, Inc., of Norfolk, requesting certain additional information, and sent a copy of this letter to The Pure Oil Company of Chicago, Ills. This morning I have had a conference with Mr. E. R. Harden, Jr., President of the South Atlantic Oil Company, Inc., who has exhibited to me certain files which appear to show that the gasoline in question was sold by the South Atlantic Oil Company, Inc., to the Federal Government, or its departments, free of tax, and the tax on this same gasoline was paid to the Commonwealth through your department by The Pure Oil Company of Chicago, Ills. Mr. Harden further informs me that his company is merely the sales agent in Norfolk and vicinity for the Pure Oil Company.

You will recall that the Supreme Court of the United States decided in *Panhandle Oil Company v. Mississippi*, 277 U. S. 218, 72 L. ed. 857, that a State may not impose a tax measured by the quantity sold upon the privilege of one of its citizens of selling gasoline to the Federal Government for use of its Coast Guard Fleet or Veterans' Hospital which the United States is empowered by the Federal Constitution to maintain and operate. Therefore, a dealer in this State who sells gasoline to the Federal Government has the right to sell it to the government, or one of its departments, free of the tax, and the State cannot compel him to account for a tax on such gasoline, other than to establish by competent proof the fact that the quantity claimed was actually sold or delivered to the Federal Government, or one of its departments.

If, in fact, the South Atlantic Oil Company, Inc., was only a selling agent for The Pure Oil Company of Chicago in the sale of this gasoline to the Federal Government, and the tax has already been paid thereon, I am of the opinion that a refund should be made of so much of the tax as was collected on account of the gasoline which was actually sold and delivered to the Federal Government, or its departments. And, if the South Atlantic Oil Company, Inc., was the selling

agent of The Pure Oil Company in this matter, upon authorization from the latter company it is my opinion that the refund could be lawfully made to the South Atlantic Oil Company, Inc.

It is true that section 7 of the Motor Vehicle Fuel Tax Act, as amended by chapter 470 of the Acts of 1928, does not authorize a refund in a case such as this, but, in view of the decision of the Supreme Court of the United States in *Panhandle Oil Company v. Mississippi*, *supra*, it is my opinion that a refund should be made as the tax has already been paid, and the gasoline has subsequently been sold to the Federal Government.

Of course, you will have to satisfy yourself before making a refund that the tax on the particular gasoline sold to the Federal Government has been paid to the Commonwealth, and that the gasoline on which the refund is claimed was actually sold and delivered to the Federal Government. I do not attempt to advise you as to any matter of fact connected herewith, but I have merely attempted to advise, or give you my opinion, as to what you may lawfully do with reference to making a refund under facts to be ascertained by you.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

GASOLINE TAX—Motor vehicle fuels tax, refunds of.

RICHMOND, VA., February 21, 1929.

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

DEAR MR. HAYES:

Acknowledgment is made of your letter of February 20, 1929, in which you say in part:

"O. B. Harvey, President of the Standard Gas and Oil Supply Company, Inc., at Clifton Forge, called at my office the latter part of January and explained that his company was maintaining gasoline stations in ten cities in the State.

"They were purchasing gasoline from the Standard Oil Company of New Jersey and have been since they began business and were in turn paying the tax to the Standard Oil Company of New Jersey on their purchases of gasoline.

"Mr. Harvey states that his company had experienced shortage from evaporation and wastage or spillage from the time the gasoline tax act has been effective. He requested refund of the tax on the number of gallons of gasoline that was lost on account of the evaporation and spillage, that is, refund on the difference between the number of gallons of gasoline purchased and the number of gallons used and sold by his company upon which tax was collected.

"The office has received an application from this company for refund of tax on 253,571 gallons of gasoline from January 1, 1923, to December 31, 1928.

"I will thank you to advise if the office has authority to authorize a refund to the above named company on this quantity of gasoline."

The only authority in law made for the refunding of taxes collected on gasoline is found in section 7 of the motor vehicle fuels tax act, as amended by chapter 470 of the Acts of 1928, pages 1185-1186.

I am of the opinion, first, that Mr. Harvey's case does not come within the provisions of this statute and, second, that, if it fell within the provisions of the statute, application was made too late to obtain a refund. The statute does not authorize a refund to any purchaser on account of a loss from evaporation and other causes. In order to obtain a refund, the case must fall strictly within the provisions of section 7 of the act above referred to, as amended. Section 186 of the Constitution provides in part:

"No money shall be paid out of the State treasury except in pursuance of appropriations made by law."

As I have said, no authority exists in law for the paying of money out of the State treasury in a case such as this.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

GASOLINE TAX—Refunds.

RICHMOND, VA., July 20, 1928.

ATLANTIC BRIDGE COMPANY, INC.,
Greensboro, North Carolina.

GENTLEMEN:

Acknowledgment is made of your letter of July 17, 1928, in re: refunds on gasoline purchased for other than transportation purposes.

The only authority in law for the refunding out of the treasury of any money paid for gas tax is found in chapter 470 of the Acts of 1928, amending sections 7 and 8 of the law imposing a tax on motor vehicle fuels. Section 7 of this act, which became effective June 17, 1928, after authorizing refunds on gasoline purchased for purposes other than transportation, provides in part:

" * * * provided that application for refunds as provided herein must be filed with the said director within thirty days from the date of sale or invoice, on forms prepared and furnished by said director."

Therefore, the Director of the Division of Motor Vehicles is without authority to pay out of the treasury, on gas tax refunds, money on account of any claim which was not presented within thirty days from the date of sale or invoice, no matter when the sale was made or what the former law was, as the former law was repealed by the amendment to section 7 of the motor vehicle fuels tax law, as amended by chapter 470 of the Acts of 1928.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

GASOLINE TAX—Motor vehicle fuels tax, refunds of.RICHMOND, VA., *February 21, 1929.*

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

MY DEAR MR. HAYES:

Acknowledgment is made of your letter of February 20, 1929, in which you enclose certain correspondence from Colonel Willard D. Newbill, Assistant Adjutant General, in regard to a refund on gasoline purchased and used in the equipment of the National Guard. You say in part:

"While they have not filed an application for this refund, they are requesting your opinion as to refunding to their department on gasoline purchased and used over a period of time, or, from the time the Supreme Court decision and the Panhandle Oil against the State of Mississippi."

The gasoline so used, I am advised, is purchased by the Federal government and is, therefore, not subject to tax in this State. *Panhandle Oil Company v. Mississippi*, decided May 14, 1928.

I know of no method, however, by which the tax heretofore collected can be refunded except in accordance with the provisions of section 7 of the motor vehicle fuels tax law, as amended by chapter 470 of the Acts of 1928, in view of the very clear provision of section 186 of the Constitution, which prohibits the payment of money out of the State treasury except pursuant to authority of law.

Of course, the General Assembly would have the authority by a special act to order a refund of the tax paid by the Federal government.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

GASOLINE TAX—Refund of.RICHMOND, VA., *October 29, 1928.*

HON. JEFF F. WALTER,
Commonwealth's Attorney,
Onley, Virginia.

MY DEAR MR. WALTER:

Acknowledgment is made of your letter of October 27, 1928, in which you enclose a previous letter. I regret to say that I do not recall your previous letter, nor am I able to find it in the office, which accounts for my failure to answer it.

In your letter you say in part:

"I am writing to ask you to give me an opinion for the members of the board of supervisors as to whether or not, under section 7, chapter 107, approved March 26, 1923, entitled, An Act to levy a tax upon motor vehicle fuels, etc., gasoline used by tractors in the construction and maintenance of the public roads is exempt from tax."

Section 7 of the motor vehicle fuels tax act, as amended by chapter 470 of the Acts of 1928, provides in part:

"Any person, association of persons, firm or corporation, who shall buy, in quantities of five gallons or more at any one time, any motor vehicle fuels as defined in this act for the purpose of, and the same is actually used for, operating or propelling boats, ships, aeroplanes or aircraft, stationary gas engines, tractors used for agricultural purposes and motor equipment belonging to cities and towns used exclusively in municipal activities, or who shall purchase and use any of such fuels for spraying purposes or for cleaning, dyeing or other commercial use, except in motor vehicles operated, or intended to be operated in whole or in part upon any of the public highways, streets or alleys of this State, on which motor fuels the tax or taxes imposed by this act shall have been paid, shall be reimbursed and repaid the amount of such tax or taxes paid by him * * *."

This act expressly provides that no refund is to be made where the gasoline is used in motor vehicles "operated, or intended to be operated in whole or in part upon any of the public highways, streets or alleys of this State," except in motor equipment belonging to cities and towns used exclusively in municipal activities.

Under the very clear language of the act, it is my opinion that a county is not entitled to a refund for gasoline used as outlined in your letter. The reason for the apparent discrimination in favor of municipalities is explained by the fact that the counties receive a considerable part of the gas tax, while municipalities do not receive any part thereof.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

GASOLINE TAX—Refunds.

RICHMOND, VA., *February 7, 1929.*

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

DEAR MR. HAYES:

I am in receipt of your letter of the 5th instant, in which you write concerning the application of the Norfolk Southern Railroad Company for a refund of gasoline tax, and which I quote in full:

"I am enclosing an application for refund of tax on 8061 gallons of gasoline in the name of the Norfolk Southern Railroad Company, 200 Terminal Building, Norfolk, Virginia.

"Attached to this application is an invoice from the Sinclair Refining Company dated December 14 along with credit memorandum dated January 17, 1929.

"This application was returned to this company and they were advised that the invoice indicated that the gas was purchased more than thirty days past when it was received at the office on January 31 and, therefore, no refund could be authorized. Mr. Bain, attorney for the company, along with Mr. Jones, was in the office this morning, and the facts that they gave to us were that this gasoline was purchased at 11 cents per gallon and when Mr. Jones received this invoice on December 20 he immediately discerned that the billing was at 11¼ cents per gallon and that on the 20th of December the invoice was returned to the Sinclair Refining Company and they were advised the price was 11 cents per gallon and they should make the necessary adjustments. Mr. Jones stated that on January 29 he received

credit memorandum dated January 17 on 8,061 gallons at one-fourth of a cent per gallon, making a credit of \$20.15 and immediately upon receipt of the invoice and the credit memorandum from the Sinclair Refining Company the application was filed for refund. Upon reference to my files I find that Mr. Jones' letter is dated January 29, that the envelope in which this letter was mailed is dated Norfolk, January 30, at 12:30 P. M. Application was received at this office on January 31. I would thank you to advise me if, under the circumstances stated above, refund should be authorized to the company."

The law under which this rebate is authorized is found at the end of section 7 of the gasoline tax bill, as amended March 26, 1928, page 1185. It provides:

"Provided that application for refunds as provided herein must be filed with the said director within thirty days from the date of sale or *invoice* on forms prepared and furnished by the said director."

In my opinion, the time limit of thirty days allowed within which to file an application for a refund began in this case on the date it received the corrected invoice. That date seems to have been the 29th day of January, 1929.

Complying with your request, I advise that the refund claimed by the company is authorized by law.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

GASOLINE TAX—Application for refund.

RICHMOND, VA., August 22, 1928.

HON. R. Q. MERRICK, *Administrator,*
U. S. Prohibition Service,
Richmond, Virginia.

DEAR SIR:

I am in receipt of your letter of August 17, in which you write:

"I have been advised of the decision of the United States Supreme Court in the case of *Panhandle Oil Company v. The State of Mississippi*, rendered May 14, 1928, denying the right of the State to collect from the dealer the State tax on gasoline sold to the United States. I have also been instructed to familiarize myself with the State law, in order that claims for refund on any tax paid may be filed in accordance with the statutory provisions of the law.

"It is requested that you furnish me with any pertinent information in this connection in order that claims may be filed for taxes that have been paid or may be paid in the future."

This office has heretofore advised Honorable James M. Hayes, Jr., Director, Division of Motor Vehicles, that the government of the United States is entitled to a refund of the Virginia State tax collected on all gasoline sold to the Federal government.

Under the State law, an application for a refund of gasoline tax to those persons to whom such refund is provided in the gasoline tax enactments of the Legislature must be made within thirty days from the date on which the gasoline is purchased.

I am not of the opinion that this limitation would apply to the Federal government, but suggest that prompt applications for refund be made by the government in all cases in which they shall have paid the State a gasoline tax.

I shall be pleased to be of any further assistance to you at any time in any matter.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

GASOLINE TAX—Refund of interest paid thereon.

RICHMOND, VA., September 21, 1928.

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, 1928, in which you say:

"During the latter part of July the office secured information that the Standard Gas & Oil Supply Co., of Clifton Forge, Va., was selling gasoline from their Bluefield, West Virginia, station to points within the State of Virginia and these people were claiming exemption on this gasoline in the State of West Virginia on account of the tax.

"Upon reference to our files and records I did not find where this company was paying a tax to this office on such sales. This company knew that they were to pay the tax on this gasoline in the State of Virginia as they were claiming exemption from West Virginia on the number of gallons sold. After the data as to the quantity of gasoline that had been delivered in Virginia was secured, the office immediately wrote this company attention Mr. O. B. Harvey, President, in regard to these deliveries and demanded the payment of the tax along with the 25% penalty and interest from the 20th of the month when the tax was due up to August 20, 1928. This interest was calculated at 6%. On August 16 the office received a check from the above named company amounting to \$8,476.31. This check made up \$6,334.79 tax, \$1,583.64 penalty and \$557.88 interest. After mailing this check to the office, on September 7 the office received a letter from Mr. Harvey, the President of this company, requesting refund on the \$557.88 interest payment as he could find no provision in the law providing for interest to be collected. The office has refused the refund to this company of this interest, and again on September 14 they have requested this refund.

"Under conditions set out above, I would thank you to advise me if the office was not correct in demanding payment of the interest on this tax. In this connection I would like to say that some of this tax was due from September 20, 1925, up to the time we requested the tax. Also during March, 1928, our officer, Mr. Breckenridge, of Bluefield, Va., notified this office that these people were making deliveries of gasoline in the State of Virginia. We requested them to pay the tax and they began paying the tax on their sales and deliveries in March, 1928. No mention was made of the previous sales in Virginia. I am requesting your opinion as to refunding this interest so that I can advise the above named company."

While there are authorities to the effect that in the absence of specific statutory provisions taxes do not carry interest, it has always been the construction placed on the motor vehicle fuel tax law that claims for taxes in these cases carried interest, as well as penalty, from the due date, and this contention has

been sustained by numerous decisions of the Circuit Court of the City of Richmond in actions brought to recover motor vehicle fuel taxes.

From the facts narrated in your letter, the case referred to was a most flagrant case. One which might well have justified the imposition of the double tax instead of the 25% penalty, and, in view of the established construction of this statute in Virginia, I am of the opinion that you would not be justified in refunding the interest paid by the Standard Gas and Oil Supply Company of Clifton Forge. See *Smith v. Bryan*, 100 Va. 199, 1902; *Virginia Blue Ridge Railway Company v. Kidd*, 120 Va. 426, 1917; *Currey v. Page*, 2 Leigh, 617, 1831.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

GASOLINE TAX ACT—Validity of nature of—Not discriminatory—Not in violation of section 9 of Federal Highway Act.

RICHMOND, VA., June 10, 1929.

E. RANDOLPH WILLIAMS, ESQUIRE,
General Counsel,
Richmond, Fredericksburg and Potomac Railroad Co.,
1003 Electric Building,
Richmond, Virginia.

MY DEAR MR. WILLIAMS:

I have your interesting letter of June 6, 1929, File 1614, with reference to my letter of May 16 to Hon. James M. Hayes, Jr., in re: the right of the State to collect the gasoline tax on gasoline used in the operation of busses doing exclusively an interstate business. I observe that you take the position that this tax is imposed upon gasoline which may be used by vehicles which never use the State highways and for this reason, if the tax be a charge for the use of the highways, would be discriminatory and an invalid imposition for a use which is never made.

You would unquestionably be right in this position if, in fact, the only State highways were those embraced in what is commonly known as the State highway system as distinguished from other public highways. This is not a fact, however. All the public roads in the counties and public streets in the municipalities of the Commonwealth are State highways.

Norfolk and W. R. Co. v. Supervisors, 110 Va. 95 (1909);
Norfolk City v. Chamberlaine, 29 Gratt. (70 Va.) 534, 538 (1877);
Yates v. Town of Warrenton, 84 Va. 337 (1888);
Fry v. County of Albemarle, 86 Va. 195 (1890).

Thus it is said in *Norfolk City v. Chamberlaine*, *supra*:

“ * * * In other words, public streets are not the property of the municipality or of the people of the municipality, but of the public at large. The legislature may, and generally does, of right, give the supervision and control of streets to the local authorities, but the property in the streets is not in the municipality, but in the public at large. The legislature of the State alone represents the public at large, and it alone has full and paramount authority over all public highways. As was well said by Chief Justice Gibson, in *O'Connor v. Pittsburg*, 18 Pa. St. R. 187: ‘To the Com-

monwealth here, as to the king in England, belongs the franchise of every highway as a trustee for the public; and streets, regulated and repaired by the authority of a municipal corporation, are as much highways as rivers, railroads, canals or public roads laid out by authority of the State.’”

In *Fry v. County of Albemarle, supra*, the court said (p. 199):

“ * * the public highways in the county of Albemarle belong to the Commonwealth, not to the county; * *.”

Therefore, it would clearly appear that there is nothing discriminatory about the gasoline tax on the theory that it is not all used on the State roads, since all the public roads and streets within her confines belong to the Commonwealth.

You next take the position that the gasoline tax cannot be supported on the theory of being a charge for the use of the highways for the reason that Federal money aid has been spent in this State, and that section 9 of the Federal Highway Act provides:

“All highways constructed or reconstructed under the provisions of this chapter shall be free from tolls of all kinds.”

A similar question was presented to the United States District Court for the Western District of Washington in *Cunningham et al. v. Potts, Treasurer of State of Washington*, 9 Fed. (2d) 469, 471-472 (1925). In denying the contention, the court said:

“If a tax of two cents a gallon, paid by the seller or distributor of gasoline used in vehicles operated or intended to be operated upon the public highways of the State, is in any sense a toll charged for the use of such public highways, it is not forbidden by section 9, because there are public highways of the State for the privilege of using which, by motor vehicles, the State has the undoubted right to exact such tax. If an attempt were made to collect such a tax upon gas distributed and used in motor vehicles operated and intended to be operated exclusively upon Federal aid highways, a different question would be presented. * *”

Your attention is also called to *Liberty Highway Co. v. Michigan Public Utilities Commission*, 294 Fed. 703 (1923).

Referring to the cases of *Cunningham et al. v. Potts, Treasurer of State of Washington, supra*, and *Anthony v. Kozer*, 11 Fed. (2d) 641 (D. C. Oregon, 1926), the annotator, in 47 A. L. R. 996, says:

“It is held that an excise tax upon gasoline, though perhaps sustained by the State court as a toll charge for the use of the highways, is not such a toll that it is in violation of the Rural Post Roads Act of Congress, which provides that highways constructed or reconstructed under the provisions of the act shall be free from tolls of all kinds.”

In the last paragraph on page 4 of your letter you say:

“I shall be glad to know whether it is your view and that of the Department of Taxation that the gasoline tax is to be upheld as a charge for the use of the public highways. * * *”

I am, of course, not certain as to just what view the courts will adopt as to the nature of our gasoline tax act. I think it is probable, after an examination of the authorities, most of which are referred to in the annotation found in 47 A. L. R. 985, *et seq.*, that they will hold that the tax imposed by the act referred to is an excise tax, the justice of the tax being in its collection for the construction

and maintenance of highways from the users of such highways in proportion to the use. Such a result was reached by the Supreme Court of South Dakota in *Standard Oil Co. v. Jones*, 48 S. D. 482, 205 N. W. 72 (1925), in which an act apparently similar to ours was construed. In so holding, the court said (205 N. W. 73):

“ * * 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 fact that this tax is wholly segregated for the construction and maintenance of the artificial highways of the State, in my opinion, is sufficient to bring the instant case within the doctrine laid down in *Kane v. New Jersey*, 242 U. S. 160, 61 L. ed. 222 (1916).

It is very true that no distinction was attempted to be drawn by the court between natural and artificial highways in *Helson v. Kentucky*, 73 L. ed. 337 (1929). It is equally true, however, that no mention is made in that case of *Hendrick v. Maryland*, 235 U. S. 610, 59 L. ed. 385 (1915), and *Kane v. New Jersey*, *supra*. As the distinction between the matter involved in *Helson v. Kentucky*, *supra*, and that under construction here is clear, I cannot believe that the Supreme Court intended by its opinion in the last cited case to reverse its decisions in *Hendrick v. Maryland*, *supra*, and *Kane v. New Jersey*, *supra*.

Aside from the strict legal rights that may be involved in the matter, allow me to suggest that the very facilities which enable your client to operate its motor busses with speed and comfort between Richmond and Washington have been provided by the State at an enormous cost. Other parts of the route have been provided by the city of Richmond, a political sub-division of the Commonwealth, at great cost to the public, and the maintenance of this same route involves a continual and never ending burden upon the Commonwealth and this particular political sub-division. May I further suggest that, in view of this, simple justice requires the payment of this tax by your client as well as by the other users of the highways who enjoy the benefit of the facilities provided by the Commonwealth and its political sub-divisions out of the proceeds of the gasoline tax and other taxation?

With my best wishes, I am

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

GASOLINE TAX—Interstate motor vehicle carriers not exempt from payment of.

RICHMOND, VA., May 16, 1929.

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

MY DEAR MR. HAYES:

Acknowledgment is made of your letter of May 14, 1929, in which you state that E. Randolph Williams, Esquire, who represents the Richmond, Fredericksburg and Potomac bus line operating between Washington and Richmond on an interstate certificate, has advanced the contention that, under authority of *Helson v. Kentucky*, 73 L. ed. 337 (1929), his client is not liable for the gasoline bought and used by it in the operation of its motor vehicle carriers.

I have read the case of *Helson v. Kentucky*, *supra*, with care. The language employed by Mr. Justice Sutherland, who wrote the majority opinion, is extremely broad, but, in view of the fact that that case had reference to interstate transportation upon a river, which is a natural highway as distinguished from an artificial one such as the Richmond-Washington Highway, and in view of the cases hereinafter referred to, I am of the opinion that such case cannot be regarded as authority for relieving this company from the payment of the gasoline tax imposed by the laws of this State.

In *Buck v. Kuykendall*, 267 U. S. 307, 69 L. ed. 623 (1925), a case in which the Supreme Court held that a State could not prohibit the operation of interstate motor vehicle carriers on its highways, the court said (pp. 314-315):

“ * * The highways belong to the State. It may make provision appropriate for securing the safety and convenience of the public in the use of them. *Kane v. New Jersey*, 242 U. S. 160, 61 L. ed. 222, 37 Sup. Ct. Rep. 30. It may impose fees with a view both to raising funds to defray the cost of supervision and maintenance, and to obtaining compensation for the use of the road facilities provided. * * ”

In *Hendrick v. Maryland*, 235 U. S. 610, 59 L. ed. 385 (1915), it appeared that Hendrick, a resident of the District of Columbia, drove his automobile into Prince George county, Maryland, without obtaining a license from that State so to do. He was arrested, carried before a justice of the peace and fined. The judgment of the justice of the peace was affirmed on appeal. It later reached the Supreme Court of the United States on the contention that the Maryland statute was void, among other grounds, because it attempted to regulate interstate commerce. The court, speaking through Mr. Justice McReynolds, called attention to the fact that the movement of motor vehicles over the highways was attended by constant and serious dangers to the public, and that it was “also abnormally destructive to the ways themselves.” Continuing, he said:

“ * * Their success depends on good roads, the construction and maintenance of which are exceedingly expensive; and in recent years insistent demands have been made upon the States for better facilities, especially by the ever-increasing number of those who own such vehicles. * * ”

After referring to numerous authorities, he further said (pp. 623-624):

“In view of the many decisions of this court there can be no serious doubt that where a State at its own expense furnishes special facilities for

the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor. The amount of the charges and the method of collection are primarily for determination by the State itself; and so long as they are reasonable and are fixed according to some uniform, fair, and practical standard, they constitute no burden on interstate commerce. * *"

In *Kane v. New Jersey*, 242 U. S. 160, 61 L. ed. 222 (1916), the same question on slightly different facts was before the Supreme Court. In that case Kane, a resident of New York, was arrested while driving his automobile on the public highways of New Jersey. When arrested, he was on an interstate journey from New York to Pennsylvania. It was contended by his counsel that a State had no right to impose taxes for revenue purposes on the motor vehicles of a non-resident engaged in interstate commerce in order to defray the expense of the construction of the improved roads of that State. The Supreme Court, speaking through Mr. Justice Brandeis, in affirming the judgment said (pp. 168-9):

"In the *Hendrick Case* it did not appear, as here, that the fees collected under the Motor Vehicle Law exceeded the amount required to defray the expense of maintaining the regulation and inspection department. But the Maryland statute, like that of New Jersey, contemplated that there would be such excess, and provided that it should be applied to the maintenance of improved roads. And it was expressly recognized that the purpose of the Maryland law 'was to secure some compensation for the use of facilities provided at great cost from the class for whose needs they are essential and whose operations over them are peculiarly injurious.'"

In the light of these decisions, I cannot believe that the opinion of the court in *Helson v. Kentucky*, *supra*, can be regarded as applicable to a case involving the use of the artificial highways of a State by an interstate carrier.

Reference to chapter 107 of the Acts of 1923, as amended, the statute imposing the gasoline tax, shows that the proceeds of this tax have been segregated exclusively for the purpose of building improved highways.

It is a well known fact that the constant use of motor vehicles on highways is extremely destructive thereto. It is an equally well known fact that the heavier the vehicle is the more damage it does to the roads over which it is operated. This fact was recognized by the General Assembly which has sought to limit the weight of loads hauled over the public highways (see chapter 145 of the Acts of 1923 and sections 2145 (39) and 2145 (42), Virginia Code of 1924, 1928 Supplement).

I am, therefore, of the opinion that the Richmond, Fredericksburg and Potomac Railway Company is not entitled to the exemption claimed by Mr. Williams.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

GASOLINE TAX—On gasoline bought by Federal government.

RICHMOND, VA., March 23, 1929.

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

DEAR MR. HAYES:

I am in receipt of a communication from C. O. Gunn, Esquire, First Lieutenant, 52nd C. A., Exchange Officer in charge of the Post Exchange, Fort

Eustis, Virginia, in which he takes the position that the Post Exchange at Fort Eustis, Virginia, is an instrumentality of the Federal Government and that gasoline bought by it for sale to the officers and enlisted men of the United States Army is not subject to the Virginia gasoline tax.

The Supreme Court of the United States decided in *Panhandle Oil Company v. Mississippi*, 277 U. S. 218, 72 L. ed. 857, that a State may not impose a tax measured by the quantity sold upon the privilege of one of its citizens of selling gasoline to the Federal government for use of its Coast Guard Fleet or Veterans' Hospital which the United States is empowered by the Constitution to maintain and operate.

The answer to Lieutenant Gunn's question, therefore, depends upon whether a Post Exchange is an instrumentality of the Federal Government. If it is, then gasoline sold by it to the members of the military forces of the United States is not subject to tax, and, under the decision in the case of *Panhandle Oil Company v. Mississippi*, *supra*, it may be sold to the Post Exchange free of the State tax.

Lieutenant Gunn has furnished me with a citation to *Dugan v. United States*, 34 Ct. of Claims 458, in which it was held that a Post Exchange was not legally liable for local or municipal taxes or licenses on the sale of commodities for the exclusive use of persons in the military service, as such exchange was an instrumentality of the Government of the United States.

It would, therefore, appear that a military Post Exchange is an instrumentality of the Federal Government and, therefore, under the decision of the Supreme Court of the United States, the gasoline bought and sold by it is not subject to the Virginia gasoline tax, provided such gasoline is sold exclusively to the members of the military and naval forces of the United States.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

GOVERNOR—Authority to appoint judges of Supreme Court of Appeals.

RICHMOND, VA., July 6, 1928.

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

MY DEAR GOVERNOR:

I am just in receipt of your letter of this date in which you say:

"Referring to Section 88 of the Virginia Constitution, as amended by the people of Virginia at a special election held on June 19th, 1928, by which it is provided that the Supreme Court of Appeals shall consist of seven judges, and to chapter 110 of the Acts of the General Assembly of 1928, which is the biennial appropriation bill, and provides for salaries for but five judges, I would like to have an opinion from you on the following questions:

"1. Whether the provision of the Constitution providing that the Governor shall have power during the recess of the General Assembly, to fill, *pro tempore*, vacancies in all offices of the State for the filling of which the Constitution and laws make no other provision, requires these vacancies, if there are such, to be filled by the Governor in the absence of any appropriation for their salaries?

"2. What was the intention of the legislature so far as the same can be ascertained from the laws which they enacted in 1928 in reference to the manner in which these vacancies, if any, should be filled?"

"3. Section 17 of the appropriation bill provides that no State department receiving appropriations under the bill shall exceed the amount of its appropriations, 'except in an emergency and then only with the consent and approval of the Governor first obtained,' and provides penalties for exceeding the amount of the appropriation without such consent and approval, is there any emergency existing which would render necessary the making of the appointments to fill such vacancies, if any exist or which would warrant the Governor in authorizing the judiciary department to exceed the amounts appropriated by the appropriation bill for the Supreme Court of Appeals?"

As stated in your letter, prior to the adoption of the amendments to the Constitution which were ratified on the 19th day of June, 1928, by the electorate of Virginia, the Supreme Court of Appeals consisted of five judges. Since the adoption of these amendments, the number has been increased to seven. No provision was made in section 88 (which is the amended section) as to the manner of selecting the two additional judges, but section 73 of the Constitution, which prescribes the duties and powers of the Governor, among other things provides as follows:

"He shall have power, during the recess of the General Assembly, to appoint, pro tempore, successors to all offices so suspended, and to fill, pro tempore, vacancies in all offices of the State for the filling of which the Constitution and laws make no other provision. Such appointments to vacancies shall be by commissions to expire at the end of thirty days after the commencement of the next session of the General Assembly."

While it is true, in my judgment, that under the provisions contained in this section you have the authority to appoint these two additional judges, at the same time, it is very doubtful if the Legislature intended for you to make these appointments.

The Legislature of 1928, which by an act approved March 14, 1928, submitted to the people of Virginia for ratification or rejection certain amendments to the Constitution, among which sections was section 88 which provided for the increase of the number of judges of the Supreme Court of Appeals, as mentioned above. The appropriation bill passed by this same Legislature contained no provision for the salaries of the two additional judges of the Supreme Court of Appeals, as proposed in section 88 of the Constitution as amended on the 19th day of June, 1928.

The failure of the Legislature in its appropriation bill to provide for the salaries of these two additional judges leads me to the conclusion that the Legislature did not contemplate the services of two additional judges during the biennial, and, if this conclusion is correct, it follows that the Legislature did not contemplate your appointment of these two judges during the recess of the Legislature.

Not only did the Legislature fail to make any provision for the payment of the salaries of these two additional judges, but in the appropriation bill I find among other things the following provision:

"No State department, institution or other agency receiving appropriations under the provisions of this act shall exceed the amount of its appropriations, except in an emergency, and then only with the consent and approval of the Governor in writing first obtained; * * *"

It further provides that it shall not be lawful for the Comptroller to pay any State department, institution or other agency any money, except as is provided for in this act, or in pursuance of some act of the General Assembly making special appropriation therefor. In view of these provisions contained in the appropriation bill, it is very doubtful if there is any authority in law to pay the salaries of these two additional judges even should Your Excellency see fit to appoint them.

No doubt the Legislature had in mind, when it failed to make an appropriation for the payment of these two additional judges, the fact that the Legislature of 1927, having provided for a Special Court of Appeals consisting of five judges, had in contemplation the fact that the court as at present constituted could easily take care of all litigation reaching the Supreme Court of Appeals previous to the meeting of the General Assembly of 1930, at which time it would then elect the two additional judges and provide for their salaries.

I have, therefore, reached the conclusion that there is no existing legal necessity which makes the appointment of these two additional judges obligatory or mandatory on you.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

INSANE ASYLUMS—Dangerous inmates, confinement of.

RICHMOND, VA., April 20, 1929.

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

MY DEAR MR. BANE:

Acknowledgment is made of your letter of April 18, 1929, with which you send me, for my opinion, a letter written to you by Dr. H. C. Henry, Superintendent of the Central State Hospital, Petersburg, Virginia. In his letter Dr. Henry says:

"I am writing to ask that you will advise me as to whether, in quartering in our building for the criminal insane, patients other than those who have been committed by the courts to this department, we are in violation of any law.

"The fact is it has been for many years and is now our custom to quarter in this building patients who, in our opinion, are dangerous and those who have dangerous tendencies and have made one or more efforts to escape."

I have been unable to find where this matter has been passed upon by a court. Ordinarily, non-criminal insane patients should not be quartered with the criminal insane, but, where a non-criminal insane patient becomes dangerous, it is the duty of the superintendent to take proper care to secure such patient in a way to prevent his escape, or the infliction of injury on others. If the only quarters provided by the State where this may be safely done is the building in which the criminal insane patients are confined, I am of the opinion that the superintendent

would be acting within his rights in confining such dangerous patient in that building.

With my best wishes, I am

Very truly yours,

JNO. R. SAUNDERS,
Attorney General.

**INSANE, EPILEPTIC AND FEEBLE-MINDED—Sterilization of—Duty
of special board of State institution.**

RICHMOND, VA., April 22, 1929.

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

MY DEAR DR. BELL:

Acknowledgment is made of your letter of April 18, 1929, in which you call my attention to section 2 of chapter 394 of the Acts of 1924, providing for sexual sterilization of inmates of State institutions in certain cases. You refer to one paragraph of this section and say:

“My interpretation of this is that the board is not sitting as a board of mental examiners and it is not expected that they can determine by personal inquisition in a few minutes the mental condition of a case, but that they shall receive and consider such information as is put before them by the superintendent or other parties to the proceeding and on these facts, as stated in depositions at the time of commitment and in depositions of the superintendent in his petition, shall base their decision as to whether or not the case is one for sterilization.”

The sixth paragraph of section 2 of this act, quoted by you, does not, in my opinion, furnish an adequate view as to the intention of the General Assembly, which must be ascertained only by an examination of the whole act and especially certain other paragraphs of this section. The first paragraph of this section requires the superintendent to first present to the special board of directors of his hospital or colony a petition stating the facts and the grounds of his opinion, verified by oath. A copy of this petition must be served upon the inmate and the legal guardian or committee, together with at least thirty days' notice of the time and place the petition will be presented and its allegations heard. If the inmate is an infant, notice must also be served on his living parent or parents. After proper notice has been given, the board is then authorized to sit at the time and place named therein, with such reasonable continuances from time to time and from place to place as the special board may determine. At the hearing, the act provides that the special board shall—

“ * * * hear and consider the said petition and the evidence offered in support of and against the same, provided that the said special board shall see to it that the said inmate shall have opportunity and leave to attend the said hearings in person if desired by him or if requested by his committee, guardian or parent served with the notice and petition aforesaid.

“The said special board may receive and consider as evidence at the said hearing the commitment papers and other records of the said inmate with or in any of the aforesaid named institutions as certified by the super-

intendent or superintendents thereof, together with such other legal evidence as may be offered by any party to the proceedings.

"Any member of the said special board shall have power to administer oaths to any witnesses at such hearing.

"Depositions may be taken by any party after due notice and read in evidence if otherwise pertinent.

"The said special board shall preserve and keep all record evidence offered at such hearings and shall have reduced to writing in duplicate all oral evidence so heard to be kept with its records.

"Any party to the said proceedings shall have the right to be represented by counsel at such hearings.

"The said special board may deny the prayer of the said petition or if the said special board shall find that the said inmate is insane, idiotic, imbecile, feeble-minded or epileptic, and by the laws of heredity is the probable potential parent of socially inadequate offspring likewise afflicted, that the said inmate may be sexually sterilized without detriment to his or her general health, and that the welfare of the inmate and of society will be promoted by such sterilization, the said special board may order the said superintendent to perform or to have performed by some competent physician to be named in such order upon the said inmate, after not less than thirty days from the date of such order, the operation of vasectomy if a male or of salpingectomy if a female; provided that nothing in this act shall be construed to authorize the operation of castration nor the removal of sound organs from the body."

From a careful examination of this act, especially section 2 thereof, it is my opinion that the special board sits in such cases as a judicial tribunal charged with ascertaining all the facts both for or against the prayer of the petition. I do not see how the board can properly discharge these functions, if it fails to make such personal inquisition as to the mental condition of the inmate as may enable it, together with the other evidence introduced, to determine whether or not such inmate is a fit subject for sterilization.

It is my opinion that in such a proceeding the law contemplates that not only a few minutes, but all of the time which may be required for the purpose, must be devoted to the matter to the end that no injustice may be done a person occupying such an unfortunate position.

Yours very truly,

JNO. R. SAUNDERS,

Attorney General.

INSANE, EPILEPTICS AND FEEBLE-MINDED—Member of board of State institution may qualify as guardian of inmate of.

RICHMOND, VA., April 22, 1929.

DR. J. H. BELL, *Superintendent.*

*State Colony for Epileptics and Feeble-Minded,
Colony P. O., Near Lynchburg, Virginia.*

MY DEAR DR. BELL:

Acknowledgment is made of your letter of April 18, 1929, in which you request me to advise you whether there would be any impropriety in a member of your board qualifying as guardian of two boy inmates of your hospital.

Section 1080 of the Code authorizes the appointment of a guardian or committee of persons situated like the two boys referred to in your letter, but all that it says is, that the court—

" * * may appoint some suitable person to be the guardian or committee of the person of such feeble-minded person, and the said court or judge may also appoint the same or a different person, guardian or committee of the property of the feeble-minded person * *."

I also call your attention to section 1053 of the Code, as amended. In my opinion, there is nothing in the law which prohibits a member of your board from being appointed guardian or committee of an inmate of your institution, and I can see no impropriety in his qualifying as such.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

INTOXICATING LIQUORS—Automobiles—Filing information for confiscation, seized transporting ardent spirits.

RICHMOND, VA., August 22, 1928.

HON. PHIL. ST. GEO. WILLSON,
Commonwealth's Attorney,
Denbigh, Virginia.

DEAR SIR:

I am in receipt of your letter of August 20, informing me that Judge Armistead refused to allow you to file information for the confiscation of an automobile seized in your county while being used in the unlawful transportation of ardent spirits, and that his refusal is based upon the fact that the law provides that an amendment to section 28 of the Layman Act provides that, should the attorney for the Commonwealth fail to file information within ten days after notice of a seizure, an information may at any time thereafter be filed by the Attorney General.

I have heretofore held that the authority given me to file information did not preclude an attorney for the Commonwealth, who had failed to file information within ten days after receiving report of a seizure, from filing the information after ten days.

I should like for you to let Judge Armistead know of this ruling and, unless he adheres to his former opinion, I shall ask you to proceed with your information. If he does so adhere, I shall ask you to file information in my name and conduct the case for me to a final conclusion, provided you are willing to accept this employment or the fee allowed for the prosecution of confiscation proceedings.

I am, therefore, returning to you the letter written you July 31 by Honorable James M. Hayes, Jr., Director, Division of Motor Vehicles.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

INTOXICATING LIQUORS—Automobile used for transporting ardent spirits, confiscation of.RICHMOND, VA., *August 22, 1928.*

HON. R. J. WATSON,
Clerk of Courts,
Roanoke, Virginia.

DEAR MR. WATSON:

I am in receipt of your letter of the 20th instant, in reference to the costs of proceedings for the forfeiture and sale of automobiles alleged to have been used in the unlawful transportation of ardent spirits, and especially with reference to the necessity and the payment for orders of publication in confiscation proceedings.

I am of the opinion that section 6070 of the Code covers orders of publication in these cases and that the court or the judge in vacation may, in his judgment, dispense with publication in a newspaper. The provision in subsection (d), page 991, of the Acts of 1928, was, in my opinion, inserted for the purpose of specifying the number of times required and not a mandatory provision for publication in a newspaper in those cases in which a court or judge was willing to dispense with publication under the section of the Code covering orders of publication.

While I cannot advise you that the State will pay for orders of publication, or other costs in confiscation proceedings, some of the judges, where there are funds derived from the sale of one or more cars, are allowing the payment of the costs in cases in which cars do not pay all the costs in proceedings against them. In other words, the proceeds of cars are treated as a common fund out of which all costs are paid and the net remainder covered into the State treasury.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

INTOXICATING LIQUOR—Seizure of automobile transporting.RICHMOND, VA., *July 24, 1928.*

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

DEAR SIR:

I am in receipt of your letter of the 19th instant, asking certain questions in reference to the construction of subsections a, c and d of section 28 of the State prohibition law, as amended by chapter 374, page 990, Acts of 1928.

You state—

“Section 28 (a) provides that an officer shall seize any conveyance of any kind if he shall find ardent spirits therein, contrary to the provisions of this act.”

and then ask—

“Does this authorize seizure in case where the vehicle is not moving, or shown to have been moving while containing ardent spirits, as well as a vehicle seized while actually transporting ardent spirits?”

The evident purpose of the law was to provide for the seizure and forfeiture of vehicles containing ardent spirits, whether or not the vehicle was standing still

or moving. A number of cases had arisen in Virginia in which vehicles containing ardent spirits had been seized, but which had not actually moved after having received such ardent spirits. The law, as amended, undoubtedly provides for the seizure and forfeiture of vehicles in which ardent spirits are found contrary to law.

You further state—

“Section 28 (c) provides that an attorney of the Commonwealth forthwith notify the Director, Division of Motor Vehicles, by letter, of such seizure, and the motor number of the vehicle so seized. And the Director shall promptly certify to said Commonwealth’s attorney the name and address of the person or persons under which said vehicle is registered, together with the name and address of any person or persons holding a lien thereon and the amount thereof. And said Director shall also forthwith notify such registered owner and lienor in writing of the reported seizure, and the city wherein such seizure was made.

“Section 28 (d) provides in the third paragraph of said section ‘the owner of and all persons in any manner then indebted or liable for the purchase price, said property and any persons having a lien thereon, if they be known to the attorney who files said information, shall be made parties defendant thereto, and shall be personally served with the notice hereinafter provided for, etc.’”

You then ask—

“Do these provisions require awaiting information from the Director, Division of Motor Vehicles (not to exceed ten days) before the filing of said information; or can information be filed making the car and such party or parties as were arrested therewith, parties defendant and citing all persons in interest to appear on the return date to show cause why said vehicle should not be condemned and sold to enforce the said forfeiture?”

In a very large majority of cases in which forfeiture proceedings were filed for the final confiscation of automobiles seized while being used in the illegal transportation of ardent spirits lienors appeared, made defense to the information filed by the Commonwealth and prayed for relief as innocent lien holders. In numerous of such cases the original purchasers were persons of property and amply financially able to pay the balance due on the purchase price. In other cases after final judgment and the sale of the automobile, lienors appeared and claimed that they had not had notice of the confiscation proceedings and that, consequently, their rights had been adjudicated and their property confiscated without their having been heard.

The amendment to section 28 had both of these situations in mind:

First. As amended, the law requires the owner and all persons liable as endorsers or guarantors for the original purchase price of the vehicle to be made parties defendant and personally served a notice. It further provides that, in case relief would not have been granted the owner, in those cases in which relief is granted the lienor, judgment shall be entered in favor of the Commonwealth against the owner, his endorsers and guarantors. No judgment can be obtained against any person who is not personally served with a notice and, although upon a final hearing of the proceedings judgment may be entered granting relief to a lienor, unless personal service is had upon the owner, endorsers and guarantors, no personal judgment being had against them, the Commonwealth loses its rights against a guilty owner.

Second. It is but fair for every person whose rights are being adjudicated to have actual knowledge of a suit instituted for the purpose of adjudicating those

rights. In many cases lienors had no such knowledge. The statute providing for personal service upon them should be observed, as I very much doubt that a purchaser at a judicial sale of confiscated property would obtain a good title unless this provision of law is followed.

In my opinion, the old practice of proceeding by order of publication, in which all interested parties are summoned, should be abandoned and actual service had upon all of such parties as the amendment requires to be served with notice, where personal service can be had.

You will notice that the new law omits as necessary party defendants persons arrested at the time of the seizure of vehicles illegally transporting ardent spirits.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

INTOXICATING LIQUOR—Automobiles—Seizure of, transporting ardent spirits.

RICHMOND, VA., *August 29, 1928.*

HON. R. KENT SPILLER,
*Attorney for the Commonwealth,
Roanoke, Virginia.*

DEAR COLONEL:

Your letter of August 15 was duly received, but, owing to the stress of important matters and the fact that the case about which you wrote was continued until the 3rd of September, I have delayed writing you my opinion concerning the situation brought about by the seizure of the automobile mentioned by you. In your letter you write:

"A few days ago the prohibition enforcement officers seized an automobile driven by its owner. In the personal possession of one of the passengers in the car was found a quart of liquor, which before the officers could recover it was thrown from the car by the passenger, and only about one pint of it recovered in the broken jar.

"This morning the owner of the car moved the court to release his car without the payment of costs on a showing that he was innocent of the liquor being in the car, and that he did not know his friend, whom he had picked up as a guest, had any liquor. The court announced his ruling that the law did not contemplate the seizure of an automobile where the owner and driver were ignorant of the possession of liquor by parties riding in his car. I asked the court to continue the case until I could confer with your office, and he continued it over until September 3rd.

"The court made it plain that he would rule that the liquor must be found in the car and not on the person of any occupant; that if the liquor was in the pocket of a person riding in the car, then the liquor was not in the car within the meaning of the statute. Such a ruling known to the bootleggers would make it possible for wholesale traffic in liquor by automobile where all liquor carried in the car would be on the person of passengers and even the driver, as the court has announced that the officers have no right to search the persons riding in the car, but must find liquor in his search of the car."

There has been no ruling to which I can refer you as laid to the solution of the problem contained in your letter.

Where the car is seized and the car itself contains ardent spirits contrary to law, there is, of course, no question as to its liability to confiscation, subject to the claim of owners and lienors to relief. Where, as in the instant case, no liquor is found in the car, but upon the person of a passenger, a very different situation arises. Provided it is concealed upon the person of a passenger, and without his knowledge that it is on the person of his passenger, I am rather of the opinion of Judge Hart. The right to search a car is confined to the car and does not extend to the person either of the driver or of a passenger, without a search warrant.

Upon the other hand, if liquor is being transported, with the knowledge of the owner, the lienor or the driver, upon his person or the person of any passenger in the car, and that fact is disclosed through any lawful means, such as an accident, I take it that the car is subject to confiscation. The fact that the ardent spirits was upon the person of an individual would not relieve it from forfeiture.

At any rate, where the car is of considerable value, I should advise an appeal in any case in which relief is granted under the circumstances last mentioned by me.

In the last paragraph of your letter you say :

"One of the reasons for my request for authority from the Governor to dispose of cars without referring the matter to him was to take care of such cases where I know the car will be released by the court, and on an agreement I can get costs by releasing to the party claiming to be the innocent owner or lien holder where I am unable to prove his or her connection with the transportation."

I do not understand that the law requires the Governor to be notified in confiscation cases until after final judgment. You have undoubtedly full authority to settle confiscation cases, just as you had previous to the amendment to section 28, and where the situation is such that you reasonably expect an adverse ruling and you cannot and do not expect an appeal, you not only have the authority, but I advise that you make the best settlement possible with the claimant and lienor.

Yours very truly,

JNO. R. SAUNDERS,

Attorney General.

INTOXICATING LIQUORS—Authority of trial officer to proceed with trial in absence of attorney for the Commonwealth—Fee of Commonwealth attorney—Final hearing.

RICHMOND, VA., November 26, 1928.

HON. W. S. JOHNSON, *Mayor,*
Damascus, Virginia.

DEAR SIR:

I am in receipt of your letter of the 23rd instant, in which you write:

"In regard to a violation of the prohibition law, where the Commonwealth's attorney has been notified by the trial officer and fails to attend, can the trial officer proceed with the trial in his absence? Is there any law where the Commonwealth's fee shall be more than \$10 except the final hearing where it is \$25? What is termed the final hearing? Is any case before a mayor or magistrate considered the final hearing?"

Mayors or other trial officers of incorporated towns, after having notified attorneys for the Commonwealth, may proceed with trials of persons charged with violations of the prohibition law under prohibition ordinances of the town. They may not do so where there is no prohibition ordinance and they are acting as an ex officio justice of the peace, except under sections 17 and 18. Justices of the peace and mayors of towns acting ex officio as justices may try persons for violations of sections 17 and 18 of the prohibition law in the absence of the attorney for the Commonwealth.

Where trials are had for violations of town prohibition ordinances and attorneys for the Commonwealth appear (except for offenses under sections 17 and 18) where the case is finally disposed of and no appeal is taken, there should be charged in the costs in favor of the attorney for the Commonwealth a fee of \$25, section 37 of the prohibition law providing:

"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, anything in the charter or ordinances of any city or town to the contrary notwithstanding."

The provision of \$10 allowed attorneys for the Commonwealth for appearing before justices of the peace really amounts to nothing, as upon appeal the attorney is entitled as against the defendant to a fee of \$25 and the statute, section 46, provides that this amount should be inclusive of the \$10 allowed at the preliminary trial.

Under separate cover I am enclosing copy of the amended Layman Prohibition Law in effect June 17, 1928. In sections 37 and 46 you will find practically all of the provisions concerning fees of officers.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

INTOXICATING LIQUORS—Fees taxed in confiscation car cases.

RICHMOND, VA., July 28, 1928.

HON. I. L. BEVERAGE, *Clerk,*
Monterey, Virginia.

DEAR SIR:

I am in receipt of your letter of yesterday, in which you write:

"On April 20, 1928, the sheriff of Highland county seized an automobile truck in which was found one pint of ardent spirits. The attorney for the Commonwealth on April 24, 1928, filed information for the forfeiture of said truck. Upon such information the clerk issued a notice and had the same published in the Highland Recorder, a newspaper published in Highland county.

"The owner of the automobile comes into court claiming to be ignorant of the presence of ardent spirits in said automobile, and it appeared to the satisfaction of the court, from the evidence, that the owner of the automobile was ignorant of the illegal use to which the same was put and such illegal use was 'without his connivance or consent expressed or implied' by the owner of said automobile."

You then ask what fees are taxed in this case and to whom payable.

First, section 28 of the Layman prohibition law, in providing for relief to an innocent owner, where the car is found to have been guilty of the transportation of ardent spirits, provides :

“ * * * provided, however, such lienor or innocent owner shall pay the costs incident to the capture and custody of such automobile or other vehicle and to the trial of said cause.”

The same provisions for the payment of the costs above referred to are contained in the original Layman law, and the present law, as amended by chapter 374, page 990, of the Acts of 1928.

Both the amendment to section 28 of chapter 231 of the Acts of 1926, and the amendment to the same section of chapter 374 of the Acts of 1928, page 990, relieve innocent owners and lienors of the payment of costs, where a vehicle has been stolen.

Second, in cases determined before June 17, 1928, the date upon which the amendment to section 28 went into effect, the old law, providing the amount of fees of officers seizing vehicles and the attorneys for the Commonwealth filing information, applies, the fees of officers and the attorneys for the Commonwealth being fixed at \$10.00 each where relief is granted the owner or the lienor of a guilty vehicle, providing for the free relief of vehicles which were stolen from persons in possession.

Under the Acts of 1928, the fees of the officers and the attorneys for the Commonwealth are fixed at \$12.50 each instead of \$10.00 each, as provided in the Acts of 1926.

These fees are payable by the Commonwealth in the event that the car did not contain ardent spirits, or was stolen from the person in possession, although the car did contain ardent spirits.

In other cases of relief, the fees of the officers are payable by the owner or lienor to whom relief is granted.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

INTOXICATING LIQUORS—Bonds not required in case of successive convictions for drunkenness.

RICHMOND, VA., January 23, 1929.

HON. ROBERT A. RUSSELL,
Commonwealth's Attorney,
Rustburg, Virginia.

MY DEAR SENATOR RUSSELL :

Acknowledgment is made of your letter of recent date, in which you request me to advise you whether, in my opinion, the bond provided for in section 41 of the prohibition law should be required in cases of successive convictions for drunkenness in public or drinking in a public place.

It is true, as you say, that section 41 of the prohibition law contains no exceptions to the rules there laid down. After careful consideration of the matter, however, I am of the opinion that this section does not apply to prosecutions for being drunk in public nor for drinking in public places.

From an examination of sections 17 and 18 of the prohibition law, relating to these last two mentioned offenses, you will see that justices of the peace are given jurisdiction for the trial and disposition of such cases. The only punishment provided is a fine of from \$5.00 to \$100.00 in one case and from \$5.00 to \$50.00 in the other. No jail sentence can be imposed, nor is additional penalty provided for subsequent convictions for these two offenses.

The General Assembly, in my opinion, has placed these offenses in an entirely separate and distinct class from other violations of the prohibition law, and I do not think that it was ever intended that the bond provided by section 41 should be required in such cases, for the reason that the bond and the confinement incident to the failure to give such bond would be out of all proportion to the offense committed and the punishment fixed therefor by the General Assembly.

While no greater punishment has been prescribed for a second offense in such cases, if a bond was required, it might result in the commitment to jail of the defendant for a period not exceeding six months for his failure to give bond.

In this connection, I call your attention to the case of *Messer v. Commonwealth*, No. 2, 145 Va. 872 (1926). It is true that this case has no direct bearing upon the question here under consideration, but it does indicate that punishments authorized by the law itself will be regarded by the court as out of all proportion to the offense and subject to reversal where a severe punishment is imposed for a petty violation of the law. I do not think there can be any doubt about the fact that the General Assembly regarded these two offenses as petty offenses and as in an entirely different class from the principal offenses enumerated in sections 1, 3, 4 and 5 of the law.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

INTOXICATING LIQUORS—Bonds—When period of limitation begins to run.

RICHMOND, VA., April 24, 1929.

MAJOR R. J. YOELL, *Superintendent,*
The State Penitentiary,
Richmond, Virginia.

MY DEAR MAJOR YOELL:

Acknowledgment is made of your letter of April 12, 1929, in which you state that one J. W. Folse was convicted of a violation of the prohibition law and sentenced to six months' confinement in jail and the payment of a fine of \$100.00. As this was his second offense, he was required to furnish a bond which he was unable to give. The time for which he could be held on account of his sentence and fine is about to expire, and you request me to advise you whether the six months' limitation for failure to give bond runs concurrently with his jail sentence, or whether it is cumulative thereto for the time he was held on account of the jail sentence and the non-payment of the fine and costs.

Section 41 of the prohibition law reads as follows:

"In addition to the penalties imposed by this act for the violation of any of its provisions, the court may, in its discretion, after conviction is had, for the first offense, and shall after every subsequent conviction, require the defendant to execute bond, with approved security, in the penalty of not less than five hundred, nor more than five thousand dollars, conditioned that the said defendant will not violate any of the provisions of this act, for the term of one year. 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, said bond when not given during the term of the court by which conviction was had, may be given before the judge thereof in vacation or before the clerk of the court in which conviction was had."

Due to the last sentence of this statute, there is some question as to when a bond begins to run where it is given at the same term at which it is required. However, I am clearly of the opinion that, where a bond is not given, the six months' period for which a person may be held for failure to give such bond is cumulative to the period of his confinement for a violation of the law and failure to pay the fine and costs, and does not run concurrently therewith.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

INTOXICATING LIQUORS—Confiscation of automobile—Transportation of ardent spirits.

RICHMOND, VA., *August 4, 1928.*

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

DEAR MR. HAYES:

I am in receipt of your letter of yesterday requesting an opinion as to the present status of the law requiring recordation, or docketing, of liens upon cars, as applicable to the forfeiture clause contained in section 28 of the Layman Prohibition Act concerning cars seized while containing ardent spirits.

This question is covered by subsection I of section 28 of the Prohibition Law, page 993, Acts of 1928, which provides in part as follows:

"And that he held a bona fide lien on said property and had perfected the same in the manner prescribed by law, prior to such seizure (if such conveyance be an automobile the memorandum of lien on the certificate of title issued by the Motor Vehicle Commissioner of Virginia on said automobile shall make any other recordation of same unnecessary)."

Dual recordation, or docketing, is no longer necessary, the law now only requiring that there shall be a memorandum of lien on the certificate of title issued from your office.

I desire to direct your attention to the fact that in order for a lienor of a car to be entitled to relief where it contained ardent spirits at the time of seizure,

the owner must have been at the time a resident of the District of Columbia, or the State of Virginia.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

INTOXICATING LIQUORS—Conviction of person for driving while drunk automatically suspends right to drive.

RICHMOND, VA., *October 31, 1928.*

MR. A. M. HARRISON,
Inspector of Traffic,
Norfolk, Virginia.

DEAR SIR:

I am in receipt today of a letter from Honorable James M. Hayes, Jr., Director, Division of Motor Vehicles, enclosing your letter to him of the 25th instant, in which you request Mr. Hayes to obtain an opinion from the Attorney General as to whether or not, prior to the 1928 amendment to section 25 of the State Prohibition Law, the first conviction of a person for driving vehicles mentioned in that section automatically suspended the right of that person to drive any vehicle mentioned therein; also whether or not, under the law as amended, a first conviction automatically suspends a person's right to drive.

Under both the old law and the new law, the right of a person to drive an automobile who has been once convicted, under section 25 of the prohibition act, of driving while under the influence of intoxicants is automatically suspended, and this is so even though the conviction was the first offense.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

INTOXICATING LIQUORS—Driving car while under influence of—Additional penalty imposed by statute cannot be suspended.

RICHMOND, VA., *June 13, 1929.*

HON. T. MUNFORD BOYD, *Judge,*
Juvenile and Domestic Relations Court,
Charlottesville, Virginia.

MY DEAR JUDGE BOYD:

Acknowledgment is made of your letter of June 10, 1929, in which you say in part:

"I am taking the liberty of requesting your office for an opinion upon the question of whether a court before which a conviction has been had under section 4675 (25) of the Code of Virginia, as amended by Acts of Assembly of 1928, may, in a proper case, reinstate the driver's permission to operate his car before the expiration of the one year period."

It is my opinion that the additional penalty imposed by section 25 of the prohibition law, in making the judgment of conviction for any offense under this

section of itself operate to deprive the guilty party of his right to drive a vehicle referred to therein for a period of one year from the date of such judgment, cannot be relieved by any judge or justice. So far as I am advised, this has been the uniform construction placed on this part of section 25 of the prohibition law.

Sincerely yours,

JNO. R. SAUNDERS,
Attorney General.

INTOXICATING LIQUORS—Operating automobiles while under the influence of intoxicating liquors.

RICHMOND, VA., *February 11, 1929.*

HON. E. E. SKAGGS,
*Attorney for the Commonwealth,
Pennington Gap, Virginia.*

DEAR SIR:

I am in receipt of your letter of January 25, in which you ask an opinion as to the authority of a justice of the peace to try a charge of driving an automobile while under the influence of intoxicants, under the provision of section 25 of the Layman Act.

I agree with you that he has no such jurisdiction. He may, under the provisions of section 33, accept a plea of guilty and fix the punishment.

My attention has been called to section 4722 of the Code of 1924, providing for the punishment of persons for driving an automobile while under the influence of intoxicants.

In my opinion, that section is in conflict with the provisions of section 25 of the Layman Act and is, therefore, not operative and a prosecution for the offense of driving while drunk can only be prosecuted under the provisions of the Layman Prohibition Act.

It is certainly not the privilege of the defendant to determine under what section he is willing to be prosecuted. It is the province of an attorney for the Commonwealth to prosecute in any case at his option.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

INTOXICATING LIQUORS—Automobile—Information against in prohibition cases.

RICHMOND, VA., *July 25, 1928.*

HON. ROBERT A. RUSSELL,
*Commonwealth's Attorney,
Rustburg, Virginia.*

MY DEAR SENATOR:

My absence from the office on a vacation is accountable for your not having an earlier reply to your letter of July 4, in reference to informations against automobiles seized for a greater period than ten days.

As I understand the provision to which you refer, and I had something to do with the amendment to section 28 of the Layman act, it was not intended to interfere with the rights of the attorney for the Commonwealth to institute information proceedings for the forfeiture of automobiles seized more than ten days before he had an opportunity to file such informations, but it was to give the Attorney General authority to file informations in cases of delays or where attorneys for the Commonwealth are disinclined to file informations against cars.

I suggest that you go ahead and file informations against all cars subject to suit in your county, and, if authority is required from this office, such authority is hereby given.

In further reference to your letter of July 20 to Honorable Leon M. Bazile, Assistant Attorney General, I would say that this office has not proper forms for forfeiture informations under the Acts of 1928. We have some on hand which were prepared for use under the old law. If you desire any of these, I will be glad to let you have some.

Let me call your attention to the fact that under the new law it is necessary to have personal service upon the owners of the car, those who are known to have endorsed for the owner, and lienors. The provision for notice as to the owner, endorsers and guarantors of the original purchase price is because of the fact that under certain circumstances the law allows personal judgments against these people while as to the lienor it is for the purpose of providing him with actual notice of the proceedings, that he may appear and litigate his rights.

Yours very truly,

EDWIN H. GIBSON,
Assistant Attorney General.

**INTOXICATING LIQUORS—Automobiles: Driven while under influence
of intoxicants—Revocation of permit.**

RICHMOND, VA., July 25, 1928.

HON. QUINTON G. NOTTINGHAM,
Commonwealth's Attorney,
Eastville, Virginia.

MY DEAR SIR:

I am in receipt of your letter of yesterday, in which you ask my opinion as to the operation of that part of chapter 413, page 1078, of the Acts of 1928, providing that a judgment of conviction for driving an automobile while under the influence of intoxicants shall operate to deprive the driver of his right to drive a vehicle or conveyance for a period of one year from the time of his conviction.

In my opinion, the provision depriving him of his right to drive for a year is a part of the penalty prescribed for the operation of a motor vehicle while under the influence of intoxicants, and the judgment of a justice or of a circuit court, in the event of an appeal from either, is suspended during the time the appeal is pending, and the *conviction* dates from the final determination of the prosecution, whether such final determination is had in a justice's court, in a circuit court or the Court of Appeals.

I take it that you refer to a conviction before a justice applies to a trial justice, as justices of the peace have no jurisdiction to try a person for a violation

of section 25 of the prohibition act. Where there are trial justices in a county, they have original jurisdiction. Justices of the peace, while they have no jurisdiction to try violations of the prohibition law, other than offenses arising under sections 17 and 18, may, in the presence of the Commonwealth's attorney, with his consent endorsed on the warrant, accept a plea of guilty and fix the punishment in misdemeanor cases. Subsection 33, section 4675 of the Code. No appeal is allowed a person who has plead guilty before a justice. *Cooper v. Town of Appalachia*, 145 Va. 861.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

**INTOXICATING LIQUORS—Driving automobile while under influence
of—Punishment for second offense.**

RICHMOND, VA., *February 21, 1929.*

HON. HERBERT J. TAYLOR,
Attorney at Law,
Staunton, Virginia.

MY DEAR MR. TAYLOR:

I have carefully read your letter of recent date, in which you state you have a prosecution of a man charged with driving an automobile while intoxicated; that he has not been convicted of this particular offense before, but has been convicted of transporting liquor. You then desire to be advised whether the present offense can be charged as a second offense, or whether, in order to so charge him in this case, it would be necessary to prove a prior conviction of driving a car while intoxicated.

I do not see how, even though this party be charged in an indictment as having committed a second offense, his punishment could possibly be increased, due to the fact that section 25 of the Virginia Prohibition Law is all inclusive and provides the sole punishment for a first or subsequent offense of driving a car while under the influence of intoxicants.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

INTOXICATING LIQUORS—Second conviction—When felony.

RICHMOND, VA., *March 8, 1929.*

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

DEAR MR. FUNK:

I am in receipt of your letter of yesterday, explaining the difficulties you have had in prosecutions of second offense violations of the prohibition law and asking my opinion on two hypothetical questions.

"(1) A is convicted of transporting less than a gallon of ardent spirits, is sentenced to pay a fine of \$50 and to serve 30 days in jail. After final

conviction A is again charged with transporting less than a gallon of ardent spirits. Should A be indicted for a felony or misdemeanor?"

The indictment against the accused should be for a felony.

Under the provisions of section 3 of the Layman Prohibition Act, it is made "unlawful for any person to * * transport * * ardent spirits * *."

Section 5, defining degrees of guilt for violations of the prohibition law, in part provides:

"* * Any person who shall violate any other provisions of sections three and four of this act, * * (including transportation) * * except as herein provided, shall be deemed guilty of a misdemeanor for the first offense and of a felony for any subsequent offense committed after the first conviction * *."

There follow certain exceptions to the provision making a second offense for violations of sections 3 and 4 felonies. Transportation is not included in these exceptions. Therefore, there can be no reasonable doubt of the fact that, where one already has been convicted for transportation and again transports ardent spirits, he should be indicted and, upon proof, convicted for a felony. In my judgment this conclusion is too plain for argument.

"(2) A is convicted of transporting less than a gallon of ardent spirits, is sentenced to pay a fine of \$50 and to serve 30 days in jail. After final conviction A is charged with driving a car on the public highway while under the influence of intoxicants. Should A be indicted for a felony or misdemeanor?"

The accused, having been once convicted of transportation of ardent spirits, is charged with driving a car on the public highways while under the influence of intoxicants.

You will notice that in section 5, defining degrees of offenses, it is provided near the middle of the sentence "except as herein provided" and that in section 6, under the head of penalties, the following:

"Any persons who shall violate any of the provisions of this act, shall, except as otherwise herein provided,"

shall be deemed guilty of certain offenses and punished according to the schedule contained in that section.

The offense of driving an automobile while under the influence of intoxicants is "otherwise provided" by section 25 of the prohibition act, in which penalties for first and second violations are specifically set out.

I am of the opinion, therefore, that a person accused of driving an automobile while under the influence of intoxicants should be indicted for a misdemeanor and his punishment fixed by a fine of not less than one hundred dollars nor more than a thousand dollars and by confinement in jail for not less than thirty days nor more than one year.

From the above opinion, you will see that I fully agree with the conclusion contained in the second paragraph of your letter.

In your postscript you say that you have been unable to find a case in the Court of Appeals bearing on the questions you have asked, or any case before them where a second offense was charged as a felony and the first as a misdemeanor.

In my opinion, there are two cases on this subject: *Staples v. Commonwealth*, 140 Va. 583, 125 S. E. 319, and *Keeney v. Commonwealth*, 147 Va. 678, 137 S. E. 478.

The indictment in the *Staples Case* is copied in full in the Virginia Report. From that you will see that the accused was convicted on the 16th day of April, 1919, for transporting ardent spirits and that afterwards it was charged that the same party "did unlawfully offer, keep, store and expose for sale ardent spirits." These two offenses are said by Judge Burks to be offenses in which the prosecution and conviction were for a felony, and that the court concurred in that view. The transportation of ardent spirits for which Staples was convicted in April, 1919, was *not* a felony. However, having once been convicted of that offense, unlawfully offering, keeping, storing and exposing for sale ardent spirits became a felony for a second conviction of offenses charged in section 3 of the prohibition act.

It would seem that this case blankets the case covered by your first question.

The *Keeney Case* contains an indictment for a first and second offense. Judge Chichester in his opinion holds that the indictment, in the absence of the bill of particulars, charged both a felony and a misdemeanor, according to the proof of the character of the second offense, the first offense charged in the indictment being for "keeping, storing and exposing for sale" while the second offense was for "selling, keeping and giving away" ardent spirits. While he does not in so many words say so, I take it that Judge Chichester meant to say that, should the proof show the second offense to have been a sale of ardent spirits, it would have been a felony, while, if the second offense was giving away ardent spirits, it would have been a misdemeanor.

I will be pleased if you will write me and let me know whether my answer to your questions is satisfactory and also the decision of the judge should the questions or either of them be presented to him for adjudication.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

INTOXICATING LIQUORS—Forfeited automobiles—Power of Governor to consent to revocation of forfeiture after term of court has adjourned.

RICHMOND, VA., March 29, 1929.

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

MY DEAR GOVERNOR:

I have before me a letter of Hon. Wilson M. Farr, Commonwealth's Attorney of Fairfax county, to you dated March 20, 1929, in re: a Studebaker roadster automobile seized while engaged in the transportation of ardent spirits and occupied by E. E. Mansfield and Leona Mansfield.

I have carefully read Mr. Farr's letter and it appears from the facts stated therein that the judgment entered by the circuit court of Fairfax county, forfeiting this automobile to the Commonwealth, is final, the term at which it was entered having adjourned. *Allens v. Commonwealth*, 114 Va. 826 (1913). The

judgment having become final in favor of the Commonwealth, I know of no authority vested in you, or any other official of the Commonwealth, to consent to the reopening of this case. It seems to me that the General Assembly is the only body that has such authority.

I have no doubt that you would willingly consent to the reopening of this case, if you had the authority to do so. It is my opinion, however, that you are without such authority.

Very truly yours,

LEON M. BAZILE,
Assistant Attorney General.

INTOXICATING LIQUORS—Automobile forfeitures—Bonds—Costs included in.

RICHMOND, VA., March 22, 1929.

HON. A. O. LYNCH,
*Attorney for the Commonwealth,
Norfolk, Virginia.*

DEAR MR. LYNCH:

The Attorney General has handed me for attention your letter of the 21st instant, which I quote in part:

"Section (e) of paragraph 28 of the prohibition law, as amended in 1928, provides that the owner or lienor of the seized property may obtain possession thereof before the hearing on the information by giving bond in a penalty of double the amount of the appraised value of said property, with a condition that if, upon the hearing on the information, the judgment of the court be that said property be forfeited, judgment may thereupon be entered against the obligors on said bond for the penalty, to be discharged by the payment of the appraised value of the property seized 'and costs.' Does the language in quotations mean that in addition to paying the appraised value of the property, the obligors on said bond must also pay all costs incident to the forfeiture, including the fee of \$25.00 each to the officer making the seizure and to the Commonwealth's Attorney?"

You inquire as to whether or not the provision that the bond given by the claimant to pay the appraised value of the car seized "and costs" includes all costs or only the costs of the litigation.

In the opinion of the Attorney General "costs" includes all costs including the fee of the attorney for the Commonwealth and the seizure officer.

Are you having many confiscation cases? Are foreign car claimants attacking the constitutionality of subsections (h) and (i) refusing relief?

If there are cars of considerable value for which relief is being claimed, I will ask you to let me know, as I am making an effort to secure information as to the general reputation of car purchasers in other States through the Federal Administrator for Virginia, who is very kindly and efficiently co-operating with the Attorney General's office for that purpose.

I am also taking the liberty of forwarding you copy of the brief of the Attorney General in a confiscation case in which the constitutionality of subsections (h) and (i) is being attacked.

Yours very truly,

EDWIN H. GIBSON,
Assistant Attorney General.

INTOXICATING LIQUORS—Fees—No provision in law for payment of fees to a private citizen.RICHMOND, VA., *September 10, 1928.*

HON. S. W. SHELTON,
Commonwealth's Attorney,
Palmyra, Virginia.

DEAR MR. SHELTON:

In reply to your letter of September 8, in which you submit certain questions as to whether or not citizens would be entitled to a fee, if they should find stills and bring them in, or if they should report the location of a still to officers, I will state that there is no provision in law for the payment of a fee, under these circumstances, to a citizen.

If an officer summoned a citizen to assist him in making an arrest or the seizure of a still, then, of course, a citizen becomes an officer and usually the officers divide the fees with them under these circumstances.

All of the fees provided for in the prohibition law, as you will observe from a reading of the law, are payable to officers and not to individual citizens.

Trusting this will give you the desired information, and with kindest regards, I am

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

INTOXICATING LIQUORS—Fees of officers making arrests.RICHMOND, VA., *November 28, 1928.*

HON. LEMUEL F. SMITH,
Attorney for the Commonwealth,
Charlottesville, Virginia.

MY DEAR SIR:

I am in receipt of your letter of the 23rd instant, which I quote in full:

"I desire to know what you think of the following situation: On several occasions raids have been made in this county and prisoners captured, especially in the violation of the prohibition act. Arrests were made, indictments had, and the prisoner bailed. Upon the calling of the case the prisoner failed to respond with the result that his bond was forfeited and the State proceeded to collect full amount under the bail bond. The Clerk then was confronted with certain costs in the offense which could not be tried because of absence of defendant. The court has indicated his willingness to enter a general order directing that before any money collected by its Clerk should be transmitted that the costs out of the case should be deducted and paid to the officers entitled.

"We will say then that bail bond was \$500 which was forfeited and collected. It seems that it is an anomalous situation that the Commonwealth should collect \$500 net to itself, and should not pay the arrest fees simply because the money was collected on the bond, and that the Commonwealth should be enriched to the extent of \$500 without payment of any of the dues to the officers making the arrest. I understand that such an order has been entered in several of the courts. Whether it is technically correct or not I have not satisfied myself. Certainly such an order is equitable and it is certain that the officers making the arrest (and I am not including myself

as one of the interested) should be paid. The court here suggested that I discuss the matter with you.

"In order that there should be no confusion about the situation, I will put the exact case which has from time to time confronted us: A is arrested for transporting liquor. He is indicted by the grand jury, gives bail and when his case is called he fails to appear. His bond of \$500 is forfeited and I promptly collect \$500, plus the costs, and turn over to the clerk \$500 in cash. A goes to St. Louis or some other distant point and there is no possibility of getting him back, certainly for a number of years. Would the circuit court be justified in entering a general order which would in effect provide that before the clerk transmits this \$500 he should pay the costs which had accrued up to the trial? This court is inclined to the belief that it has such authority."

In the first paragraph of this letter you state a case in which, an arrest having been made, the accused is let to bail for his appearance to answer the charge, he fails to appear, his recognizance is forfeited, and judgment is entered for the amount of such recognizance. It would appear from this statement that judgment is entered only for the face of the bond, as you say that the judge of your court has indicated his willingness to enter a general order directing the payment of costs out of the amount collected by the clerk before it is transmitted to the Comptroller for credit to the Literary Fund.

I do not think that such an order should be entered. This being a criminal case, the costs are payable by the Commonwealth. Judgment upon the recognizance, under section 3505, should include a taxed attorney's fee and five per centum in favor of the attorney for the Commonwealth, and all bonds should provide for the payment of the amount of bail required and costs and, when it is necessary to levy, to collect the judgment which is entered upon the recognizance, the sheriff or collecting officer would be entitled to his fees just as he would upon any other judgment.

I do not just understand that there can be any failure of equity so far as the collection of arrest fees are concerned, and it should make no difference to the officer whether the fees are allowed by the court as other fees and expenses are allowed and paid by the Commonwealth, or paid out of the recovery on the bond, and I take it that this was in mind when section 3505 was passed making provision alone for the payment of the fee and commission to the attorney for the Commonwealth.

It is possible that there may be a difference where accused is arrested upon a prohibition charge, is bailed to appear, forfeits his recognizance, and is tried in his absence, in those cases in which he has absconded, as the officer's fee collectable out of the State treasury is only \$1.50, while, if it was made out of the accused, it would be \$10. However, it is impossible to provide for every contingency.

In cases where cash bond is given, the amount deposited should be the amount required plus the attorney's fee and commission provided in section 3505 and the incidental costs of the judgment. Even in this case I do not see how, under the present law, the fee of officers can be provided for.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

INTOXICATING LIQUORS—Fee of Commonwealth's attorney in prohibition cases.RICHMOND, VA., *June 12, 1929.*

MR. T. L. STANLEY, *Constable,*
Lawrenceville, Virginia.

DEAR SIR:

In reply to your letter of the 29th ultimo, answer to which has been delayed on account of my attendance upon the Supreme Court of Appeals at Wytheville, after noting the questions you ask concerning fees, I desire to advise you that I have already considered the amount due attorneys for the Commonwealth upon the final hearing of prohibition cases before mayors of towns, and have arrived at the conclusion that they are entitled to the same fees under section 46 of the prohibition law as they are entitled to prosecutions in the circuit court. I am enclosing you a letter written on this subject to the Honorable Robert A. Russell, Attorney for the Commonwealth, of Campbell county, under date of February 11, 1929.

I note that you say in your letter that the young man arrested by you and Sheriff Turnbull was fined \$25.00 by the mayor of Lawrenceville, upon his conviction for the *possession of ardent spirits*, and that the attorney for the Commonwealth is allowed a fee of \$25.00. He is entitled to that fee in all cases in which he appears even though the accused pleads guilty. Under the provisions of the same section, where an accused is carried before a justice of the peace, he may plead guilty instead of being sent on to the grand jury and, as an inducement for him to plead guilty and to avoid the burdensome necessity, inconvenience and delay of a trial before the circuit court, the statute provides that, upon his plea of guilty before such justice, the fee of the attorney for the Commonwealth is only \$10.00.

In prosecutions under sections 17 and 18, whether in the circuit court or before a mayor or trial justice of a county, the fee of the attorney for the Commonwealth is only \$5.00 in contested cases. He receives no fee in either court upon a plea of guilty.

Not knowing whether you have a Layman Prohibition Law, I am enclosing you one under separate cover and refer you to section 46.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

INTOXICATING LIQUORS—Fees of officers—Attorneys for the Commonwealth.RICHMOND, VA., *February 11, 1929.*

HON. ROBERT A. RUSSELL,
Attorney for the Commonwealth,
Rustburg, Virginia.

MY DEAR SENATOR:

I am in receipt of your letter of the 6th instant, enclosing copy of your letter to Mr. Whitehead under date of January 28 and his reply of the 2nd instant concerning the matter of fees of an attorney for the Commonwealth in prohibition prosecutions before trial justices.

In my opinion, fees of all officers, including fees of attorneys for the Commonwealth, are the same in cases heard by trial justices as those taxed in courts of record. It is only in those cases before justices of the peace upon pleas of guilty and under sections 17 and 18 that the fees of attorneys for the Commonwealth are less than the fees provided for in section 46 in trials in circuit courts.

In other words, where there is an actual final determination of all prohibition cases, except prosecutions under sections 17 and 18, attorneys for the Commonwealth and all other officers are entitled to the same fees as those provided for by section 46 of the Layman Prohibition Act where trials are had in circuit courts.

I have recently ruled that the same fees are taxable where cases are finally disposed of by mayors or other trying officers for violations of town ordinances.

Yours very truly,

JNO. R. SAUNDERS,

Attorney General.

INTOXICATING LIQUOR—Illegal to publish advertisements of malt, etc.

RICHMOND, VA., *January 17, 1929.*

NEWS LEADER,

Richmond, Virginia.

GENTLEMEN:

Acknowledgment is made of your request of this morning that you be advised whether it is legal to publish advertisements of malt, malt syrup, malted grain, mixtures thereof, or substitutes for malt.

It is my opinion that advertisements of any of these articles violate the Virginia Prohibition Law. See sections 3, 15, 16 and 86 thereof. It is true that some newspapers in Virginia have carried such advertisements in the past, but, on the matter being taken up by this office, they were discontinued.

Yours very truly,

LEON M. BAZILE,

Assistant Attorney General.

INTOXICATING LIQUORS—Right of police justice to suspend jail sentence in case of driving while under influence of intoxicants.

RICHMOND, VA., *February 6, 1929.*

HON. JOHN H. BOOTEN, *Justice,*
Luray, Virginia.

DEAR MR. BOOTEN:

I am in receipt of your letter of yesterday, which I quote in full:

"Will you please advise me whether or not a police justice of a town may suspend the jail sentence in a case of driving while under the influence of intoxicants if the prohibition ordinance of the town authorizes him to do so? I am of the opinion that the general law prohibits such suspension, but am advised that it is done all over the State. As I have been charged with acting arbitrarily and contrary to established practice, I shall appreciate your advice."

I take it that you, as justice, are authorized by ordinance of the town of Luray to try cases involving prohibition law violations of the ordinance adopted by your town.

There is considerable difference of opinion as to the rights of a mayor or justice of a town to suspend for any violation of the prohibition law other than that conferred upon such mayor or justice by section 37 of the Layman Prohibition Act.

However, there is an inference contained in the second paragraph of section 6 of the Layman Act that a judge, *justice*, mayor or other officer trying the case may suspend a person upon conviction for a first offense misdemeanor. At least, this has been the construction placed upon the law by the Attorney General's office.

No justice of the peace may suspend sentence in any case. A mayor or a town justice may suspend a jail sentence imposed upon a person for driving while drunk for the first offense, but under no circumstances can he suspend or excuse the payment of a fine or relieve the person convicted of the prohibition of law preventing him from driving an automobile within one year of the date of his conviction.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

INTOXICATING LIQUORS—Jurisdiction of towns.

RICHMOND, VA., *November 24, 1928.*

HON. N. B. HUTCHERSON, *Mayor,*
Rocky Mount, Virginia.

MY DEAR SIR:

I am in receipt of your letter of the 22nd inst., which is as follows:

"Have incorporated towns of the State of Virginia jurisdiction in liquor cases for unlawful possession of ardent spirits within three miles of the corporate limits of said town, when they have an ordinance in accord with the State law covering such cases?"

"We are having some trouble enforcing this law. Some of our friends say that we do not have jurisdiction in cases of unlawful possession only within the corporate limits of said town, and we would like to have your opinion on this matter as early as is possible for you to let us have it."

In my opinion, towns are authorized by section 37 of the Prohibition Law to pass ordinances covering offenses of every character against the prohibition laws of the State, the penalties contained in such ordinances being the same as those prescribed by the State Prohibition Law.

In *Barber v. City of Danville*, 149 Va. 418, the Supreme Court decided that under the provisions of section 34, cities and towns could not pass ordinances covering the three mile territory around the city of Danville, except in cases of manufacture, sale or distribution of ardent spirits.

The Legislature in 1928 amended section 34 so as to eliminate the objection contained in the decision in *Barber v. City of Danville*, limiting the three mile jurisdiction to cases of manufacture, sale or distribution, and provided that mayors and police justices should have jurisdiction over territory contiguous to cities and

towns within three miles of the city or town limits for the enforcement of all ordinances, which the city or town is authorized to pass under section 37 of the Prohibition Law.

This change was made for the purpose of extending the jurisdiction of cities and towns to cover all offenses, and, in my opinion, it was so worded as to accomplish its purpose.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

INTOXICATING LIQUORS—Statutes of limitation do not refer to prohibition felonies.

RICHMOND, VA., *October 25, 1928.*

HON. GEORGE K. TAYLOR, JR.,
Commonwealth's Attorney,
Amelia Court House, Virginia.

MY DEAR MR. TAYLOR:

Acknowledgment is made of your letter of October 23, 1928, in which you say:

"I have evidence against a man charged with manufacturing whiskey, but I cannot prove that the offense occurred later than eighteen months ago. Is there any law under which I can institute a prosecution against him more than one year after the commission of the offense?"

Whiskey is ardent spirits. The manufacture of distilled ardent spirits is made a felony by section 5 of the Virginia Prohibition Law. So far as I am able to find, there is no statute of limitation for a violation such as this. The only statutes of limitation, with reference to criminal cases in this State, are sections 4768, 2396, 4413 and 4926 of the Code. None of these statutes relates to prohibition felonies.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

INTOXICATING LIQUORS—Warrants—Fees of Commonwealth's attorneys.

RICHMOND, VA., *December 3, 1928.*

HON. E. W. THEINERT,
Justice of the Peace,
Brooke, Virginia.

DEAR SIR:

I am in receipt of your letter of November 28, in which you ask certain questions concerning proceedings against Massey Woolfrey and Raymond Minnick, charged with violations of the State Prohibition Law for the illegal transportation of ardent spirits.

In your first question you ask whether or not the accused, being charged with the same offense, should not have been proceeded against in one warrant.

(1) The Court of Appeals of Virginia in *Ossa v. Town of Appalachia*, 137 Va. 795, held in a case in which several defendants complained of the action of a circuit court in consolidating warrants and trying the accused together for a misdemeanor that, where the offense was one and the same, it was not only permissible, but the proper thing to do, to consolidate and try the warrants together, as the proper course to have been pursued was to have issued one warrant for the arrest of all of the defendants.

(2) My reply to your first question is an answer to part of this inquiry. However, I think you are mistaken as to the attorney for the Commonwealth being entitled to only one fee, as I am of the opinion that an attorney for the Commonwealth, in prohibition cases, is entitled to a separate fee for each of the persons tried and convicted.

(3) In my opinion, the fee of the attorney for the Commonwealth as against each of the defendants should have been taxed as \$10.00.

It is true that section 33 of the Layman Prohibition Act, adopted by the Legislature of 1924, provided that fees of all officers should be the same as those elsewhere provided for prosecutions in courts of record. Under that section, attorneys for the Commonwealth should be entitled to fees of \$25.00 as against each defendant, but the Legislature of 1926, amending section 46 of the Layman law, provided that attorneys for the Commonwealth should be entitled to a fee of \$10.00 in cases where pleas of guilty are entered in misdemeanor cases before a justice of the peace, except under sections 17 and 18, in which case you would be entitled to no fee at all where the accused plead guilty, and only to a fee of \$5.00 in each case where defense was made and the accused found guilty.

(4) Previous to the 1928 session of the Legislature in those cases in which an accused was found guilty, section 8 of the prohibition law provided that the judge or justice should sentence the accused to additional period of confinement of not less than three nor more than six months for default in payment of fines.

At its 1928 session the Legislature amended section 8 so as to provide that persons sentenced to confinement for prohibition law violations should work out their fines just as persons sentenced for violations of any other law, such persons being entitled to a credit of 50 cents per day for each day they work and 25 cents per day for each day of confinement upon which they do not work.

(5) In my opinion, there is no law authorizing a justice of the peace or a court of record to enter a personal judgment for damages against an accused on account of injury to property. In arriving at the punishment upon a plea of guilty, a judge or justice is warranted in endeavoring to arrange adjustment of the damage done to a person's property, but this endeavor cannot be made a part of a judgment nor collected by any protest in a criminal proceeding.

Some time ago I inadvertently advised an attorney for the Commonwealth that he was entitled, upon pleas of guilty before a magistrate, to a fee of \$25.00 in each case. This was done under the provisions of section 33 and did not take into account the amendment to section 46, to which I have referred you.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

INTOXICATING LIQUORS—Wine lawfully manufactured and left by deceased passes to heirs. Permits must be obtained to transport to their respective bona fide homes.

RICHMOND, VA., *September 25, 1928.*

S. A. THOMPSON, ESQ.,
Attorney at Law,
Stuart, Virginia.

MY DEAR MR. THOMPSON:

Acknowledgment is made of your letter of September 20, 1928, in which you say:

"A was a householder who had a family of children who were married and had established homes of their own, and none of them living at their old homestead. A died intestate. B qualified as his administrator, and when B, the administrator, went to the home to administer on his effects, he found in the cellar of that home, as the property of A a certain quantity of ardent spirits, principally wines that A had manufactured from his own grapes for his own family use, and had stored in his own cellar. A was not indebted so that the sale of said wines is not necessary for the payment of debts. The question that I am unable to answer is, has the administrator the right to make sale of those wines, either publicly or privately? I feel quite sure that he has not, publicly, but if he has privately, to whom has he a right to make such sale? And if he has not the right to make such sales, has he the right to deliver those wines to the distributees of the estate to be divided in kind among them; and if he has the right to make such division in kind, have those distributees the right to transport those wines to *their* homes there to be stored for their own use?

"It is true that the amount involved is not so very large and still it is something. The possession by A under the statute was clearly lawful, and the wines in his possession were property of value. What steps can the administrator take to lawfully dispose of that property?

"All parties concerned are extremely anxious to not violate any State law, and the wines will set still in the cellar where they are, pending advices from you as Attorney General as to what shall be done."

Under the Virginia Prohibition Law wine may be lawfully manufactured and possessed under certain conditions in this State—see section 32 of the Virginia Prohibition Law.

If the wine in question was lawfully manufactured and possessed by A, I am of the opinion that it passed, as other property, to the personal representative, and, I am further of the opinion that the personal representative is without authority to sell the same.

There being no debts in this case, I am of the opinion that it may be lawfully divided among the distributees of this estate, but before it can be transported by the distributees to their bona fide homes it will be necessary for them to obtain permits from the Attorney General, which are provided for by section 53 of the Prohibition Law.

Trusting this gives you the desired information, I am

Very truly yours,

JNO. R. SAUNDERS,
Attorney General.

INTOXICATING LIQUORS—Destroying evidence, fine for.

RICHMOND, VA., July 12, 1928.

HON. ROBERT A. RUSSELL,
Commonwealth's Attorney,
Rustburg, Virginia.

MY DEAR SENATOR RUSSELL:

Acknowledgment is made of your letter of July 6, 1928, in which you say:

"In the trial of a case for destroying evidence (about a pint of ardent spirits), the defendant raises the question that the fine should be only \$10, rather than \$50 and 30 days, which seems to be the minimum for a misdemeanor under the prohibition law.

"If there is anything under the prohibition law allowing a fine as small as \$10 for destroying evidence, please refer me to it, and oblige."

The offense referred to in your letter is provided for by section 49 of the Virginia prohibition law. It provides in part:

" * * It shall likewise be unlawful to conceal or destroy evidence before or after it shall have been lawfully captured by any person otherwise than as permitted by this act."

Except where specifically otherwise provided, the penalties for violating the prohibition law are fixed by section 6, as amended by the Acts of 1926, chapter 231, page 418. This section provides in part:

"Any person who shall violate any of the provisions of this act, shall, except as otherwise herein provided, be deemed guilty of a misdemeanor, and be fined not less than fifty dollars, nor more than five hundred dollars, and be confined in jail not less than one nor more than six months, * *."

More severe penalties are provided by other parts of the section for certain offenses and lesser penalties are prescribed for certain other violations of the act, among which is not included the destruction of evidence, unless such destruction be an unintentional or inadvertent violation of the act, in which event the penalty is also fixed by section 6. In this connection I call your attention to *Messer v. Commonwealth*, 145 Va. 838 (1926).

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

INTOXICATING LIQUORS—Seizure of horse transporting.

RICHMOND, VA., July 12, 1928.

HON. N. CLARENCE SMITH,
Commonwealth's Attorney,
Tazewell, Virginia.

MY DEAR MR. SMITH:

Acknowledgment is made of your letter of July 10, 1928, in which you request my opinion on the two following questions:

"(1) Supposing a man carrying ardent spirits on a horse, riding horse-back, under the law has the officer a right to seize that horse, or if the

ardent spirits are being carried in saddle-pockets on a horse, has the officer a right to search them without a search warrant?

"(2) In cases where officers take violators of the prohibition laws into the town courts, under proper ordinances, and the defendant is convicted and works out his prison term and his fine and costs on the State road, from whom does the officer collect his fee?"

Section 28 of the prohibition law was amended by chapter 374 of the Acts of 1928. The language of subsection a thereof is as follows:

"Where any officer charged with the enforcement of the prohibition laws of this State, shall have reason to believe that ardent spirits are, contrary to law, in any conveyance of any kind, either on land or on water (except conveyance owned or operated by a railroad, express, sleeping or parlor car or steamboat company, other than barges, tugs or small craft), it shall be the duty of such officer to search such conveyance, and if ardent spirits be found therein, contrary to the provisions of this act, he shall seize the same, and also seize and take possession of such conveyance, and the team if it be drawn by a team, * *."

Subsection d requires the attorney for the Commonwealth to file an information against the seized property, while subsection j requires the forfeiture to the Commonwealth of such property under certain circumstances.

It is, therefore, my opinion, in answer to your first question, that where ardent spirits are transported on the back of a horse both the ardent spirits and the horse are subject to seizure and forfeiture.

The answer to the last part of your first question is found in section 96 of the prohibition law. Under authority of this section, it is my opinion that an officer is authorized to search, without a warrant, baggage carried on the back of a horse.

In response to your second question, there is no provision made in the law for the payment of any fee out of the State treasury to an officer for enforcing a city or town ordinance. Indeed, to the contrary, section 2077 of the Code requires such city or town to pay for the support of such city or town prisoners while in the State convict road force, and section 37 of the prohibition law provides:

"The Commonwealth shall not be chargeable with any costs for enforcing the provisions of this section, nor shall any such costs be paid out of the State treasury."

Unless some provision is made by the city or town for the payment of the costs, where they are not paid by the accused, I suppose the officers will have to go without pay. Certainly no State funds can be used to pay for the enforcement of city or town ordinances.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

JAIL PRISONERS—State convict road force—Offenses against prohibition law.RICHMOND, VA., *February 11, 1929.*HON. IRBY TURNBULL,
Boynton, Virginia.

DEAR SIR:

In re: M. C. Howell.

I am in receipt of your letter of February 7, in which you write concerning the confinement of M. C. Howell, who you say was sentenced to serve nine months on the road and to pay a fine of \$25 and costs, but who you say "was not sentenced to serve any time on the road in the event he did not pay the fine and costs."

I note that you say that Howell was tried for a violation of the prohibition law and you ask me to examine the statute with regard to his confinement for non-payment of fine and write you my authority for the facts stated.

The General Assembly of 1928 amended section 8 of the Layman Prohibition Act. Previous to the amendment it became the duty of the court, upon conviction of a violation of the prohibition law, to impose an additional sentence for failure to pay fine and costs of not less than three months nor more than six months. The special provision of section 8, providing a term of imprisonment for the non-payment of fine and costs, was repealed and in lieu thereof it was provided that the person convicted should be sentenced to the State convict road force, under the provisions of sections 2094 and 2095 of the Code.

In my opinion, the law providing for confinement for non-payment of fine and costs is now automatic and no person is entitled to claim exemption from the operation of sections 2094 and 2095 because the court in its order did not specifically provide for confinement for the non-payment of fine and costs.

The superintendent of the penitentiary was so advised by one of my assistants.

Yours very truly,

JNO. R. SAUNDERS,
*Attorney General.***JAILS AND PRISONERS—Convict road force—Jailor's fees.**RICHMOND, VA., *March 14, 1929.*HON. R. M. YOEELL,
Superintendent of Penitentiary,
Richmond, Virginia.

MY DEAR MAJOR YOEELL:

Acknowledgment is made of your letter of March 9, 1929, in which you say:

"Recently two convicts at a distant part of the State were wanted as witnesses in King and Queen county. These men were sent to be witnesses at the expense of the State convict road force, because the judge of the King and Queen court had ordered them by habeas corpus proceedings in spite of the fact that the State convict road force had no appropriation to do this service from the Legislature.

"The jailor of King and Queen has sent me a bill for \$22.00 at the rate of one dollar per day for the board of these men. At your suggestion, they were left there eleven days until the date of their discharge, since it would have been a very expensive proposition to have sent them back to the road camps for eleven days work. Whenever we have had an occasion to leave

men for a day or two in any city or county jail in the State, the jailors have always collected their fees from the criminal expense fund and not from the State convict road force, as we are only allowed twenty-five cents per day to board prisoners on the road force. I am writing to ask if this bill should be collected by the jailor from the criminal expense fund and not from the State convict road force."

You are entirely correct in refusing to pay this bill. It is not a charge upon the State convict road force. These men should be treated as any other jail prisoners and the sheriff is entitled to pay for their keep in the same way that he is paid for taking care of other jail prisoners.

I have discussed this with the Comptroller and he will pay the sheriff's bill if he has it certified in the proper manner.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

JAILS AND PRISONERS—Fees of jailor.

RICHMOND, VA., March 6, 1929.

HON. ARTHUR W. JAMES, *Director,*
Bureau of County and City Organization,
Department of Public Welfare,
Richmond, Virginia.

MY DEAR MR. JAMES:

Acknowledgment is made of your letter of February 26, 1929, in which you call attention to the fact that the sheriff of Frederick county, who is also the jailor for the city of Winchester, has been rendering separate accounts to the State for the Winchester and Frederick county jail prisoners. You request me to advise you whether Mr. Pannett, the sheriff of Frederick county, should not be required to render one account for all of the prisoners in his jail instead of separate accounts for the two sets of prisoners.

Section 2868 of the Code makes the jail and jailor of the county of Frederick also the jail and jailor of the city of Winchester. This section, however, does not make Winchester prisoners Frederick county prisoners nor Frederick county prisoners Winchester prisoners. While it is a jail for both jurisdictions, the prisoners are the prisoners of each separate jurisdiction, and the judge of the circuit court of Frederick county is not authorized as such to allow and certify in the jailor's account for Frederick county the prisoners of the city of Winchester. Likewise, the court in Winchester is not authorized to allow and certify in the account for the Winchester prisoners the prisoners confined in jail for Frederick county.

It, therefore, follows, in my opinion, that two separate accounts must be allowed and certified in this case by two separate courts and, therefore, you cannot compel the sheriff of Frederick county, as jailor for that county and the city of Winchester, to file one account.

This morning I received a letter from Honorable Lemuel F. Smith, Commonwealth's Attorney of Albemarle county, with reference to a similar situation relative to the jail of the county of Albemarle and the city of Charlottesville.

It is my opinion that the accounts from these two jurisdictions must likewise be allowed and certified separately.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

JAILS AND PRISONERS—Good conduct allowance.

RICHMOND, VA., *April 9, 1929.*

MR. THOMAS B. TWEEDY, *Jailor,*
Rustburg, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of April 8, 1929, in which you request me to advise you whether a person sentenced to the State convict road force, but not removed from jail by the superintendent of the penitentiary, is entitled to ten days per month for good conduct while confined in jail.

A prisoner was entitled to such allowance prior to the taking effect of the Acts of 1928, but at the 1928 session of the General Assembly sections 2094 and 5017 of the Code were amended so as to allow ten days per month only from the time such prisoner is actually received in the State convict road force.

Therefore, the only credit to which a person sentenced to the State convict road force, but who serves his time in jail, is entitled to receive is the regular allowance made to jail prisoners for good conduct, as provided by section 2860 of the Code.

Trusting this will give you the desired information, I am

Very truly yours,

JNO. R. SAUNDERS,
Attorney General.

JAILS AND PRISONERS—Time for which a prisoner can be held for non-payment of fine and costs.

RICHMOND, VA., *March 14, 1929.*

HON. J. SWANSON SMITH, *Clerk,*
Circuit Court for Carroll County,
Hillsville, Virginia.

DEAR SIR:

Acknowledgment is made of your letter of March 7, 1929, in which you say:

"(1) Suppose a defendant is sentenced to jail for one, four or six months, by a jury or the court, for a felony, misdemeanor or prohibition, is it necessary for me to report such sentence to the superintendent of the State Penitentiary, or to whom do I report?"

"(2) Suppose a defendant in a prohibition case pleads guilty to the charge and the court imposes a fine of \$100.00 and sentences the said defendant to ninety days in the county jail, does the said defendant have to pay the fine of \$100.00 before he can be released from jail?"

In answer to your first question, I call your attention to section 2094 of the Code, as amended by the Acts of 1928, pages 1369-70, which makes it the duty of the judge or justice sentencing the person to the convict road force to notify the superintendent of the penitentiary. I do not find in the law where the clerk is required to notify anybody in those cases where the prisoner is sentenced to jail instead of the State convict road force. You will observe from an examination of section 2075 of the Code that jail prisoners may be requisitioned by the superintendent of the penitentiary for work on the roads.

In the second case referred to in your letter, section 8 of the prohibition law requires such a prisoner to be sentenced to the State convict road force, in which event he works out the fine and the costs, if not paid, at the rate prescribed by section 2095 of the Code, as amended by the Acts of 1928, page 1370. See section 8 of the prohibition law, as amended by the Acts of 1928, page 1236. In those cases where a man is not sent to the convict road force, if he fails to pay the fine and costs, he is to be held in accordance with the provisions of section 4953 of the Code. In the case mentioned by you, where the fine is \$100.00, he can be held for its non-payment not more than three months under this section.

Of course, he is entitled to discharge immediately upon the payment of the fine and costs if he has served the flat time given him.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

JAILS AND PRISONERS—State convict road force.

RICHMOND, VA., *March 26, 1929.*

HON. E. E. JOHNSON, *Judge,*
Juvenile and Domestic Relations Court,
Johnson Law Building,
Culpeper, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of March 23, 1929, in which you say:

"On December 17, 1928, I sentenced James Tibbs to the road for twelve months for non-support of his two children, and provided that he should make payment through this court for maintenance and support of these children under section 1936 of the Code. This man seems to have been sent to the road and, after working a few days, was forwarded by them to the State Farm, and I have received less than \$10.00 under the provision of this section. In the meantime, the court has expended considerable money for the maintenance and support of these children. I wrote Mr. R. R. Penn relative to payments, and he told me that he knew of no provision under which he could make payments for the support of these children. I would certainly appreciate it if you would give me your opinion as to what procedure I should take in the matter, and oblige."

The only provision made for the payment of such compensation under section 1936 of the Code is where such prisoner is employed on the State convict road force, or other public work of the State. The State Farm has no appropriation out of which an item can be paid, and it is my opinion that Captain Penn was entirely correct when he informed you that he was unable to pay the charge.

I assume that the man in question was sent to the State Farm because he was unable to work on the public roads. If this is not the fact, he should be returned to the public roads, in which event the item would be paid.

Trusting this will give you the desired information, I am

Very truly yours,

JNO. R. SAUNDERS,
Attorney General.

JUROR—Whether or not a person votes does not affect his right to serve as juror.

RICHMOND, VA., *September 10, 1928.*

MR. H. W. MOYERS,
*Commissioner in Chancery,
Stanardsville, Virginia.*

MY DEAR SIR:

I am in receipt of your letter of September 8, in which you ask whether a man whose name appears on a jury list is precluded from serving as a juror because he has never voted.

In reply I will state that whether or not a party votes does not affect his right to serve as a juror. In this connection, I call your attention to section 5984 of the Code, which provides what persons are liable to serve as jurors.

With kindest regards and best wishes, I am

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

JUSTICE OF THE PEACE—Authority to make arrests—Violation of penal laws.

RICHMOND, VA., *November 15, 1928.*

MR. W. J. HUBBARD,
*Justice of the Peace,
Forest, Virginia.*

DEAR MR. HUBBARD:

I am in receipt of your letter of the 13th instant, in which you say that your authority as a justice of the peace in the matter of the enforcement of the State highway laws is often questioned by reckless drivers, and you ask whether or not you as a justice of the peace have a right to wear a badge designating you as a "county officer."

Under section 4789, you are made a conservator of the peace and it is made your duty to arrest without a warrant for felonies committed in your presence, or upon reasonable suspicion of felony and for breaches of the peace and all misdemeanors committed in your presence.

There is, therefore, no question of your authority to make arrests for violations of the penal laws of the State anywhere within your county.

However, I call your attention to chapter 235, p. 430 of the Acts of 1926, providing that no officer except sheriffs and deputies are entitled to fees of any character for arrests made on any public road or highway of the State unless he is in uniform or is in company with an officer in uniform or a sheriff or deputy sheriff.

You undoubtedly have the right to wear a badge designating your official character. Instead of one with the words "county officer" upon it, I would suggest that you procure a badge using the words "justice of the peace."

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

JUSTICE OF THE PEACE—Executions.

RICHMOND, VA., *April 12, 1929.*

MR. B. C. RENNOLDS,
Rexburg, Virginia.

DEAR BEN:

I am in receipt of your letter of the 9th inst., which is as follows:

"When a justice issues an execution returnable within sixty days, is it the duty of the sheriff or constable, to make a return of the papers to the justice within that time, stating thereon whether the execution has been satisfied or not, and is the justice required to file the papers, or is he to deliver them to the clerk of the circuit court?"

"Should the sheriff or constable pay the money to the justice when the papers are delivered, or pay it to the party to whom it is due?"

The inquiries you make are covered by sections 6029, 6030 and 6031 of the Code of Virginia.

Upon the rendering of a judgment the justice, unless an appeal is taken, a new trial awarded, or a stay granted, issues an execution immediately directed to the sheriff or constable of the county. If the execution is collected, the sheriff or constable should pay the money directly to the creditor, or his attorney. All the papers in the case, including the execution marked satisfied, should be returned to the clerk's office. It is immaterial whether the sheriff or constable returns the execution directly to the clerk's office, or to the justice, and it is returned by him to the clerk's office.

Of course, if the execution is not satisfied, it may be returned any time within one year to the justice, who may thereupon issue a second execution.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

JUSTICE OF THE PEACE—Jurisdiction.RICHMOND, VA., *January 14, 1929.*

MR. W. H. GALEY,
Justice of the Peace,
Crewe, Virginia.

MY DEAR SIR:

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

“As a justice of the peace of Nottoway county, Virginia, can I issue and/or try civil and/or criminal warrants in the entire county, or am I limited to Winningham district?”

Under sections 6020, 6022, 4823, 4824 and 4826 of the Code of Virginia, it is my opinion that you are a justice of the peace in both civil and criminal matters for your county.

The cases must be tried, however, in the magisterial district in which the offense was committed in criminal cases, unless removed as provided in section 4824 of the Code, and in civil cases must be tried in the magisterial district in which the defendant, or, if there be more than one, in which one of the defendants resides, or in the district in which the cause of action arose if in the county in which the defendant or one of the defendants resides.

You will observe the exception as to public service corporations in section 6020 of the Code. See also Reports of the Attorney General, 1917, page 188, and 1918, page 101.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

JUSTICE OF THE PEACE—Jurisdiction in cases of infants.RICHMOND, VA., *August 23, 1928.*

HON. J. WALTER STOTT,
Justice of the Peace,
Smithfield, Virginia.

DEAR MR. STOTT:

Your letter of August 4, having reference to the jurisdiction of justices of the peace in cases of infants under 18 years of age charged with a criminal offense, was duly received, but has, in the stress of business, been overlooked until today.

Chapter 78, section 1905 of the Code, gives exclusive original jurisdiction to juvenile and domestic relations courts in cities and counties wherein there are domestic relations courts and to circuit courts of counties where there are no domestic relations courts.

Section 1911 answers your question as to what should be done where a boy who has committed a crime is arrested and carried before a justice. This section in part provides:

“ * * * Whenever any child under eighteen years of age, and who otherwise comes under the provisions of this chapter, is brought before any other justice or court in such county or city, such justice or court shall forth-

with, by proper order, transfer the case to the said juvenile and domestic relations court or said circuit, corporation or hustings court, * *"

The section also provides as to warrants against juvenile criminals:

"But no warrant of arrest shall be issued for any child under twelve years of age, except with the written permission of a judge of a court of record or the justice of the juvenile and domestic relations court; * * * And no warrant of arrest shall be issued for any child between the ages of twelve and eighteen years, except when the use of such process is imperative. * *"

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,

Attorney General.

JUSTICE OF THE PEACE—Not allowed to collect fees of any kind, even though he may also be a notary public.

RICHMOND, VA., December 5, 1928.

MR. SIDNEY W. INGRAM,
Justice of the Peace,
Foster, Virginia.

MY DEAR MR. INGRAM:

Acknowledgment is made of your letter of December 4, 1928, in which you say:

"Please give me an answer to the following: Does the law passed at the last session of the Legislature forbidding justices of the peace to collect money for a fee apply to notaries public? The question has been raised here and I want an opinion from you, as I am a notary and justice both. I hold that my bond which is of record at clerk's office gives me a right to collect for a fee."

Section 6019 of the Code, as amended by the Acts of 1928, page 1294, makes it unlawful for any 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, either before or after judgment. It further makes a violation of this provision a misdemeanor. The fact that a justice is also a notary public would not exempt such justice from the very clear provision of this section of the Code.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,

Attorney General.

JUSTICE OF THE PEACE—Authority to issue warrants for violation of motor vehicle law.

RICHMOND, VA., July 16, 1928.

MR. O. C. WEST,
Justice of the Peace,
R. F. D. No. 2,
Richmond, Virginia.

MY DEAR SIR:

I beg leave to acknowledge receipt of yours of the 14th, which is as follows:

"Please advise me whether or not a justice of the peace has the authority to issue warrants concerning Motor Vehicle Laws of Virginia. Also I am curious to know whether or not a justice of the peace is affected in such cases when the county authorities adopt the Motor Vehicle Laws of Virginia as an ordinance."

In reply thereto I will state that a justice of the peace has a right to issue a warrant for a violation of the State Motor Vehicle Law where the warrant is issued on behalf of the Commonwealth of Virginia, even though the county authorities have adopted the motor vehicle law as an ordinance. The adoption of a county ordinance parallel to the State law in no manner affects the rights of the State to proceed against violators of its laws.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

JUVENILE AND DOMESTIC RELATIONS—Costs taxable against infants convicted of a misdemeanor.

RICHMOND, VA., November 23, 1928.

MR. S. BERNARD COLEMAN,
Attorney at Law,
Fredericksburg, Virginia.

MY DEAR MR. COLEMAN:

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

"This is to request advice from your office as to whether or not an infant, under the age of eighteen years, may be compelled to pay the costs of a proceedings against him in the Juvenile and Domestic Relations Court when he has been convicted by that court of a misdemeanor.

"It is my contention that, under section 1951-b and 1953-i of Michie's Code (Va. 1924), the costs of such proceedings are to be paid from the criminal accounts fund by the State Auditor of Public Accounts and are not to be charged to the infant."

It is my opinion that costs are a necessary incident to all criminal proceedings in which a conviction results, regardless of whether the sentence is imposed by a juvenile or some other court, and I have heretofore so ruled. I do not think the two Code sections referred to in your letter relieve an infant misdemeanant from the costs which the law permits to be taxed against one convicted of a misdemeanor.

Hon. J. Hoge Ricks, Judge of the Juvenile and Domestic Relations Court of this city, informs me that, in construing the juvenile laws, he has always held that costs are taxable against infants convicted in his court. I think that this is unquestionably the law in Virginia.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

LANDLORD AND TENANT—Rights of tenants.

RICHMOND, VA., September 19, 1928.

HON. W. R. DOOLEY, *Treasurer,*
Bedford County,
Bedford, Virginia.

MY DEAR MR. DOOLEY:

Acknowledgment is made of your letter of September 18th, 1928, in which you say:

"I have rented several pieces of real estate for 1927 levies, and wish to know if the successful bidder is entitled to apple crop now on premises, also if he has the right to fallow for fall seeding of wheat."

Where the property was leased under section 2439 of the Code, the lease cannot exceed a term of one year. The effect of such lease when made, in my opinion, is to constitute the lessee a tenant or lessee for all purposes, with all of the rights that would be possessed by the lessee of the owner of such land.

It, therefore, follows that a party who rents land from the treasurer of a county acquires the same rights and privileges as he would have had he rented it directly from the land owner.

Of course, if the lease expires before the wheat crop will mature, I do not think the tenant would have a right to go on the premises and harvest the crop. If the apple crop ripens during the life of the lease, in my opinion, the tenant would have the right to gather the apples, see *Quiggley v. Vining*, 125 Ga. 98, 54 S. E. 74.

Very truly yours,

JNO. R. SAUNDERS,
Attorney General.

LICENSE—Authority of Real Estate Commission to refuse renewal of license to bankrupt real estate dealer.

RICHMOND, VA., October 15, 1928.

MR. OTTO HOLLOWELL, *Secretary,*
Virginia Real Estate Association,
Norfolk, Virginia.

DEAR SIR:

I am in receipt of your letter of the 12th instant, in which you say in part:

"In Norfolk we had an agent who was in the rental business fail, causing the loss to his landlords of rent collected of several thousand dollars.

At the bankruptcy proceedings this man stated he had used the money to pay for his speculation in local real estate."

You then ask whether the Virginia Real Estate Commission has authority, upon its own motion and without specific complaint, to refuse a renewal of a license to the Norfolk agent referred to.

In my opinion, the Commission not only has authority to deny an agent—

"(g) failing, within a reasonable time, to account for or to remit any monies coming into its possession which belong to others, or

"(h) being unworthy or incompetent to act as a real estate broker or salesman in such a manner as to safeguard the interest of the public, or

"(i) any other conduct, whether of the same or different character from that hereinbefore specified, which constitutes fraudulent or dishonest dealing,"

but may, after notice to any such person, revoke the license already granted. The act creating the Virginia Real Estate Commission contemplates and requires a careful scrutiny of the character of applicants for honesty, truthfulness, fair dealings and competency, and no person may legally receive a license whose character does not meet these requirements of the statute.

Even after a license has been granted, under paragraphs (g), (h) and (i) of section 8, the license of brokers or salesmen may be revoked upon the motion of the Commission for the offenses specified in those paragraphs.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

LICENSE—Merchant's license—When exempt from city and town license.

RICHMOND, VA., June 12, 1929.

HON. GEORGE L. BROWNING,
Attorney at Law,
Orange, Virginia.

MY DEAR MR. BROWNING:

Acknowledgment is made of your communication of June 12, 1929, in which you request me to advise you whether a merchant, who has been duly licensed by the State and by the city or town in which his business is located, can be compelled by another city or town to obtain a city or town license, under authority of section 296 of the Tax Code, for selling and delivering at the same time his goods and wares to licensed dealers or retailers, but not to consumers, in such last mentioned city or town.

Section 188 of the Tax Code, relating to the State license tax on merchants, provides in part as follows:

"A merchant, who has been duly licensed by the State, and duly licensed by the city or town, if his place of business be in a city or town, or in lieu of a license tax to the city or town, has been taxed by the city or town on the capital employed in business, may, other than at a definite place of business, sell and deliver at the same time to licensed dealers or retailers, but not to consumers, anywhere in the State, without the payment of any additional license tax of any kind for such privilege to the State, or to any city or town."

You will see from an examination of the above quoted provision of section 188 of the Tax Code that a merchant, who has been duly licensed by the State and by the city or town in which his business is located, or, in lieu of such license tax, the city or town has taxed such merchant on the capital employed in his business, has authority to sell and deliver at the same time his goods to licensed dealers and retailers anywhere in the State without the payment of any additional license tax of any kind for such privilege.

It is true that section 296 of the Tax Code is broad enough to authorize a city or town to impose an additional tax for this, but sections 188 and 296 are parts of the same statute and must be construed together.

It is, therefore, my opinion that section 296 of the Tax Code is subject to the limitation contained in section 188 thereof above quoted. In my opinion a city or town cannot impose an additional tax on a merchant duly licensed as stated in your question and conducting his business as therein indicated.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

LICENSES—Merchants.

RICHMOND, VA., *February 11, 1929.*

MR. B. F. WHITE, *Secretary,*
Town Council,
New Market, Virginia.

MY DEAR MR. WHITE:

I am in receipt of your letter of February 6, which is as follows:

"Kindly advise at your convenience what license a lunch room proprietor should have who sells chewing gum, tobacco, oysters by measure in season, candy, soft drinks, canned goods, etc. We are of opinion that he would have to have merchants, tobacco and private entertainment licenses."

If the party in question does not furnish lodging to guests, I do not think he would have to have a license for private entertainment. If food is consumed in his place of business, of course, he would have to have a restaurant license. If, on the other hand, the oysters which you state he sells by the measure are not cooked and consumed at his place of business, he could sell these under his merchant's license. If they are sold at a fountain by the glass, then he would have to have a license to keep a soda fountain.

I would, therefore, think from the contents of your letter that the only licenses the party would have to obtain would be a merchant's license and a tobacco license, provided, of course, he does not do the things mentioned above.

Perhaps it would be best for you to take this matter up with your commissioner of the revenue, who issues these licenses and he, no doubt, after a statement of the facts in the case, would be able to tell you just what licenses the party will have to obtain.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

LICENSES—Commission merchants.RICHMOND, VA., *August 17, 1928.*

HON. R. B. JORDAN,
Chief of Police,
Richmond, Virginia.

MY DEAR MAJOR:

The Attorney General has handed me your letter of the 13th instant in which you say:

"I would be pleased to have you advise me whether or not it is permissible for a regular licensed Commission Merchant to take a truck load of food stuff and sell directly to a retail merchant from the truck without having a peddler's license."

The question you ask is covered by the provisions of section 192, chapter 45 of the Acts of 1928, which under the head of peddlers provides in part:

"For the privilege of peddling or bartering in any county, city or town, there shall be paid, * * * except that the tax on peddlers of ice, wood, meat, milk, butter, eggs, poultry, fish, oysters, game, vegetables, fruits or other family supplies of a perishable nature not grown or produced by them, shall be twenty-five dollars for each vehicle used in such peddling, * * *."

After consultation with Mr. Parr of the State Tax Commission, I would advise you that a commission merchant, who undertakes to truck and sell any of the articles mentioned, is required to take out a peddler's license for that purpose, unless the commission merchant had a merchant's license also and is the owner of the produce he sells, in which event, should he sell directly to a retail merchant, he may do so without taking out a peddler's license, his operations being covered by his merchant's license.

If the opinion I have written you does not cover the case you had in mind when you wrote, I shall be pleased to hear from you further.

Yours very truly,

EDWIN H. GIBSON,
Assistant Attorney General.

LICENSES—Practicing attorney.RICHMOND, VA., *August 22, 1928.*

MR. E. J. HAJEK,
2703 Griffin Ave.,
Richmond, Virginia.

DEAR SIR:

I am in receipt of your letter of August 18, in which you state a case upon which you desire my opinion, as follows:

"Please inform me whether or not an attorney, who has been licensed to practice law in Virginia but who is not actively engaged in practicing law, would be permitted, without paying the required State and city licenses, to appear in a case for a friend gratuitously without violating either the State or city ordinance and thereby subjecting himself to a fine."

The law requires that every person practicing law shall have a State and city license. No distinction is made between cases in which a lawyer appears for a friend gratuitously and one in which a charge is made for his services.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

LICENSES—Peddlers.

RICHMOND, VA., May 17, 1929.

HON. JEFF F. WALTER,
*Commonwealth's Attorney,
Onley, Virginia.*

MY DEAR MR. WALTER:

I am just in receipt of yours of the 16th in which you say:

"I wish you would kindly advise me whether or not non-resident merchants are required to pay a merchant's tax to Virginia when doing business in this State.

"We have a number of merchants from Maryland who daily come into our County and sell merchandise from trucks. Prominent among them are The Tawes Baking Company, Stevens Ice Cream Company and some oil and gas companies. All of these make daily trips, solicit and sell from their trucks.

"It would seem that they are either merchants or peddlers under our law and should be required, as are residents of the State, to obtain a license for this privilege."

In reply I beg leave to call your attention to the following sections of the Virginia Tax Code.

Section 192 describes who is a peddler, which reads as follows:

"Any person who shall carry from place to place, any goods, wares or merchandise, and offer to sell or barter the same, or actually sell or barter the same, shall be deemed to be a peddler, and any person licensed as a peddler may sell any personal property a merchant may sell, or he may exchange the same for other articles."

One paragraph of section 188 provides under what conditions a merchant may sell and deliver goods at the same time. This paragraph reads as follows:

"A merchant, who has been duly licensed by the State, and duly licensed by the city or town, if his place of business be in a city or town, or in lieu of a license tax to the city or town, has been taxed by the city or town on the capital employed in business, may, other than at a definite place of business, sell and deliver at the same time to licensed dealers or retailers, but not to consumers, anywhere in the State, without the payment of any additional license tax of any kind for such privilege to the State, or to any city or town."

A merchant who has been licensed to do business in the State of Maryland, but pays no license tax in the State of Virginia, certainly does not meet the provisions of the paragraph of section 188 of the Tax Code, above quoted, but seems to me would fall under the definition of a peddler according to the provisions of section 192, above quoted.

I have talked with Mr. Morrissett, State Tax Commissioner, relative to this matter, and he concurs in this.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

LICENSES—Peddlers—Farm products.RICHMOND, VA., *January 26, 1929.*

HON. T. C. VALENTINE, *Deputy Clerk,*
Bowling Green, Virginia.

MY DEAR MR. VALENTINE:

Acknowledgment is made of your letter of January 25, 1929, in which you call attention to section 192 of the Tax Code of Virginia which imposes a license tax on peddlers. You quote the following from this section:

“Nothing in this section shall be construed to require of any farmer a peddler’s license for the privilege of selling or peddling farm products, wood or charcoal grown or produced by him.”

You then ask me whether one is subject to a State license for selling meat from a wagon driven from house to house, where it appears that some of the animals slaughtered had been raised by such person from their birth while other animals slaughtered had been bought by him and fattened, after which they were killed and thus sold.

In *Corby Baking Co. v. Commonwealth*, 123 Va. 10 (1918), the Court of Appeals held that a baking company, which bought its flour and mixed and baked the bread, produced a family supply of a perishable nature within the meaning of what was then sections 50 and 51 of the Tax Bill.

Meat is certainly a farm product, and, if the mixing and baking of bread is the production of a family supply of a perishable nature within the meaning of the tax laws, it is my opinion that the fattening of animals bought by a farmer prior to the slaughter thereof is a producing of such meat within the meaning of the exception contained in this section of the Tax Code.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

LICENSE—Peddlers—Not required of farmers.RICHMOND, VA., *November 9, 1928.*

MR. H. H. McCLAIN,
Avon, Virginia.

MY DEAR SIR:

Your letter of October 31, 1928, addressed to Hon. G. W. Koiner, Commissioner of Agriculture and Immigration, has been referred to me for attention. You ask whether any license is required of a farmer who wishes to sell the products of his own farm in any city or town in the State.

Section 192 of the Tax Code, which requires a license tax of peddlers, provides:

“Nothing in this section shall be construed to require of any farmer a peddler’s license for the privilege of selling or peddling farm products, wood or charcoal grown or produced by him.”

Section 296 of the Tax Code provides in part:

“No city or town shall impose upon or collect from any person any tax, fine, or other penalty for selling farm or domestic products within the limits of any such town or city outside of the regular market houses and

sheds of such city or town provided, such products are grown or produced by such person."

A chauffeur's license is not required of the owner of an automobile as a prerequisite to the right to operate it, unless such vehicle is used as a public or common carrier of persons or property (section 19½ of chapter 148 of the Acts of 1926).

I am unable to tell you what your rights would be in Washington, D. C. That is beyond the jurisdiction of Virginia, and I am not advised as to the laws of the District of Columbia.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

LICENSE—Peddler of meat required to pay tax.

RICHMOND, VA., *September 14, 1928.*

MR. L. D. VINCENT, *Mayor,*
Bowling Green, Virginia.

DEAR SIR:

Your letter of August 23 was duly received and inadvertently overlooked. I trust, however, that the information about which you wrote me may still be of service.

By section 122 of the new tax Code, found on pages 127-128 of the Acts of 1928, you will see that a peddler—of meat—is required to pay a State tax of \$25.00.

Under section 296 of the tax law, pages 186-187 of the Acts of 1928, the council of a town may require a town license for anything done within town, with the proviso that no tax, fine or other penalty for selling farm or domestic products within the limits of such town, outside of the regular market houses and sheds of such town, may be imposed, provided such products are grown or produced by the person making sale thereof.

Provided your charter allows it, your town council may impose a tax upon all peddlers of meat where the same is not grown by such peddler. This tax need not necessarily be \$25.00; it may be more or less, so that it is not unreasonably high.

All local taxes are ordinarily collectable by the town treasurer and are assessed by some town official.

The commissioner of the revenue assesses for a State license and, of course, that license is collectable by the county treasurer.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

LICENSE—Issuance of marriage license.RICHMOND, VA., *September 5, 1928.*HON. H. F. HUTCHESON, *Clerk,*
Boydton, Virginia.

MY DEAR SIR:

Your letter of September 3, addressed to Hon. W. A. Plecker, Registrar of the Bureau of Vital Statistics, has been referred by him to me for reply. In your letter you call attention to section 5074 of the Code of 1919, as amended by chapter 49 of the Acts of 1928, relating to the issuance of marriage licenses. You then ask the following questions:

"If a couple come into my office and want a marriage license, and sign this affidavit and make affidavit to it, including their ages, will that be sufficient without their having some witness known to the clerk to also make affidavit as to their ages, etc.? Sometimes people come into my office who are not known to me at all, but apparently are more than twenty-one years of age, so I am wondering if I would be justified in issuing them a license on their own affidavits.

"Then, again, my county is twenty miles by forty miles long, and there are many girls reared in distant sections of the county who have never been to the court house—sometimes daughters of friends of mine whom I know to be reliable. Some of these distant points have no notary or justice. Will it not do just as well for the father to sign and make this affidavit for his daughter or son?"

In response to your first question, I would say that, in my opinion, the affidavit required is all that is sufficient, unless the clerk is put on notice that it is untrue, in which event it would be his duty to investigate before issuing the license.

As to your second question, I call your attention to the language of the statute, which provides that the clerk "shall before issuing the license require the parties contemplating marriage to state, under oath, or by affidavit or affidavits filed with him, *made by the parties for whom the application is made*, before a person qualified to take acknowledgments or administer oaths," certain facts. (Italics supplied.)

It is, therefore, my opinion that the affidavit made by the father of one of the parties would not answer the requirements of the statute.

Yours very sincerely,

JNO. R. SAUNDERS,
*Attorney General.***LICENSE—Resident of this State must have Virginia license to operate his automobile in Virginia.**RICHMOND, VA., *January 7, 1928.*MR. R. G. GRASSFIELD, *General Manager,*
Chamber of Commerce,
411 Consolidated Building,
Jacksonville, Florida.

MY DEAR SIR:

Acknowledgment is made of your letter of January 5, 1929, in which you request my opinion on the following question:

"Can a bona fide resident of your State, which has a reciprocal agreement with Florida, operate his automobile in the State of which he is a resident, under a Florida license tag?"

Most assuredly no resident of Virginia can operate his automobile in the Commonwealth of Virginia without his procuring a license and the necessary plates from the Commonwealth of Virginia so to do. Section 7, chapter 149 of the Acts of 1926.

If a resident of Virginia were to attempt to operate his automobile in this State under a Florida license, he would be subject to criminal prosecution. Section 37, chapter 149, Acts 1926.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

MARRIAGE—Status between white and colored persons.

RICHMOND, VA., *December 4, 1928.*

MRS. J. S. PERKINS,
644 32nd Street,
Newport News, Virginia.

MY DEAR MRS. PERKINS:

Acknowledgment is made of your letter of November 28, 1928. I am indeed sorry to hear of the trouble referred to in your letter.

Section 5087 of the Code provides that all marriages between a white person and a colored person shall be absolutely void without any decree of divorce, or other legal process. Section 5089 of the Code makes a marriage contract by such parties, residents of this State, outside of the State, with the intention of returning to Virginia for the purpose of residing therein, subject to the provisions of section 5086 of the Code. Sections 4540 and 4546 make the contracting of such marriages felonious in this State.

While it is true that such marriages are declared to be void *ab initio* by the statute, the safest procedure would be to apply for a decree of annulment since, from the facts stated in your letter, it is possible that the girl might contest the charge that she is a negro within the meaning of the statute. Of course, if she prevailed in such contention, the marriage would be valid. If the matter was not adjudicated by a competent court, there would always be the risk of a prosecution for bigamy, in the event the boy contracted a subsequent marriage. There might also be prosecutions for non-support.

It seems to me that the attorney, who offered to obtain the decree of annulment for \$75.00, fixed a very reasonable fee for his services; indeed, a fee much below that usually charged in a case of this kind. It would unquestionably cost much more than that to defend a criminal prosecution for bigamy.

Trusting this gives you the desired information, I am

Very truly yours,

JNO. R. SAUNDERS,
Attorney General.

MARRIAGE LICENSE—Issuing to non-residents.

RICHMOND, VA., July 2, 1928.

JOHN L. YATES, ESQ.,
County Clerk,
Lunenburg, Virginia.

DEAR SIR:

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

"Please advise me if in your opinion I have the authority to issue marriage license to non-residents of Virginia, if the marriage is to be solemnized in this county. Section 5072 of Michie's Code of 1924 says in part: 'Every license for a marriage shall be issued by the clerk of the circuit court of the county, or of the corporation court of the city in which the female to be married usually resides, or his deputy; and in case she is not a resident of the State, then by the clerk of the circuit court of the county or of the corporation court of the city in which the marriage is to be solemnized, or his deputy, etc.' Does the fact that the man is a non-resident make any difference, or if they intend getting license in this county, is it necessary to make the arrangement before leaving their State."

In my opinion, the local requirement in respect to a woman who is to be one of the contracting parties in a license to be married is determined, in case the woman is a resident of the State, by that provision of section 5072 limiting the right of the clerk to issue license to the county or city in which the female to be married usually resides. In case she is a non-resident of the State, then the issuance of license is limited to the city or county in which the ceremony is to be solemnized.

The residence of the man either in the State or out of the State in no wise controls, limits or regulates the issue of a marriage license.

It is not necessary in any event for the contracting parties to make arrangements concerning the issue of a marriage license before applying for such license.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

MARRIAGE LICENSE—Residence of parties.

RICHMOND, VA., July 2, 1928.

MR. L. RANDOLPH THOMPSON,
Lynch Station, Virginia.

DEAR SIR:

I am in receipt of your letter of June 28, in which you state as to the status of a young lady in reference to the issue of a marriage license for the marriage of a couple, of which she is to be one of the parties.

Section 5072 provides for the issue of a marriage license in that county or city in which the female usually resides. The woman to whom you refer having for some length of time lived outside of the State, I do not suppose that it can be stated that she usually resides in any city or county of Virginia. The issue of a license not depending upon the county in which she usually resides, the provision as to the issue of a license in her case is governed by that provision

designating the county of issue as the county in which the ceremony is to be performed.

The license can be secured in any county in Virginia, provided, of course, that the marriage is to be solemnized in that county in which the license is issued.

Yours very truly,

JNO. R. SAUNDERS,

Attorney General.

MARRIAGE LICENSE—Affidavit for.

RICHMOND, VA., *August 10, 1928.*

HON. A. D. LATANE, *Clerk,*
Tappahannock, Virginia.

DEAR SIR:

Your letter of August 2, addressed to the Secretary of the Commonwealth, has been referred to this office for a reply. In this you state:

“Section 5074 of the Acts of the General Assembly (1928) provides that it shall be the duty of the clerk upon issuing marriage licenses to require the persons making application therefor to make oath or affidavit as to the date of marriage, place of marriage, occupation of husband, ages, etc., and that the clerk shall deliver the certificate together with the marriage license to the person entitled thereto.”

You then ask:

“Will you please inform me whether this applies in all cases or only when one of the persons making application applies in person. In the event that the certificate is required in all cases, it may be that new forms have been prepared with the necessary certificate attached.”

In my opinion, the requirements provided for by section 5074, chapter 49, page 314, of the Acts of the General Assembly, 1928, apply to both persons making application for a marriage license.

If either or both are present when application for license is made, then he or she or both are required to state under oath the facts required by section 5074. Should neither be present, affidavits of both parties should be filed stating the facts which would have been required of them in person. If one is present and one absent, the one present should make oath and the one absent should file with you his or her affidavit.

I am not advised as to whether or not new forms have been prepared covering the requirements of the present law.

Yours very truly,

JNO. R. SAUNDERS,

Attorney General.

MAYOR—Acting as justice—Right to suspend jail sentence in prohibition cases.RICHMOND, VA., *August 2, 1928.*HON. W. B. RICE, *Mayor,*
Pamplin, Virginia.

MY DEAR SIR:

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

"Will you be kind enough to write me your ruling as to whether the mayor of a town has the right to suspend a jail sentence for violation of the prohibition law? Some lawyers claim they have the right, and others claim they have not.

"Also, I should like to know if a mayor has the right to suspend for other violations.

"Will you kindly advise me if, when an accused pleads guilty of driving an automobile while under the influence of ardent spirits, he has the right to an appeal?"

The authority of a mayor to suspend a jail sentence is, as you say, a matter about which lawyers differ, and one which has not as yet been passed upon by the Supreme Court of Appeals.

No judge or mayor can suspend a jail sentence in any case of felony, nor for a second offense, nor for the manufacture, sale or transportation of ardent spirits in excess of one gallon, nor for any second offense against the State law, or city or town ordinances.

Under section 37 of the Prohibition Law, towns and cities are given authority to pass ordinances concerning prohibition offenses. Mayors of towns, having such ordinances, have jurisdiction to try all cases arising within the corporate limits, and, under an amendment to section 34 of the Prohibition Law, within three miles from the corporate limits.

For first offenses, there is a difference of opinion as to whether a mayor may suspend jail sentences. There is an apparent conflict between sections 37, providing that no mayor or police justice shall have power to suspend the sentence of any person convicted of the violation of city or town ordinances, except in cases of transportation and possession of ardent spirits where the quantity does not exceed one pint, and the provisions of section 6 relating to penalties, in the second paragraph of which there is the following provision:

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

This provision, by inference, gives jurisdiction to mayors to suspend sentences for violations of town ordinances for a first offense.

In a letter to Hon. R. A. Bicker, Attorney for the Commonwealth of Culpeper County, on August 26, 1927, I gave the following opinion in reference to the suspension of sentences of prohibition offenses by a mayor:

"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."

In reply to your second query as to whether or not a mayor has a right to suspend for other violations (than violations of the prohibition law), I would say that under section 4925 of the Code it is provided:

"Except where authorized by statute, no court, judge or justice shall suspend the entry or execution of a judgment in any criminal case."

The revisors of the Code of 1919 said they did not believe that the right to suspend sentence existed at common law, but as such power had been often exercised, it was deemed proper to include the prohibition in statute law.

Town councils having authority to provide by ordinance for the punishment of crime within the jurisdiction of a town, I am of the opinion that such authority would confer upon them the right to provide in the ordinance for a suspension of sentence, but, where the ordinance does not provide the right to suspend sentence, a mayor could not exercise such authority.

In reply to your third query, I will say that where a person pleads guilty to any offense he may not afterwards appeal. Should he not plead guilty, he has a constitutional right to a trial and is given, by law, the right of appeal—but it has been held that the plea of guilty waives such constitutional right.

Let me add that this office has held that while a mayor may suspend the jail sentence imposed for the first violation of an ordinance against driving while drunk, he has no authority to suspend or relieve the person convicted from that part of his punishment which prevents him from driving an automobile within a year from the date of his conviction.

Yours very truly,

JNO. R. SAUNDERS,

Attorney General.

MAYOR—Jurisdiction outside of town to try prohibition cases.

RICHMOND, VA., July 30, 1928.

HON. N. B. HUTCHERSON, *Mayor,*
Rocky Mount, Virginia.

MY DEAR SIR:

I am in receipt of your letter of July 28, which reads as follows:

"Has the mayor of a town in the State jurisdiction in any case outside of the corporate limits of the town, other than for violation of the State prohibition law?"

Section 3006 of the Code provides:

"The jurisdiction of the corporate authorities of each town or city, in criminal matters, and for imposing and collecting a license tax on all shows, performances, and exhibitions, shall extend one mile beyond the corporate limits of such town or city."

This quotation answers your inquiry.

Yours very truly,

JNO. R. SAUNDERS,

Attorney General.

MAYORS—Holding the office of justice of the peace.

RICHMOND, VA., November 24, 1928.

HON. N. B. HUTCHERSON, *Mayor,*
Rocky Mount, Virginia.

MY DEAR SIR:

I am in receipt of your letter of the 22nd, which is as follows:

"Can a mayor of any town in the State of Virginia, act or hold the office of Justice of the Peace in the district in which the town is located? I know he can act as a Justice of the Peace both in civil and criminal cases, but can he hold the office of Justice of the Peace if appointed by the Judge of the Circuit Court in the county in which said mayor lives?"

Mayors of towns in Virginia have both civil jurisdiction within the limits of the town, and criminal jurisdiction within certain limits in the territory contiguous to the city or town outside of its limits.

I know of no statute which prohibits a mayor of a town from holding the office of justice of the peace of the magisterial district in which the town is situated. There is no statute preventing a person holding both of these positions, and I do not think that the duties of the offices are incompatible.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

MEDICAL COLLEGE OF VIRGINIA—Access to files—Right of individual to examine.

RICHMOND, VA., September 13, 1928.

HON. EPPA HUNTON, JR., *Chairman,*
Board of Visitors,
Medical College of Virginia,
Richmond, Virginia.

DEAR MR. HUNTON:

In reply to your letter of the 8th instant, which was received just before leaving to attend a session of the Supreme Court of Appeals of Virginia at Staunton, and which I wrote you on the 10th I would answer upon my return, I desire to advise you as to my opinion upon the subject concerning which you wrote.

It will probably be best to quote your letter:

"During the investigation of the charges preferred by Dr. A. Murat Willis against Dr. W. T. Sanger, President of the Medical College of Virginia, Dr. Willis has asked for certain information from the files, all of which has been furnished him. He has also been advised by me that, if he would present his request for any further information, it would be considered. He has frequently asked for access to the files of the Medical College. This latter request has been refused, not because of any apprehension as to what the files of the College will show, as he infers, but because it is deemed unwise to open all of our files to anyone.

"Will you be kind enough to advise me whether Dr. Willis, as a taxpayer and a citizen, or any other taxpayer and citizen, has the legal right to unlimited access to all of the files of the Medical College of Virginia, and, if so, under what circumstances and conditions.

"I am writing you this request for a ruling by you under instructions given me by the unanimous vote of the Board of Visitors of the Medical College of Virginia."

The records of the Medical College of Virginia are public documents and, so far as they are of direct interest to an individual, or of public concern, I am of the opinion that any person individually interested has a right to an inspection of the files directly concerning him, and that, where it is a matter of serious public concern, a taxpayer and citizen, though not himself personally interested, has a right to access to such of the public files of the College as may reasonably include the subject of public interest about which he desires information.

No person, however, is entitled to unlimited access to all of the files of your institution. The right to access at all is one spoken of as an absolute right, but the courts have held that there must be a sufficiency of purpose for which the applicant for the files desires the inspection. Not only must there be sufficient purpose, but an institution may impose such reasonable restrictions and regulations as are necessary for the safety of the records, and the inspection must be had in such manner and at such times as not to interfere with the business of the office.

You, as a lawyer, will realize that it is difficult for me to express a more decided opinion as to the rights of Dr. Willis, and that his request for information must be decided upon the general principles I have indicated.

The case and notes of *Welford v. Williams*, from the Supreme Court of Tennessee, found in 64 L. R. A. 418, may be of interest. I also refer you to 23 R. C. L. 160, 162, 163, 164, and *Gleaves v. Terry*, 93 Va. 491, and *Keller v. Stone*, 96 Va. 667.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

MEDICAL COLLEGE OF VIRGINIA—Liability for negligence—Liability of professors in for negligence.

RICHMOND, VA., *March 14, 1929.*

DR. W. T. SANGER, *President,*
Medical College of Virginia,
Richmond, Virginia.

DEAR DR. SANGER:

Acknowledgment is made of your letter of March 13, 1929, in which you say in part:

“Is it proper to understand that patients treated in our medical and dental clinics cannot sue the institution for malpractice? If the institution cannot be sued, can the individual physician or dentist treating the case be sued?”

I have heretofore expressed the opinion that the Medical College of Virginia is a State institution. If my conclusion as to this is correct, the institution itself is not subject to action for an injury of the kind referred to in your letter. *Phillips v. University of Virginia*, 97 Va. 472, and *Stuart, Governor, et al v. Smith Courtney Company*, 123 Va. 231.

In answer to your second question, the physician or dentist treating the case would unquestionably be subject to action for an injury caused to a patient through negligence on the part of such physician or dentist.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

MEDICAL COLLEGE OF VIRGINIA—State institution.RICHMOND, VA., *August 27, 1928.*

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

MY DEAR MR. BRADFORD:

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

"The Governor has asked me to obtain an opinion from you as to whether or not the Medical College of Virginia is a State institution and as such subject to the regulations governing its expenditures which apply to State agencies generally.

"The funds of this institution are deposited in the State treasury and its expenditures at present are audited in the same manner and under the same rules which govern all State departments and agencies.

"Please advise me also whether the payment of annual membership dues to a Rotary Club is a legal expenditure by a State institution."

In reply thereto, there can be no doubt as to the fact that the Medical College of Virginia is a State institution, and as such is subject to the regulations governing its expenditures which apply to all State agencies generally.

In answer to your question contained in the third paragraph of your letter, namely, whether the payment of annual membership dues to a Rotary Club is a legal expenditure by a State institution, I would state that such dues, in my judgment, are not a legal expenditure chargeable to the State, but are solely a personal obligation and should be paid individually by the person, or persons, belonging to such an organization.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

MILITIA—Members of, when exempt from jury service—Contributing members, when exempt from jury service.RICHMOND, VA., *April 23, 1929.*

GENERAL W. W. SALE,
The Adjutant General,
Richmond, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of April 15, 1929, in which you say:

"Herewith copy of letter from Captain Harry T. Adkins, commanding Battery B, 246th Coast Artillery, Virginia National Guard, Danville, Virginia, wherein it is stated that the Judge of the Western District of Virginia refused to excuse a man (member of the National Guard) from jury service, because he could not state that he personally made the contribution of \$25.00 to the National Guard Unit, which was apparently paid by the company employing him.

"It may be further noted that this company (The Dan River and Riverside Cotton Mills) are now withholding contribution until a ruling has been made as to whether or not money paid by them for their employees who are members of the National Guard will be considered proper contribution to exempt said employees from jury service."

Section 5985 of the Code, as amended, provides that the active non-commissioned officers and the active members of the Virginia volunteers shall be exempt from serving on juries, and also provides for the exemption of "contributing members of said volunteer companies who have contributed not less than twenty-five dollars per annum." It further provides:

" * * But to entitle the active officers and active members of the Virginia volunteers, as well as such contributing members of said volunteer companies * * to this exemption, the captain or chief officer of any company of the Virginia volunteers * * shall annually, on the first day of May, furnish to the clerk of the circuit court of the county or corporation court of the corporation wherein such company or department is, a list containing the name of each active officer and active member of his company or department, and where there are contributing members to his company, the name of each contributing member who has for the preceding year contributed not less than twenty-five dollars shall be likewise furnished."

In the first place, I am of the opinion that the exemptions contained in this section are not binding upon the Federal courts, and that it would only be through comity and not as a matter of right that a juror would be excused from jury service in such courts on account of membership in the Virginia volunteers, or because of contributing membership therein. I am further of the opinion that, in order to entitle such persons to exemption in the State courts, the above quoted portions of section 5985 of the Code, as amended, must be complied with.

I do not think that this section means that the twenty-five dollars paid by a contributing member must be personally paid by such member, so long as it comes out of his personal means. I see no reason why an employer may not lawfully make the payment of this contribution for his employees, provided it comes from the money which would otherwise be paid to such employees.

I call your attention to *Tilton v. Herman*, 109 Va. 503, 506, in which the Court of Appeals construed the words "personally paid," as used in section 20 of the Constitution requiring the payment of State poll taxes. In that case the court held that these words, as used in that section, meant that the tax therein referred to must be paid by the voter out of his own estate or means and not by another out of that other's estate or means, but that the payment need not be made by the voter in proper person and his bodily or physical presence at the time of payment was not necessary.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

MINES—Inspection of.

RICHMOND, VA., *February 12, 1929.*

HON. JOHN HOPKINS HALL, JR.,
Commissioner of Labor,
Department of Labor and Industry,
Richmond, Virginia.

MY DEAR MR. HALL:

Acknowledgment is made of your letter of February 5, 1929, in which you say:

"Our Chief Mine Inspector, Mr. A. G. Lucas, advises me the Pocahontas Coal Company of West Virginia have driven underground over the

line into the State of Virginia and at present they are working places in this State, underground, but have no outlet on the Virginia side; in view of which, he has written asking if these underground workings come within the provision of chapter 76 of the Code of Virginia, relating to mine inspection, etc. I am enclosing herewith a copy of these mine laws, in which I see no reason why this department should not have jurisdiction. However, I am writing to request your opinion in the premises."

Sections 1835-1887 of the Code relate and apply to all mines and mining operations carried on in the Commonwealth of Virginia. The fact that the mouth of a mine is located in some other State would not relieve the operator of such mine, when opened into Virginia, from the application of the provisions of the above mentioned sections of the Code. Of course, your authority would be limited to those galleries in the Commonwealth of Virginia. Your department would have nothing to do with the parts of the mine located outside of the Commonwealth, but I think your inspectors would have the right to pass through the entrance of the mine in another State in order to get to those portions located in this State, if no other way of reaching them has been provided by the owner or operator of such mine.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

MISDEMEANOR—Intentional injury to dog punishable as such.

RICHMOND, VA., *February 1, 1929.*

HON. JOSEPH A. BILLINGSLEY,
Commonwealth's Attorney,
King George C. H., Virginia.

MY DEAR MR. BILLINGSLEY:

Acknowledgment is made of your letter of recent date, in which you call my attention to subsection (a) of section 30 of chapter 474 of the Acts of 1926, and to sections 68 and 69 of the same act. You state that C, driving on a highway, deliberately ran over a dog accompanying A and B who were walking on the highway, and, after killing it, instead of stopping, speeded up his car and made his escape for the time being: You ask whether he is guilty of a misdemeanor or a felony.

You will notice that both sub-sections (a) and (b) of section 30, referred to by you, regulate the duty of the driver of a vehicle involved in an accident resulting in injuries or death to personal property. I take it that this means injuries occasioned by accidental collision. They do not include the intentional injury to property, such as a dog, pig or chicken.

I am further of the opinion that intentional injury to a fowl, or to a dog listed for taxation, comes within the provision of section 4467 of the Code, and that an intentional injury of an assessed dog is a misdemeanor and punishable as such.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

MOTION PICTURE CENSORSHIP—Authority to censor talking sequences or other sound features of synchronized films.

RICHMOND, VA., November 21, 1928.

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

DEAR MR. CHESTERMAN:

Some time ago you wrote me a letter, which I quote below:

"A fortnight or more ago the members of the Division of Motion Picture Censorship, in furtherance of their efforts to enforce the provisions of the law under which they operate, adopted a rule requiring the producers and distributors of films designed for exhibition with vitaphone, movietone or other speaking devices, to furnish said division with such script, dialogue or other explanatory matter (including the words of songs) as would enable the censors to give this class of pictures intelligent consideration.

"The receipt of this explanatory matter was made one of the conditions precedent to the granting of license to display such films in Virginia, since previous experience had convinced the censors that they could gain little or no idea of the true significance of any motion picture by a mere review of its assembled photographs. In this connection it should be explained that the so-called synchronized films, popularly known as 'talking movies,' are practically devoid of subtitles, since they substitute speaking parts for the printed matter usually employed to sustain the continuity of photoplays and comedies.

"For the most part the replies received in answer to the circular promulgating the new rule have been guarded or non-committal, though one or two concerns have indicated a purpose to meet the requirement at least for a while. In short, the inference drawn from the letters, as well as from printed matter appearing in motion picture magazines, is that the producers and distributors question the authority of the Division to exercise jurisdiction over the talking sequences of the so-called synchronized films.

"One concern, the Fox Film Corporation, has sent the Division a categorical answer to its demand for script or other matter. It courteously but firmly refuses to comply with the new rule. This raises an issue which cannot be evaded—an issue which has already developed litigation in several other States having censorship laws more or less similar to the Virginia statute.

"In consideration of the foregoing, the members of the Division are constrained to ask your advice as to their future procedure, which can doubtless be guided by answers to the following questions:

"(1) Does the present censorship law of Virginia (Chap. 257, Acts of Assembly, 1922, as amended by sub-section (c) Section 22, Chapter 33, Acts of Assembly 1927) give the Division jurisdiction over the talking sequences, or other sound features of synchronized films (pictures with speaking parts, songs and other utterances) judged objectionable in whole or part?

"(2) If such authority is vested in the Division, would it have the right to reject in toto a film in which the speaking parts, dialogue, etc., were deemed so radically offensive as to taint the entire picture?

"(3) Assuming that the Division lacks authority to censor the talking sequences of synchronized films, does it nevertheless have the right under Section 14 of the original act to demand explanatory material of the producers and distributors so that the censors may intelligently review and correctly interpret the significance of the assembled photographs constituting the film?"

In my opinion, the present motion picture censorship law of Virginia requires that persons desiring to exhibit films in the State of Virginia furnish the Board

of Motion Picture Censors with each complete film, including speaking parts, songs and all other utterances. Unless this requirement is complied with, your Board should refuse a permit for films carrying speaking parts where the words used are not furnished with the film.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

NOTARY PUBLIC—Jurisdiction of.

RICHMOND, VA., August 17, 1928.

MR. D. H. PENN, *Secretary,*
Retail Merchants Association, Inc.,
Danville, Virginia.

MY DEAR SIR:

I am in receipt of your letter of the 15th instant in which you state:

“Will you kindly advise if a notary public holding a commission for the City of Danville can legally take an acknowledgment or affidavit in the county of Pittsylvania.”

He can.

His authority is conferred by section 2850 of the Code of Virginia, in which it is provided:

“Notaries in cities and in counties in which cities or parts thereof are located, shall have authority to act as such in each of said localities.”

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

NOTARY PUBLIC—Use of seal.

RICHMOND, VA., August 17, 1928.

MR. C. L. ROBey, *President,*
Purcellville National Bank,
Purcellville, Virginia.

DEAR SIR:

Your letter of August 14th directed to the Treasurer of Virginia, asking for specific instructions as to the conditions under which a notary public should use a State \$1.00 tax stamp under the impression of the seal, was referred by the Treasurer to this office for attention.

The new provision for seals is contained in sections 123 and 124, chapter 45 of the Acts of 1928, pages 93 and 94, and was amended by chapter 519, page 1362 of the same Acts.

These provisions of law require a State seal on all papers upon which a notary's seal is required, and declare illegal and void all impressions of notary made by a seal where the State seal is not used.

This provision of section 123 is subject to a qualification in section 124, providing:

"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."

Trusting that the information furnished you is satisfactory, and assuring you that should you need further advice, it will be given you with pleasure, I am

Yours very truly,

EDWIN H. GIBSON,
Assistant Attorney General.

NOTARIES PUBLIC—Of cities and counties have authority to act in each of said localities.

RICHMOND, VA., *December 12, 1928.*

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

MY DEAR MR. BROADDUS:

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

"The county clerk has asked to be advised as to whether or not notaries public, who were commissioned for the county of Henry, can now take acknowledgments within the city of Martinsville."

This matter is governed by section 2850 of the Code. This section provides, in part, with reference to the power of the Governor to appoint notaries:

" * * He may appoint the same person to serve for two or more counties and cities. * * "

It then provides:

" * * Notaries in cities and in counties in which cities or parts thereof are located, shall have authority to act as such in each of said localities. * * "

You will see from this that notaries public commissioned for the county of Henry are authorized to take acknowledgments within the city of Martinsville, which, while not politically a part of Henry county, is still located within the geographical limits of that county.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

NOTARIES—Authority to act in certain localities.

RICHMOND, VA., *January 28, 1929.*

MESSRS. SAVAGE AND LAWRENCE,
203 *Granby Street,*
Norfolk, Virginia.

GENTLEMEN:

Acknowledgment is made of your letter of January 25, 1929, in which you call attention to the following language contained in section 2850 of the Code:

" * * Notaries in cities and in counties in which cities or parts thereof are located, shall have authority to act as such in each of said localities. * * "

You then say:

"We assume that under the above language a notary commissioned for the county of Norfolk could act in the city of Norfolk and in the city of Portsmouth, both of these cities being located within the geographical limits of Norfolk county.

"We shall greatly appreciate it if you will be good enough to advise us whether or not you have issued a ruling covering this subject, and, if you have not already issued a ruling, we shall appreciate your giving us the benefit of your opinion."

I have been unable to find where the question raised by you has been passed on heretofore, but I am of the opinion that you have correctly construed this statute as stated in the first paragraph quoted from your letter above.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

NOTARIES PUBLIC—Who ineligible for appointment.

RICHMOND, VA., March 5, 1929.

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

MY DEAR GOVERNOR:

In response to your inquiry as to whether or not you can appoint a person a notary public, who has been convicted of a felony and whose political disabilities have not been removed, I beg leave to submit the following:

Section 23 of the Constitution provides who shall be excluded from registering and voting. Among those are persons who have been convicted of a felony and whose political disabilities have not been removed.

Section 32 of the Constitution provides that every person qualified to vote shall be eligible to any office of the State, county, city or town, etc. A notary public is an officer of the law. In fact, by virtue of his office, he is made a conservator of the peace.

While it is true that section 32 of the Constitution provides, among other things, that persons eighteen years of age shall be eligible to hold the office of notary public and qualified to execute the bonds required of them in that capacity, it is my opinion that a person twenty-one years of age or over, who has been disqualified from voting by conviction of a felony and whose political disabilities have not been removed, is not eligible to the office of notary public.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

OFFICE—Compatibility of.RICHMOND, VA., *December 12, 1928.*

MR. SIDNEY W. INGRAM,
Justice of the Peace,
Foster, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of December 7, 1928, in response to my letter to you of December 5.

I do not know of anything in the law that will prevent a justice of the peace from being a notary public. The fact that you are a justice of the peace will not prevent you from taking affidavits, certifying acknowledgments and doing other things that a notary public is authorized to do, provided you do not, either as a justice or as a notary, receive claims of any kind for collection, or 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 you on any such claim either before or after judgment. Notaries public are not authorized as such to collect claims. They are State officers having certain duties and authorities conferred upon them by law, but the collection of claims is not one of the things which they are authorized as such to undertake.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

OFFICE—Compatibility of.RICHMOND, VA., *November 28, 1928.*

HON. P. A. L. SMITH, JR.,
Attorney for the Commonwealth,
905 Travelers Building,
Richmond, Virginia.

DEAR MR. SMITH:

Mr. Bazile, to whom your letter of the 20th addressed to the Attorney General was referred at your request, is absent from the office and asked me to write you concerning the matter about which you desire an opinion.

Section 2702 provides that certain officers, naming them, shall not hold any other office elective or appointive at the same time, with certain exceptions. Included in the list are sheriffs and treasurers.

Your inquiry is as to whether or not the deputy of one of these may also hold a position as deputy to another.

There is no express provision of law in which deputies are named, but the definition of deputy, found in 13 Cyc., p. 1043, clearly points out that a deputy is one who acts as a substitute of another and who is empowered to act for him, in his name and on his behalf, and who performs in every way the duties of his superior.

This point has not been expressly decided in Virginia, but I call your attention to the case of *Farmers Bank v. McGavock*, 119 Va. 510, in which it is held that a deputy may perform all of the duties of his superior unless the statute law expressly forbids, and further to the case of *Board of Supervisors v. Lucas*, 142 Va. 84, 91, in which it is said:

" * * This being true, the question naturally arises, can there be a dual entity flowing from a common source? We think not. In contemplation of law, both organic and statutory, a sheriff and a deputy sheriff are one. A deputy can only come into being by virtue of the appointment of a sheriff."

At common law the same person cannot hold incompatible offices and it would appear that section 2702 is a legislative expression of the opinion that sheriffs and treasurers should not hold any other office than those expressly excepted in that section.

While I have not had opportunity to examine the case, I refer you to *State v. Bus*, 135 Mo. 325, 36 S. W. 639, 33 L. R. A. 616, in which it was held that the offices of deputy sheriff and school director are not incompatible, and to the case of *Bamford v. Melvin*, 7 Mc. 14, in which it is held that the offices of justice of the peace, sheriff, deputy sheriff or coroner are incompatible.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

OFFICERS—County officers must reside in county by which appointed or elected.

RICHMOND, VA., December 12, 1928.

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

MY DEAR MR. BROADDUS:

Acknowledgment is made of your letter of recent date, in which you state that the town of Martinsville has recently become a city of the second class. You then request me to advise you whether justices of the peace and a member of the county board of supervisors, who resided in the town of Martinsville and now reside in the city of Martinsville, are entitled to continue in their county offices since Martinsville is no longer a part of Henry county.

Justices of the peace and supervisors are district officers (section 127 of the Code). Section 2703 of the Code requires district officers to reside in the district for which they are elected or appointed at least thirty days next preceding said election or appointment. This section further provides that a county officer shall be a resident either of his county or the city wherein the court house of said county is.

Section 2704 of the Code reads as follows:

"If any officer, required by the preceding section to be a resident, at the time of his election or appointment, of the county, city, district or town for which he is elected, or appointed, or of the city wherein the courthouse of such county is, remove therefrom, except from the said county to such city, or from such city to the county, or in case a non-resident who has been elected Commonwealth's attorney, remove from the county or county seat of the county in which he resided when elected, except to the county in which he is elected, his office shall be deemed vacant."

Residence in, or removal to the city wherein the court house of said county is, applies, in my opinion, only to county officers and not to district officers. When

a town becomes a city of the second class, it ceases to be a part of the county or counties in which it was located and becomes a separate political jurisdiction. I think that, unquestionably, district officers residing in such town, on its becoming a city of the second class, would have the right to move their residences from said city to the county and retain their offices therein, but, if they elect to retain their residences in said city, it is my opinion that the effect of section 2704 of the Code is to vacate the offices of all district officers who continue their residences in the city.

Trusting this gives you the desired information, I am

Very truly yours,

JNO. R. SAUNDERS,
Attorney General.

OFFICERS—Laws prohibiting them from serving as members county electoral boards applies to their deputies.

RICHMOND, VA., *October 19, 1928.*

MR. F. C. HILLMAN,
Clinewood, Virginia.

MY DEAR SIR:

I am in receipt of your letter of October 17, in which you state:

"I have been a member of the electoral board of Dickenson county for some years. I am also deputy treasurer. The question has come up as to the legality of my serving on the electoral board. Under section 31 of the Constitution, some contend that a person holding office under an elective officer of the State, county, city or town is not disqualified, others claim he is."

I have heretofore held that the law prohibiting an elective officer from serving as a member of county electoral boards applies to deputies of such officers.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

PAUPERS—District poor houses.

RICHMOND, VA., *April 9, 1929.*

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

MY DEAR MR. LACY:

Acknowledgment is made of your letter of April 5, 1929, in which you enclose a copy of the minutes of the Board of Directors of the District Home at Chatham, Virginia.

It appears from the enclosed minutes that the counties of Amherst, Campbell, Halifax, Henry and Pittsylvania have entered into an agreement for the establishment of a District Home for the care and maintenance of the poor, and that a controversy has arisen between the county of Campbell and the other counties as to the basis on which the assessment against Campbell county is to be made.

It appears that the assessment is made against each of the counties on the basis of the 1920 census, and, the county of Campbell insists that due to annexation as of January 1, 1926, it lost 6000 or more of its inhabitants thereof, leaving its population at approximately 21,000.

Section 5 of Chapter 180 of the Acts of 1918, providing for the establishment of such District Homes for the poor, provides in the last sentence thereof as follows:

“* * * the district homes hereinabove provided for shall pay for the farm, stock, buildings, furniture, tools, and other necessary equipment in proportion to population, and shall hold and own the same in same proportion.”

It does not appear from the papers sent me when the agreement between the above named counties for the establishment of such District Home was entered into, but it is my opinion that the law contemplates the assessment to be made as of the time when the obligation is incurred. Therefore, if the agreement was entered into after January 1, 1926, and if it is true that Campbell county did lose 6000 of its inhabitants through annexation proceedings, as of that date, I am of the opinion that population to this extent should be deducted from that shown by the last census.

I think it is true that in the absence of an authentic census, normal increase or decrease in a population in a county could not be taken into account, but where a county or city has lost or gained a large population since the last census due to some extraordinary cause, then I believe such increase or decrease in population should be taken into account, if it could be ascertained with reasonable certainty.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

PRISONERS—Time of imprisonment—Credits.

RICHMOND, VA., January 14, 1929.

CAPTAIN R. R. PENN,
*Superintendent State Farm,
State Farm, Virginia.*

MY DEAR CAPTAIN PENN:

Messrs. H. C. Joyner and L. S. Herrink are now in my office with reference to the detention of one Melvin Jones, held as a Powhatan jail prisoner at the State Farm under order of the judge of the circuit court of Powhatan county.

Melvin Jones was convicted in the circuit court of Powhatan county on October 23, 1928, and sentenced to five months confinement in jail, in lieu of which sentence he was ordered to serve five months on the State Convict Road Force. It is my understanding that this man has remained at the State Farm as a Powhatan jail prisoner since October 23, 1928, and is still there. I am informed by counsel for Jones that this man was confined at the State Farm as a Powhatan jail prisoner, awaiting trial, from August 19 to October 23, 1928. The order shows that he was again remanded to the State Farm on October 23, 1928, where, I assume, he has been continuously confined.

It is true that the order exhibited to me by counsel does not comply with the provisions of section 5019 of the Code as amended, in allowing to this man the time served by him in jail while awaiting trial. The fact, however, that the circuit court judge failed to perform the duty imposed upon him by this statute would not justify the detention of the man for a longer period than the law requires him to serve upon the production before you of satisfactory proof that he was confined in jail from August 19 to October 23, 1928. Of course, if the man was in prison at the State Farm as the jail of Powhatan county, you would know whether or not he was actually confined during this period, and would be in a position to give him credit for this time.

Under the provisions of section 5017 of the Code, as amended, this man would be entitled to a good conduct credit of four days per month for each month served by him at the State Farm, designated as the Powhatan jail, beginning with October 23, 1928, assuming of course that his conduct has been good. It is my opinion, in view of the provisions of section 5019 of the Code, as amended, that he would not be entitled to good conduct allowance on the time served by him while awaiting trial.

If you find from your records that this man has already served five months in jail, in this case the State Farm, including the time he was confined while awaiting trial, you should discharge him. If the five months have not as yet expired, he should be discharged as soon as they do expire.

I am informed by counsel that the clerk of the circuit court of Powhatan county added at the bottom of the order sent you that this man was not to receive credit for the time spent by him in confinement while awaiting trial. The Code of Virginia and the verdict of the jury fix the time that this man can be held in jail and the credits to which he is entitled. It is beyond the power of the clerk of the circuit court of Powhatan county, or even the judge of such court for that matter, to alter the statutes of Virginia.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

PRISONERS—Confinement in jail for non-payment of fine and costs.

RICHMOND, VA., November 14, 1928.

HON. J. POWELL ROYALL,
Attorney at Law,
Tazewell, Virginia.

MY DEAR SENATOR:

Acknowledgment is made of your letter of November 13, 1928, in which you say in part:

"At the August, 1928, term of the Circuit Court of this County, I defended a man charged with the violation of the prohibition law, to-wit, possession and transporting ardent spirits, and the verdict of the jury was one month in jail and \$50.00 fine and costs, total fine and costs amounting to about \$99.00.

"This man has been in jail since August 19th, and has, of course, long since served his sentence, but is unable to pay his fine and costs, and his sentence being less than sixty days, was not sent to the roads.

"The object of this letter is to ask just how long this man can be held in jail on account of the non-payment of his fine and costs?"

If the man was not sentenced to the convict road force, but sentenced to serve his time in jail, as stated in your letter, the matter would be governed by sections 4949, 4953 and 2860 of the Code of Virginia.

The last cited section provides that for good behavior a person held in jail is to receive a credit of four days per month.

Section 4949 of the Code provides that unless the fine and costs for which a prisoner is held in confinement be paid, or his discharge ordered by the court, he shall continue in confinement until the expiration of the limitation prescribed by law. That limitation in the case of jail prisoners not members of the convict road force is prescribed by section 4953 of the Code.

In the case referred to in your letter, the prisoner could be held for three months for the non-payment of the fine and costs. It would, therefore, appear that the prisoner referred to can be held for a period of four months less the good conduct time allowed by section 2860 of the Code.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

**PRISONERS—Time spent in jail to be deducted from penitentiary sentence
—Allowance for good behavior.**

RICHMOND, VA., *November 15, 1928.*

MESSRS. HOLLAND & WOODWARD,
Attorneys at Law,
Suffolk, Virginia.

GENTLEMEN:

Acknowledgment is made of your letter of November 13, 1928, in which you say:

"Hines Herndon, a negro, was convicted of a statutory offense, and verdict rendered of one year in the penitentiary. Sentence was deferred, and the prisoner has spent more than eight months in jail. Section 5048a commutes the sentence of every man sentenced to the penitentiary ten days out of every calendar month. Section 5019 provides that such person who may hereafter be sentenced by any court to a term of confinement in the penitentiary * * shall have deducted from any such time all time actually spent by such person in jail awaiting trial. Upon the sentence of this person, will he be entitled to the time actually spent in jail awaiting trial, and if so, what commutation of sentence will there be for the time so spent?"

Section 5048a of the Virginia Code of 1924, Acts of 1928, p. 474, was repealed by the Acts of 1928, and the credit to which this man is entitled appears to be governed by sections 5017 and 5019 of the Code, as amended, and section 2860 of the Code.

It would appear from your letter that the man has not as yet been sentenced. If this be true, he would be entitled to credit on his sentence for the time that he has been confined in jail awaiting sentence. This credit would appear, however, to be limited to the time "actually spent in jail." See section 5019 of the Code, as amended by chapter 154 of the Acts of 1928. While it is true that this section only refers to the time spent in jail awaiting trial or while awaiting the outcome of an appeal, I think that the statute should be construed so as to extend this

credit to any person held in jail after trial and while awaiting sentence, as the trial is not completed until the final sentence is entered. *Gilligan v. Commonwealth*, 99 Va. 816, 827 (1901).

This man would certainly not be entitled to the allowance of ten days per month for good behavior authorized by section 5017 of the Code, as amended by chapter 150 of the Acts of 1928, as this section expressly provides such good conduct allowance shall commence only on the day the prisoner is received in the penitentiary for the convict road force camp. This section, as amended, also allows four days per month for each month actually served by him in jail after sentence and while awaiting removal to the penitentiary or the convict road force.

Section 2860 of the Code authorizes an allowance of good conduct time of four days for every month that any convict held in jail appears to have faithfully observed the rules and regulations of the jail while confined therein, etc., provided the judge consents to such deduction. It rather looks as if this section was limited to persons under sentence.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

PRISONERS—Sentenced to State convict road force—Terms of confinement.

RICHMOND, VA., *September 12, 1928.*

HON. W. E. SANDIDGE, *Clerk,*
Circuit Court of Amherst County,
Amherst, Virginia.

DEAR SIR:

I am in receipt of your letter of yesterday, in reference to terms of confinement of prisoners sentenced to work on the State convict road force. I note that you call attention to section 8 of the prohibition law, as amended, page 1236 of the Acts of 1928 section 2094 of the Code, as amended, page 1369 of the Acts of 1928, and section 2095 of the Code, as amended, page 1370 of the Acts of 1928, and in which you also make reference to section 4953 of the Code.

In your letter you ask three questions which I quote:

“When a prisoner is sentenced to the State convict road force for the non-payment of fine and costs, and such prisoner is not taken into such force, but is kept confined in jail, for what length of time must he be confined in jail for the non-payment of the fine and costs? Does section 4953 of the Code prevail as to such prisoners?”

“As I understand it, section 4953 of the Code, fixing the time a prisoner must serve in jail for the non-payment of fine and costs, applies to all *prisoners confined in jail* for the non-payment of fine and costs, and that section 2095 only applies to prisoners actually taken into and worked on the State convict road force. Is this correct?”

“It is obvious that a prisoner worked on the State convict road force under section 2095 must serve a longer time for the same amount of fine and costs than a prisoner who is confined in jail, but, as I understand it, when a prisoner has worked out his fine and costs on the State convict road force he has thereby paid and satisfied the fine, while a prisoner who serves the time in jail prescribed by section 4953 has not paid the fine and costs and the same can still be enforced against him. Is this correct?”

In explanation, and before answering your questions, I will say that it is my understanding that section 8 of the prohibition law was amended to conform the limit of punishment and the allowance for days worked and days of idleness to the provisions of sections 2094 and 2095 of the Code.

Previous to the amendment and without regard to the amount of fine and costs, the judge could, in default of payment, sentence the person convicted to a definite period of confinement ranging from three months to six months. Under such law, a person who has been convicted of a violation of the prohibition law could be sentenced to as much as six months confinement in lieu of the payment of a small fine, while some other judge might impose the minimum of three months confinement in lieu of the payment of a fine as large as \$500. I also understand that the provisions of section 8 apply to prohibition cases to the exclusion of so much of section 4094 as is in apparent conflict therewith.

In answer to your first question, I would say that a person sentenced to the State convict road force for the non-payment of fine and costs, who does not serve upon the convict road force, but remains idle in jail, is only entitled to a credit of 25 cents per day for each day of confinement, his total confinement to be for no longer time than six months. It has been expressly held in *May v. Dillard*, 134 Va. 707, that section 4953 does not apply to persons sentenced to the State convict road force or to work in quarries, but that that section applies to female prisoners and such male prisoners as have been found physically unable to work upon the public roads. The amendment to section 2094 would allow a person whose total fine and costs would require that he be held for not less than sixty days to be sentenced to the State convict road force, whether physically fit or not; that such persons as were found to be physically fit should be sent to the convict road force and those physically unfit should be sent to the State farm for misdemeanants, and that all such persons should be given the same allowance for time off as those confined in the State penitentiary.

You express an opinion that all prisoners confined in jail for the non-payment of fine and costs are held subject to section 4953 of the Code and section 2095 only applies to prisoners actually taken into and worked on the State convict road force. You ask if your conclusion is correct.

I think not. In all prohibition cases, unless a person is physically unfit, the law requires that each male must be sentenced to the convict road force and such one, as well as others legally sentenced to the road force, is expressly allowed the same credit as is provided for convicts in the penitentiary. It is only those persons who are not sentenced to the convict road force who come within the provisions of section 4953 of the Code, under the provisions of which his or her confinement is graded according to the total amount of fine and costs.

You are correct in your conclusion that every prisoner who has served on the convict road force is entitled to a credit on the amount of his fine and costs, but that a person who is not sentenced to the convict road force, but is confined in jail, under the provisions of section 4953, is not entitled to a credit on the fine and costs, and that fine and costs may still be enforced in civil proceedings, but not by *capias pro fine*.

It is certainly true that a person, confined in jail is more leniently treated and serves a shorter length of time for the non-payment of fine and costs than a person sentenced to the roads, but this is a matter which has been determined by

the Legislature, and the term of confinement of each person must be worked out according to the provisions of the sections to which we have had reference.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

PRISONERS—State convict road force—Payment from treasury for support of convict's family to continue after expiration of sentence if convict is held and worked.

RICHMOND, VA., March 28, 1929.

HON. H. T. HOLLADAY, JR.,
Juvenile Justice,
Rapidan, Virginia.

MY DEAR MR. HOLLADAY:

Acknowledgment is made of your letter of recent date, with reference to Ben Breeden who was sentenced to the State convict road force for the non-support of his wife and children. It appears from the statements in your letter that, through an error, this man was held on the convict road force longer than he should have been held under his sentence. You ask me to advise you whether the State convict road force should pay the \$1.50 per day, ordered to be paid for the support of his wife and children, for the number of days he was held and worked on the road force after his sentence expired.

Section 1936 of the Code in the second paragraph thereof provides:

"It shall be the duty of the board of supervisors of the county, or of the council * * of the city within the boundaries of which any work is performed under the provisions of this act to allow and order payment, at the end of each calendar month, out of the current funds of said county or city, to the court which originally sentenced such prisoner for the support of the wife of such prisoner a sum not less than fifty cents nor more than one dollar *for each day's work performed by such prisoner*, and twenty-five cents per day additional for each child coming within the provisions of this act * *." (Italics supplied.)

The last paragraph of section 1936 of the Code provides:

"If, however, such prisoner shall be employed on the State convict road force or other public work of the State, the sum or sums provided for above shall be paid by the State Highway Commissioner out of the funds provided for the construction and maintenance of the public roads or other public work, as the case may be."

This statute is a remedial statute intended to aid in the care of the wife and children of a prisoner punished for failure to support them, its principal object being to provide for the support of such wife and children while the husband and father undergoes the punishment. This being the object of the statute, it is my opinion that an allowance is to be made for each day that he works on the State convict road force, regardless of whether or not his sentence has been completed.

I am, therefore, of the opinion that the Highway Department should pay for the number of days this man worked after his sentence expired.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

PRISONERS—Held at penitentiary for violation of prohibition law—For nonpayment of fines and costs.RICHMOND, VA., *August 23, 1928.*

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

DEAR SIR:

I am in receipt of your letter of the 22nd instant, in which you write concerning the time of confinement of persons committed to your custody for violations of the State prohibition law.

You say that you are receiving commitment papers in cases tried since June 17, 1928, in which you are directed to hold persons convicted for a specified length of time for non-payment of fine and costs.

You call my attention to the fact that section 8 of the prohibition law, authorizing a judge to fix the term of confinement for non-payment of fine and costs, has been amended and re-enacted by chapter 481, page 1236, of the Acts of 1928, by which act the term of confinement of such persons is fixed by section 2095 of the Code providing a per diem allowance upon such fine and costs and providing that no person is to be held for a longer period than six months.

In my opinion, the order of commitment showing the amount of fine and costs, you should be governed by the provisions of section 2095 instead of the order of the court, sentencing a person to a specified term of imprisonment.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

PRISONERS—Mileage allowed sheriff and guard in going after prisoner.RICHMOND, VA., *November 8, 1928.*

MR. L. T. MUNDY, *Sheriff,*
Buchanan, Virginia.

DEAR MR. MUNDY:

I am in receipt of your letter of November 3, inquiring as to the amount allowed a sheriff and guard for mileage where such sheriff and guard go out of the sheriff's county and return with a prisoner charged with a felony. I presume from your letter that a guard was ordered by the justice issuing the warrant of arrest.

Section 3508 provides 8 cents per mile for a sheriff and guard for each mile travelled going and returning and the same amount for each mile travelled by a prisoner carrying him to jail. Apparently section 3508 covers cases in which a prisoner is arrested in a sheriff's own county.

Section 4960, which covers cases in which sheriffs or other officers go out of their county to execute process in criminal cases, provides that such officers shall receive out of the State treasury such compensation as the court from which the process issued may certify to be reasonable.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

PRISONERS—Payments can be made to dependents only for time spent on convict road force and not for time spent at State Farm.

RICHMOND, VA., September 7, 1928.

MR. E. H. DEJARNETTE, JR.,
Attorney at Law,
Orange, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of September 3, 1928, in which you say in part:

"In March or April of this year Ben Breeden was found guilty, by H. T. Holladay, Judge of the Juvenile Court of Orange county, Virginia, of failure to support his wife and four infant children, and was given a sentence of twelve months. A few days later he was sent to the State Farm, instead of to the road force, and was only transferred to the road force on August 17, 1928. The order sentencing Breeden provided that the State Highway Department should pay the regular amount per day for the support of his wife and children. The Virginia statute provides in section 1936: 'If, however, such prisoner shall be employed on the State convict road force or other public work of the State, the sum or sums provided for above shall be paid by the State Highway Commissioner out of the funds provided for the construction and maintenance of the public roads or other public work, as the case may be.'

"It is my contention that this statute was intended to provide a support for the deserted wife and children, that the work on the State Farm is a public work, and that the time worked on the State Farm falls within this provision. The wife and children should be paid for such time worked on the State Farm."

I have examined section 1936 of the Code with care, and it is my opinion that payments can be made from the funds of the State Highway Department only for such length of time as the prisoner was a member of the State Convict Road Force. No appropriation is made for the payment to the wife and children of a prisoner who is confined at the State Farm for defective misdemeanants.

I am, therefore, of the opinion that payments can be made only for such time as the prisoner was a member of the State Convict Road Force.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

PRISONERS—Towns liable for costs, including keep of prisoners in jail previous to joining convict road force.

RICHMOND, VA., October 19, 1928.

HON. N. B. HUTCHERSON, Mayor,
Rocky Mount, Virginia.

DEAR SIR:

I am in receipt of your letter of recent date, in which you say:

"When a man is convicted in the mayor's court for a violation of the State prohibition law and is given say three months on the State convict road force, and that man stays in the county jail for a period of two weeks

or more, who should pay the jail expense, the town or State? This is after he is convicted awaiting his transfer to the road. It has been the custom for the State to pay this expense after the man has been convicted in the mayor's court until he is transferred, but it seems now that the State wants to charge this expense up to the small towns, and they get the labor of the man when he is finally transferred to the road."

In my opinion, where a town has adopted a prohibition ordinance and receives fines imposed upon violators of the law, the town is under the prohibition law liable for the payment of all costs, including the keep of the prisoner sentenced to the convict road force after he shall have been convicted and up until the time he was sent for and delivered to the road force authorities.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

PRISONERS—Crimes and punishment—Petit larceny.

RICHMOND, VA., February 25, 1929.

MAJOR R. M. YOEUELL, *Superintendent,*
The Penitentiary,
Richmond, Virginia.

MY DEAR MAJOR YOEUELL:

Acknowledgment is made of your letter of February 21, 1929, with which you send me the court order in the case of *Commonwealth v. Robert Bailey*, entered by the circuit court of Accomac county on February 9, 1929. It appears that this man was indicted for burglary. On his arraignment, he pleaded guilty of petit larceny, was convicted of that offense, and his punishment fixed at confinement in the penitentiary for six months. You ask me to advise you whether this is a proper sentence and whether you should send for the man on this order.

The punishment for petit larceny is provided for by section 4440 of the Code, and is fixed at confinement in jail not less than ten days nor more than twelve months, or by fine not less than five nor more than one hundred dollars, or both. Petit larceny is, therefore, a misdemeanor, except in the cases provided for by section 4785 of the Code. Even in the cases governed by the last mentioned section, the minimum punishment in the penitentiary is one year.

I am, therefore, of the opinion that you should return this order to the clerk with this explanation so that it may be corrected.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

PUBLIC UTILITY—Hydro-Electric Corporation is not a public utility within meaning of section 4067 of the Code.

RICHMOND, VA., *January 4, 1929.*

ALFRED J. KIRSH, ESQ.,
Attorney at Law,
Richmond, Virginia.

MY DEAR MR. KIRSH:

Acknowledgment is made of your letter of January 2, 1929, in which you say in part:

"The Hydro-Electric Corporation of Virginia is a business corporation organized under chapter 148 of the Code of Virginia. Among the assets of the corporation is a power plant which generates electricity. The Virginia Public Service Corporation has entered into a lease with the Hydro-Electric Corporation of Virginia to lease its plant for a period of thirty years at a rental of a certain sum per annum for the use of the plant.

"In connection with the above facts I call your attention to section 4067 of the Code of Virginia, and inquire whether or not the Hydro-Electric Corporation of Virginia is a public utility in Virginia."

In your conversation with me about this matter, you stated that the Hydro-Electric Corporation sold no current to the public and would not engage in the sale of current to the public, but that the lessee of one of its plants, the Virginia Public Service Corporation, would engage in the business of selling current to the public generally.

Section 4067 of the Code, so far as is applicable to the question here under consideration, provides as follows:

"The term 'public utility' as used in this act shall mean and embrace every corporation, other than a municipality, company, individual, or association of individuals, their lessees, trustees, or receivers, appointed by any court whatsoever, that now or hereafter may own, manage or control any plant or equipment within the State for the conveyance of telephone messages or for the production, transmission, delivery, or furnishing of heat, light, power, or water, either directly or indirectly, to or for the public."

On receipt of your communication, I took the matter up with two of the members of the State Corporation Commission, Messrs. Fletcher and Hooker, the third member of the Commission, Senator Epes, being absent on account of illness, and they agreed with me that, on the facts stated in your letter, the Hydro-Electric Corporation of Virginia would not be a public utility within the meaning of section 4067 of the Code, as amended.

This section of the Code is badly drawn and its meaning not entirely free from doubt, but it is our opinion that it means that the owner of such a plant is a public utility only when such owner engages in the delivery or furnishing of heat, light or power either directly or indirectly to or for the public. Where the plant is leased to a *bona fide* lessee, such owner, in our opinion, is not engaged either directly or indirectly in the furnishing of such commodities to the public. It is the lessee who is engaged in doing this, and it is the lessee who is declared by this statute, in my opinion, to be the public utility.

While the question has not been directly adjudicated by the Corporation Commission of this State, the Commission has never attempted to apply the law with reference to public utilities to owners who lease their plants to public service

corporations, or other persons furnishing current to the public, nor to those producers of current who sell their excess supply to a corporation or individual engaged in furnishing current to the public, although the records of the Commission show that there are a great many persons who have done, and are continuing to do, these things in Virginia.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

REGISTRARS—Compensation.

RICHMOND, VA., *October 25, 1928.*

MRS. MARIE B. POWERS,
Mechanicsburg, Virginia.

MY DEAR MRS. POWERS:

His Excellency, Governor Byrd, has referred to me for reply your letter of recent date. In this letter you ask to be advised whether a registrar is entitled to the compensation fixed by section 200 of the Code, as amended, or that of section 96 thereof.

Section 96 of the Code, as carried into the Code of 1919, remains unamended. Section 200 of the Code has been amended three times since it was adopted as a part of the Code in 1919, the last time in 1928 (Acts of 1928, page 769). This, being the last act on the subject, controls, and the pay of a registrar is \$5.00 for each day's service rendered.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

RESIDENCE—Residents of government reservations are not residents of State.

RICHMOND, VA., *September 29, 1928.*

MRS. E. N. BERRY,
Accotink, Virginia.

MY DEAR MRS. BERRY:

In response to your letter of recent date, I call your attention to the case of the *Bank of Phoebus v. Byrum*, 110 Va. 708, 709, 67 S. E. 349, in which the court held that a person who is a resident on a United States reservation is not a resident of the State of Virginia. This decision may possibly be qualified by the decision of the court in *Nikis v. Commonwealth*, 144 Va. 618, but I am not certain as to this.

As it stands at present, I am of the opinion that persons who are residents of government reservations are not residents of Virginia within the meaning of the Constitution and statutes so as to permit such persons to vote in this State.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

REWARDS—Prisoners—Payment of reward for capture of.

RICHMOND, VA., May 22, 1929.

MISS VIOLET E. McDOUGALL, *Executive Secretary,*
Governor of Virginia,
Richmond, Virginia.

MY DEAR MISS McDOUGALL:

I wish to acknowledge receipt of your letter of May the 20th, with enclosures, which is as follows:

"I am enclosing herewith communication of the Commonwealth's Attorney of Henry County together with enclosure in the matter of a reward offered for the arrest and conviction of one Brice Gravely. Would you be good enough to advise us whether Section 5068 of the Code will permit the payment of this reward to these policemen?"

I have also examined section 5068 of the Code of Virginia, to which you refer. In this connection, I would state that I have also examined section 2991 of the Code of Virginia, and call your attention to the last paragraph thereof, which provides as follows:

"Nothing contained in this section shall be construed as prohibiting a policeman from claiming and receiving any reward which may be offered for the arrest and detention of any offender against the criminal laws of this or any other Commonwealth or nation."

The Court of Appeals, in the case of *Buek v. Nance*, 112 Va. 28, construed sections 5068 and 2991 of the Code, and held that section 5068 of the Code did not prevent a policeman from receiving a reward.

I am, therefore, of the opinion that it will be entirely right and proper for the Governor to pay the reward of \$50.00, which he offered by virtue of his proclamation issued on the 12th day of December, 1928, to the two policemen, J. W. Tyree, and T. S. Stultz, of the City of Martinsville.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ROADS—Special road law of Mecklenburg county, providing for district road boards, repealed.

RICHMOND, VA., September 10, 1928.

HON. E. CHAMBERS GOODE,
Commonwealth's Attorney,
Boydton, Virginia.

MY DEAR MR. GOODE:

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

"Since 1900, Mecklenburg county has operated under a special road law. The act creating this law is to be found in the Acts of the General Assembly of Virginia, 1899 and 1900, at page 974. This act makes each magisterial district of the county a separate road district, and provides for the appointment of two commissioners who, with the supervisor from that district, constitute the district road board.

"The Acts of 1928, section 46, page 588, repeal all special road laws, except such as provide for a county road board or county commission.

"Our Board of Supervisors is loath to accept the repeal of the special law mentioned. For that reason, I am submitting the matter to you. I will greatly appreciate your opinion as to whether or not the special road law mentioned is repealed by the Acts of 1928."

Section 46 of chapter 159 of the Acts of 1928, page 589, after repealing a number of Code sections, provides:

"and 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; and all other parts of acts, general or special, so far as inconsistent with the provisions of this act be and they are hereby repealed."

It seems to me this language is so clear that it is not subject to interpretation. I am of the opinion that this act has the effect of repealing all special road laws, including those creating district road boards, except such acts as provide "for a county road board or county road commission."

In my opinion the Mecklenburg act, providing for district road boards, has been repealed.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

ROAD LAWS—Cumberland county—Compensation of board of supervisors.

RICHMOND, VA., July 9, 1928.

HON. WILLIAM M. SMITH,
Commonwealth's Attorney,
Cumberland, Virginia.

MY DEAR MR. SMITH:

Acknowledgment is made of your letter of July 6, 1928, in which you call my attention to chapter 17 of the Acts of 1916, providing a special road law for Cumberland county; to section 2769 of the Code of 1919, as amended by the Acts of 1928, and to section 46 of chapter 159 of the Acts of 1928, providing a general road law applicable to all counties in the Commonwealth, etc.

You then request my opinion as to whether or not the special road law for Cumberland county, with its provision for compensation of the members of the board of supervisors in overlooking and supervising the roads of their respective districts, has been repealed and, if so, are they only entitled to the compensation provided for by section 2769 of the Code, as amended.

From the very sweeping language of section 46 of chapter 159 of the Acts of 1928, it is my opinion that the special road law for Cumberland county has been repealed. As the compensation of the members of the board of supervisors, fixed by chapter 17 of the Acts of 1916, is, as you say, for their services rendered under the special road law, it would seem that no authority would exist for the payment of any compensation, as, since this act is repealed, no services will be rendered by the members of the board under chapter 17 of the Acts of 1916. I

observe the language of section 2769 of the Code, as amended by the Acts of 1928:

“ * * * provided, that the provisions of this section shall not prevent supervisors in the counties which have such road laws from receiving additional compensation for such services in connection with road work done under said special road laws now existing, or as hereinafter amended, if such compensation be allowed in such special road law. * * ”

I do not think that this language can be construed as keeping alive a provision as to compensation in a special road law repealed by section 46 of chapter 159 of the Acts of 1928. Manifestly, where the special road law has been repealed, work cannot be “done under said special road” law.

It is, therefore, my opinion that no compensation can be paid to the board of supervisors of Cumberland county under authority of chapter 17 of the Acts of 1916.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

SANATORIUMS—Philippino should be admitted as patient same as white person.

RICHMOND, VA., January 22, 1929.

DR. ENNION G. WILLIAMS,
*State Health Commissioner,
Department of Health,
Richmond, Virginia.*

MY DEAR DR. WILLIAMS:

Acknowledgment is made of your letter of recent date, in which you request me to advise you whether a Philippino can be admitted as a patient to Catawba Sanatorium, one of the sanatoriums provided for white people. You state in your letter that you also have Piedmont Sanatorium which is provided for negro patients.

In an opinion given Dr. B. L. Taliaferro on November 17, 1920 (Report of the Attorney General, 1920, page 189), I advised him that a Chinaman could be admitted to Catawba Sanatorium. Chapter 371 of the Acts of 1924, entitled an act to preserve racial integrity, merely relates to the intermarriage of persons.

A Philippino, in my opinion, is not a negro and, therefore, I see no reason why, like a Chinaman, he is not entitled to admission to Catawba Sanatorium for treatment.

Sincerely yours,

JNO. R. SAUNDERS,
Attorney General.

SAND—Ownership of in beds of rivers and streams.RICHMOND, VA., *June 11, 1929.*

MR. GILMER J. SNEAD,
Fork Union, Virginia.

DEAR SIR:

Your letter of May 31, addressed to the Attorney General, has remained unanswered on account of his absence from the office on official business.

You say in your letter that you own a farm on the James river at Warren which you desire to rent for the storage of sand to be gotten from the river bed, and you ask whether or not you have any claim on the sand and have a right to a royalty of half the width of the stream.

I refer you to section 4441-a of the Code of Virginia, which makes it a criminal offense for any person to remove and carry away sand or gravel from land abutting on any of the rivers, streams or other waters of the Commonwealth, without the consent of the owner. The same section gives you a right to take sand from the river and gives you a further right to allow other persons, with your written consent, to remove the sand.

This being so, you are at liberty to dispose of the sand to any person on your own terms.

Yours very truly,

EDWIN H. GIBSON,
Assistant Attorney General.

SCHOOLS—School board—Clerk of.RICHMOND, VA., *March 26, 1929.*

FRANK P. PULLEY, JR., ESQ.,
Attorney at Law,
Waverly, Virginia.

MY DEAR MR. PULLEY:

Acknowledgment is made of your letter of March 23, 1929.

I have examined section 655 of the Code (School Code) with care and, while the question is not absolutely free from doubt, I am inclined to the opinion that this section does not prohibit the school board from appointing the division superintendent clerk of the school board.

Yours very sincerely,

JNO. R. SAUNDERS,
Attorney General.

SCHOOLS—School board—Compatibility of offices.RICHMOND, VA., *March 28, 1929.*

HON. R. C. HAYDON,
Division Superintendent,
Manassas, Virginia.

MY DEAR MR. HAYDON:

Acknowledgment is made of your letter of recent date, in which you request me to advise you whether a member of the school board in Prince William county can hold the office or position of county fire warden.

While I find provision made in the Code for the appointment of fire wardens for cities and towns (sections 3127-3131 of the Code), I do not find any provision thereof for county fire wardens. I do find, however, sections 540-541 of the Code providing for the appointment and the duties of forest wardens, it being one of the duties of the forest wardens to superintend the extinguishment of forest fires. The position of forest warden created by section 540 of the Code is an office, and one appointed thereto is an officer and as such would be ineligible, under chapter 499 of the Acts of 1928, to act as a member of the county school board.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

SCHOOLS—Authority of school board to employ additional teachers.

RICHMOND, VA., *December 11, 1928.*

HON. T. D. FOSTER,
*Superintendent of Schools,
Waverly, Virginia.*

MY DEAR MR. FOSTER:

Acknowledgment is made of your letter of some weeks ago, in which you ask my opinion on several questions. Your letter came at a time when I was extremely busy in the preparation of the Commonwealth cases for the approaching term of the Court of Appeals. Since that time, I have been so constantly engaged in court, or the preparation for the trial of Commonwealth cases, I have gotten terribly behind with my correspondence.

Your first two questions are as follows:

"First. Does the school board have the authority, if, in their judgment, it becomes necessary for the good of the system, which condition results from certain shifts in the school population or other causes, to employ additional teachers, or a school supervisor and helping teacher who is the same as a teacher?"

"Second. Could the school board refuse to employ a teacher for the same reasons given above, even though the necessary funds had been budgeted?"

It is my opinion that a school board is not authorized to employ any person, or incur any obligation, in excess of the allowance fixed in the school budget (see section 675 of the Code). The only thing that I can suggest is that, if such a teacher is necessary, you appeal to the Board of Supervisors to make an additional appropriation for this purpose.

Responding to your second question, it is my opinion that a school board is not required to expend all the funds provided for in the budget, unless a necessity exists for so doing.

Your third inquiry is as follows:

"Has the school board authority to use funds budgeted for pay of teachers to pay repair bills?"

The object of sections 657 and 658 of the Code (School Code) was to advise the Boards of Supervisors and the public just what expenditures were proposed

to be made by the school authorities, and, once this budget approved and a tax laid in accordance therewith, it is my opinion that the school boards are without authority to expend an item levied for one purpose for an entirely different purpose. It is, therefore, my opinion that you cannot use any part of the funds budgeted for the pay of teachers for the purpose of paying repair bills.

Your fourth question reads as follows:

"The Patrons League of one of our schools wishes to borrow \$2,000.00 for the construction of a school building. It has given notes totaling \$4,950.00 signed by twenty-eight patrons of the school and citizens. This \$2,000.00 note and interest are to be paid by the League and not by the school board over a period of four years. The bank asks that additional collateral in the form of a time warrant be given them. Can the school board legally endorse such a note or give such a warrant as collateral?"

Section 675 of the Code prohibits a school board from borrowing money, except pursuant to authority of law. A school board is authorized to make temporary loans not exceeding one-half of the amount produced by the county school levy for the year in which the loan is negotiated, or one-half of the amount of the cash appropriation made for schools for the preceding year, provided the school board first obtains the approval of the Board of Supervisors. Such temporary loan cannot be made, however, until all prior temporary loans have been paid.

Section 115-a of the Constitution, as amended June 19, 1928, prohibits a school board from contracting any debt or obligation except to meet casual deficits in the revenue, a debt created in anticipation of the collection of the revenue of said county for the then current year, or to redeem a previous liability, unless authorized by general law, and in addition thereto the matter is first submitted for approval or rejection to the voters of said county, who approve the creation of such obligation.

I do not think that the giving of a note under these circumstances would be the making of a temporary loan, and I do not know of any general law which authorizes a school board to become the endorser for the obligations of others, even though such obligations were incurred for the benefit of the school system. In addition to this, I do not think a school board has the authority to issue a time warrant, as this would be a violation of the budget provision and also of section 657 of the Code.

Trusting this gives you the desired information, I am

Very truly yours,

LEON M. BAZILE,
Assistant Attorney General.

SCHOOLS—Town school district—Authority of school board to draw warrants.

RICHMOND, VA., *November 24, 1928.*

HON. A. W. BOHANNAN, *Treasurer,*
Surry, Virginia.

MY DEAR MR. BOHANNAN:

Honorable Harris Hart, Superintendent of Public Instruction, has referred to this office your letter to him of November 17 with reference to the status

of the town school district and to the authority of the school board of such a district to draw warrants upon the county treasurer.

The Legislature of 1928 has the following provision in the revised school law: "All special school districts and special town school districts are hereby expressly retained as they exist at the present time" (section 653).

I am of the opinion that the Legislature intended that the special town district should be retained not merely in its geographical limitations but also in its function as a school district. Such a district would therefore have a board of three members appointed by the town council for the purpose of operating the schools in the independent town.

It is my opinion that such a town board would not have authority to draw warrants upon the county treasurer. The county treasurer is the custodian of all State and local funds levied or appropriated for the operation of the schools of the county. The county school board through warrants signed by its chairman and clerk has authority to draw upon the county treasurer.

The town district school board has authority to draw warrants upon the treasurer of the town for any school funds raised and of which funds the town treasurer is the custodian. The funds of such an independent town district correspond precisely to district funds in any other district except that in the former case they are paid to the town treasurer for local disbursement, whereas, in the latter case, they are paid to the county treasurer for general disbursement by the school board.

The law provides for a county levy not exceeding one dollar, except in designated counties, for the general operation of the schools. This levy is of course laid in the county and in independent town districts as well, and the resources from this levy come to the county treasurer's office. The law also provides, Acts 1928, section 698, that councils in incorporated towns are authorized to levy an additional tax not exceeding one dollar for the support and maintenance of the public schools in said town. This latter tax would of course be collected in the town and the funds would be deposited with the town treasurer and may be drawn by warrant of the town school board.

If teachers in the town districts are appointed or approved by the county school board as they should be, then for the payment of such teachers warrants should be drawn by the county school board upon the county treasurer. The town may supplement the salary fixed by the county school board out of any local moneys at the disposal of the town.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

SCHOOLS—Education compulsory where facilities are adequate—Illegal for school board to borrow money without consent of tax levying body.

RICHMOND, VA., *October 18, 1928.*

HON. JOHN H. COLE,
Commonwealth's Attorney,
Stony Creek, Virginia.

MY DEAR MR. COLE:

Acknowledgment is made of your letter of recent date, in which you state that the white schools of your county have adequate facilities for all the white

children, but that sufficient building facilities are not adequate for the colored children. You then request me to advise you whether section 687 of the Code, enacted into law in 1928 and relating to compulsory education, can be enforced as to the white children when, due to the lack of adequate building facilities, it cannot be enforced as to the colored children.

I have examined sections 129 and 140 of the Constitution, and sections 680, 683-687 of the School Code with care, and the intention of the General Assembly, unquestionably, was to compel the education of all children wherever the facilities are adequate. I do not think that it was ever the intention of the General Assembly to postpone the operation of this law in any community, in which the facilities are adequate, simply because the facilities are inadequate in another community in the same county.

It is, therefore, my opinion that the compulsory education statutes must be enforced in every community in which the school facilities are adequate, and that, such facilities being adequate in the white school system in your county, it must be enforced as to the white children within the school ages. I am also of the opinion that, if in part of your county the school facilities of the negro schools are adequate for the population of that community, the compulsory education law must be enforced as to the negro children within the school ages, although the colored school facilities in other communities may be inadequate. The dominant idea of the General Assembly was to provide elementary education for the children of Virginia, and I do not think that this intention can be defeated in any community, which has adequate school facilities, simply because some other branch of the school system, or neighborhood, may be without such facilities and, therefore, exempt from the compulsory education law under section 687 of the Code.

You next say:

"The other question pertains to the right of a school board to issue warrants for the payment of teachers' salaries at a time when the treasurer has no funds on hand with which to pay them, the school board making arrangements with the banks to pay the warrants when presented and hold them until the school levy is collected, this being done without the consent of the tax levying body. In view of section 675 of the act, found on page 1211 of the Acts of 1928, I take the position that the school board is without any authority in law to borrow money in this manner, and, if they do, the transaction is void."

You are entirely correct as to this. If the school board finds it necessary to make a temporary loan, it can do so within the limitations of section 675 of the School Code by obtaining the consent of the tax levying body. The issuing of warrants, however, in the manner outlined in your letter is clearly illegal.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

SCHOOLS—How county school board and county superintendent of schools appointed.RICHMOND, VA., *January 25, 1929.*MRS. ARTHUR GARTRELL,
Middleburg, Virginia.

MY DEAR MADAM:

Acknowledgment is made of your letter of January 24, 1929, in which you request me to tell you how the members of the county school board and the county superintendent of schools are elected or appointed.

Section 653 of the Code (School Code) provides that a school trustee electoral board composed of three members shall be appointed in each county by the circuit court of such county, or the judge thereof in vacation. The county school board consists of one member appointed from each school district in the county and the members of this board are appointed by the trustee electoral board.

Under section 649 of the Code (School Code), the division superintendent is appointed by the county school board from a list of eligibles certified by the State Board of Education.

Trusting this gives you the desired information, I am

Very truly yours,

JNO. R. SAUNDERS,
Attorney General.

SCHOOLS—Composition of county school boards.RICHMOND, VA., *January 22, 1929.*HON. EDWIN J. SMITH,
*Commonwealth's Attorney,
Norfolk, Virginia.*

MY DEAR MR. SMITH:

Acknowledgment is made of your letter of January 18, 1929, with reference to the composition of the county school board.

Section 653 of the Code (School Code) provides in part:

“ * * The county school board shall consist of one member appointed from each school district in the county by the school trustee electoral board. The members so appointed shall constitute the county school board * * *.”

This section further provides in the second paragraph thereof:

“ * * All special school districts and special town school districts are hereby expressly retained as they exist at the present time * * *.”

It is, therefore, my opinion that each school district, whether it be a magisterial district, a special school district, or a special town school district, is entitled to have one member from such district on the county school board, and the board thus constituted is the school board referred to in section 133 of the Constitution and section 649 of the Code (School Code).

The town of Virginia Beach should, therefore, have a representative on the county school board appointed by the trustee electoral board, regardless of whether or not the town have a local board of three members appointed by the town

council for the purely local administration of the town schools, and this member so appointed would, of course, have a vote in the election of the county superintendent.

Very truly yours,

JNO. R. SAUNDERS,
Attorney General.

SCHOOLS—County school board, eligibility of members of.

RICHMOND, VA., *April 15, 1929.*

HON. R. C. HAYDON,
Division Superintendent,
Manassas, Virginia.

MY DEAR MR. HAYDON:

Acknowledgment is made of your letter of April 13, 1929, in which you request me to advise you whether a member of the town council of Manassas is eligible for membership on the county school board.

The only law applicable to the subject of your inquiry is chapter 499 of the Acts of 1928, which provides in part:

"No federal, State or county officer, or any deputy of such officer and no supervisor shall be chosen or allowed to act as member of the county school board * * *."

You will observe from this that the prohibition is against State, federal and county officers. A member of a town council holds as such neither a federal, State nor county office, and, in my opinion, is, therefore, eligible for membership on the county school board. *Burch v. Hardwicke*, 30 Gratt. (71 Va.) 24, 32, 33 (1878).

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

SCHOOLS—County school board, eligibility of members.

RICHMOND, VA., *April 12, 1929.*

HON. POSIE J. HUNDLEY,
Commonwealth's Attorney,
Chatham, Virginia.

MY DEAR MR. HUNDLEY:

Acknowledgment is made of your letter of April 11, 1929, in which you call attention to section 1498 of the Code, as amended by the Acts of 1928, and to chapter 499 of the Acts of 1928. You then request me to advise you whether or not a local health officer, elected under section 1498 of the Code, as amended, can serve as a member of the county school board.

The question presented by you for my opinion requires the determination of whether or not a local health officer is a State or county officer, and is not entirely free from doubt. Section 1498 of the Code, as amended, speaks of the local health official as an officer, and certainly, when his powers are examined,

they would seem to include a delegation to him as such officer of some of the sovereign functions of government to be exercised by him for the benefit of the public. *Hartigan v. Board of Regents*, 49 W. Va. 14, 20, 38 S. E. 698. Because of this, I am of the opinion that it would be much safer not to appoint a local health officer a member of the county school board.

With my best wishes, I am

Very truly yours,

JNO. R. SAUNDERS,
Attorney General.

SCHOOLS—County school board, how constituted.

RICHMOND, VA., February 25, 1929.

MR. C. W. STEELE, *School Trustee,*
Meadow View, Virginia.

DEAR SIR:

Acknowledgment is made of your letter of February 25, 1929, in which you say:

"I am writing to ask for an opinion on a point of law, or parliamentary law. We have in our school board eight votes. The town of Abingdon has three members, with one-third vote each. What I want to know is how many votes it takes to elect. In the State Senate we always had a majority vote, no fractions. Will we have five votes, I mean whole votes, or will four and a fraction elect school superintendent."

If you are correct in your statement as to the membership of your board, the school board of your county is not properly constituted. Under section 653 of the School Code, the county school board consists "of one member appointed from each school district in the county by the school trustee electoral board" and these members constitute the county school board. Special school districts and special town school districts are retained by this section and, therefore, one member must be appointed to the county school board from a special town school or a special school district, as well as from the magisterial districts. The three members of the town school board are not a part of the county school board and have nothing to do with it. Each member of the county school board, as properly constituted, has one vote in its proceedings.

Section 649 of the Code, which provides for the election of the division superintendents of schools, merely says that the division superintendents of schools shall be appointed by the local county school boards "from a list of eligibles certified by the State Board of Education, in accordance with the provisions of this section."

It is my opinion that a majority vote of the members of the county school board will control the election of the division superintendent.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

SCHOOLS—Only children whose parents are residents of this State can demand free tuition in public schools.

RICHMOND, VA., *November 10, 1928.*

MRS. CHAS. J. HARKRADER,
Chairman of School Board,
Bristol, Virginia.

DEAR MRS. HARKRADER:

I am in receipt of your letter of the 2nd instant, inquiring as to the right of children whose parents are actual residents of Bristol, Tennessee, to enter the public schools of Bristol, Virginia; and I note what you say as to the claim of the parents of these children.

In my opinion, the school law of Virginia restricts free tuition to children whose parents are actual residents of the State, and I do not think that, because a parent retains a technical voting residence in Virginia, his or her children can demand tuition in the public schools of Virginia, contrary to the wishes of the school boards of the cities and counties of the State.

Let me add that I have talked with Honorable Harris Hart, Superintendent of Public Instruction, and he concurs in this opinion.

Yours very sincerely,

JNO. R. SAUNDERS,
Attorney General.

SCHOOLS—Residence for purpose of attending schools free of of tuition.

RICHMOND, VA., *December 5, 1928.*

HON. FLETCHER KEMP,
Division Superintendent of Schools,
Rosslyn, Virginia.

MY DEAR MR. KEMP:

Acknowledgment is made of your letter of December 4, 1928, in which you say in part:

"In Arlington county we have several hundred pupils attending our elementary and high schools, who are brothers, sisters, nieces, nephews, cousins, etc., of people living here, and who have taken these children with them as members of their families."

You then ask me how you are to determine who are residents of Arlington county for the purpose of attending its schools free of tuition.

Section 682 of the Code, Virginia School Laws, page 26, provides in part:

"The public schools, except as otherwise provided, shall be free to all persons between the ages of seven and twenty years residing within the county."

The test, in my opinion, as to whether a child is residing within a county or not is where it has its permanent abode. Children ordinarily have their permanent abode at the home of their parents or the parent having custody of them, but, of course, there are many cases where children permanently reside with other persons who stand in loco parentis to such children. In all such instances, I

think that children reside in a county within the meaning of section 682 of the Code.

I do not think, however, that children who are sent into Arlington county to live with persons other than their parents only during the school session could be regarded as residing within the county within the meaning of section 682 of the Code, so as to entitle them to free tuition in the schools of Virginia.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

SCHOOLS—Election of division superintendent, conditions and agreements.

RICHMOND, VA., June 26, 1929.

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

MY DEAR MR. HART:

I beg leave to acknowledge receipt of a petition addressed to the State Board of Education which is signed by Messrs. W. N. Hicks, E. C. Nicholls, J. M. Whitlock, et als.

You request that I examine this petition and advise you whether or not the action of the School Board of Powhatan County, at its meeting held on the 21st day of March, 1929, in electing Mr. P. C. Williams as Superintendent of Schools for the County of Powhatan, was legal and, if not, what are the duties of the State Board of Education in the premises.

Accompanying this petition is a copy of the minutes of the Board which shows its acts and doings on that day. So far as is applicable to the question here under consideration, the minutes of the Board are as follows:

"The Chairman made the statement that under the Constitution as now in effect putting upon this Board the responsibility of naming a Division Superintendent of Schools, for the next four years. And if the Board wanted to go into this matter it was open for discussion. The present incumbent, P. C. Williams, made the proposition to the Board that he would agree to serve as Superintendent for the ensuing term for a salary of \$1,500.00 per year on the condition that a rural supervisor be employed, thus relieving him of the duties of class room supervision, and further that he be permitted to engage in other business for profit with the understanding that such business should not interfere with the proper conduct of his office as Superintendent, this Board to be the judge as to whether or not the said duties were properly performed, and provided further that the consent of the State Board of Education be had before such arrangement should be in effect.

"On motion of B. M. Bonifant, and seconded by J. W. Mosley, P. C. Williams is unanimously appointed as Superintendent of Schools for Powhatan County, for the ensuing term of four years beginning July first, 1929. This appointment is made under and subject to the conditions named above."

The petition alleges that the action of the said Board in electing Mr. P. C. Williams as Superintendent of Schools for the County of Powhatan, by virtue of the conditions precedent contained in the above quoted resolution, was ultra vires, null and void.

I have carefully read this petition, sections 132-133 of the Constitution, sections 615 and 649 of the School Code of Virginia, and section 9 of the regulations of the State Board of Education, all of which deal with the question of the election of Superintendent of Schools, the salary prescribed by law, and the duties incident to that office.

I quote from the above resolution adopted by the Board the following statement:

“ * * * The present incumbent, P. C. Williams, made the proposition to the Board that he would agree to serve as Superintendent for the ensuing term for a salary of \$1,500.00 per year on the condition that a rural supervisor be employed, thus relieving him of the duties of class room supervision, and further that he be permitted to engage in other business for profit with the understanding that such business should not interfere with the proper conduct of his office as Superintendent, * *.”

These conditions upon which the School Board elected Mr. Williams, in my opinion, are in conflict with the law applicable to this matter and would have the effect of relieving him of the most essential duties imposed upon him as Superintendent by law.

I am, therefore, of the opinion that the election of Mr. P. C. Williams as Superintendent of Schools for Powhatan County upon the conditions above set forth, which were precedent and prior to his election, was an illegal and void act on the part of the Board.

The time having elapsed by law in which the School Board of Powhatan County can elect a Superintendent of Schools, it, therefore, follows that it now becomes the duty of the State Board of Education to elect such Superintendent.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

.SCHOOLS—Division superintendents, authority to remove.

RICHMOND, VA., May 3, 1929.

HON. J. MURRAY HOOKER,
Attorney at Law,
Stuart, Virginia.

MY DEAR MR. HOOKER:

Acknowledgment is made of your letter of April 20, 1929, in which you say:

“Referring to the matter of the authority of the State Board of Education to remove from the eligible list the name of one who has been placed thereon, will say that I think from an examination of sections 132 and 133 of the Constitution, as amended, it will be seen that, after the State Board has certified one as an eligible to the local board of trustees, its authority and power over the matter ceases.

“Section 132 of the Constitution, as amended, provides:

“ * * * It shall certify to the local board or boards of each division in the State a list of persons having reasonable academic and business qualifications for division superintendent of schools, one of whom shall be selected as the superintendent of schools for such division by said school board or boards, as provided by section one hundred and thirty-three of this Constitution.”

"Section 133 of the Constitution, as amended, then provides that the local school board shall select the division superintendent from this eligible list. This list has been certified to the local board of Patrick county. The local board, after due notice to the public, proceeded to select a division superintendent. Mr. J. F. Reynolds, whose name was duly certified on the eligible list, was selected. The opposition to him was given a full hearing, taking two days to air their opposition. The board has appointed Mr. Reynolds, has delivered to him a certificate of election, has certified the appointment to the clerk of the circuit court of the county and has directed the clerk to certify the appointment to the State Board of Education. I am not sure but think Mr. Reynolds has qualified for his new term by taking the required oath of office.

"It is manifest that the State Board of Education is without authority to remove the name of Mr. J. F. Reynolds from the eligible list, and I do not find any authority authorizing it to hear any charges against him. This now would seem to be a responsibility of the local board of trustees."

I have examined sections 132 and 133 of the Constitution, as amended, and sections 649 and 651 of the Code (School Code), and I fully agree with you that the State Board of Education is without authority to remove the name of Mr. J. F. Reynolds from the eligible list at this time. From an examination of section 651 of the Code (School Code), it would seem that the power to remove a division superintendent is placed in the hands of the appointive power, which, in this case, would be the local school board.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

SCHOOLS—Distribution of funds in various districts.

RICHMOND, VA., July 10, 1928.

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

DEAR SIR:

Acknowledgment is made of your letter of recent date, in which you refer to your letter of June 12 and my reply to you of June 13, in re the basis of distribution of State school funds among the different districts of a county. You then say:

"Please advise me the basis of distribution of school funds received from the State among the districts of the county, prior to the enactment of chapter 471 of the Acts of 1928, pages 1202-1203."

Prior to chapter 471 of the Acts of 1928, the funds derived from the State school tax on real estate and tangible personal property, under section 2205 of the Code, was required to be applied to the support of the public schools for the equal benefit of all of the people of the State, to be apportioned on a basis of school population.

I am advised by the State Board of Education that, after it apportioned the fund among the several localities of the State, the practice was for each locality to sub-apportion the fund among the several districts, based on the school population in such districts.

This, in my opinion, was the proper procedure under section 2205 of the Code and section 135 of the Constitution prior to the abolition of the school districts by chapter 471 of the Acts of 1928.

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

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

SCHOOLS—County school funds—Expenditures.

RICHMOND, VA., *December 26, 1928.*

HON. W. J. EDMONDSON,
Superintendent of Schools,
Abingdon, Virginia.

MY DEAR MR. EDMONDSON:

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

"I am asking your advice on the following questions: The school board is desirous of conducting its finances as well as administration under the county unit plan. The White bill, a special act passed in 1926, specifies how the school levies for the county should be made. For support and maintenance of schools the supervisors are empowered to levy a fifty cent county tax and a dollar district tax. These levies have been laid in all the districts with the exception of Saltville, which has laid a fifty cent district tax, and Goodson, which has laid a ninety-five cent district tax. Therefore, (1) Can the treasurer credit all the proceeds from the State and county funds to one general fund which we designate as 'County School Fund'? (2) Can the school board instruct the treasurer to transfer the amounts arising from the district school levy for support and maintenance to this fund? The school board will spend more than the district school levy in the payment of teachers' salaries, etc., in every district in the county. If this can be done, you will readily see that it will relieve the treasurer and also the school board from a great deal of bookkeeping and serve the same purpose as if different accounts were kept."

It is my opinion that, where school funds are raised by means of a district tax, these funds must be segregated and can be lawfully used only in the district in which they were raised. Further, except where expressly authorized by law so to do, I do not think that any funds raised for one specific purpose can be diverted to any other purpose. It was with a view of getting rid of such troublesome matters that the new school Code made the county unit system compulsory in all except a few cases.

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

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

SCHOOLS—Treasurer custodian of school funds.RICHMOND, VA., *March 29, 1929.*

MR. J. L. BORDEN, *Principal,*
Bedford High School,
Bedford, Virginia.

MY DEAR MR. BORDEN:

Acknowledgment is made of your letter of March 22, 1929, with its enclosure. In your letter you state, first, that tuition money in your school is collected by you and deposited in the name of the Bedford High School, and disbursed by you, a statement of disbursements being rendered to the school board periodically; second, that the county and State funds, which come through the county school board, are deposited in the name of the Municipal School Board and the salary checks paid from this fund; and, third, that the district fund, which is collected in town, is generally deposited by the town treasurer to the credit of the Municipal School Board. You request me to advise you whether this procedure complies with the law.

You will recall that section 653 of the Code (School Code) abolished the several school districts in the State, except special town school districts. Under section 698 of the Code (School Code), the school tax in a county must be laid as a county tax, including the property located in the towns in such county. Under section 700 of the Code (School Code), it is provided:

"All funds for school purposes in the counties, both State and local, shall be handled by the county treasurer and paid out in the same manner as other county funds are handled and paid out by him under the provisions of chapter one hundred and ten of the Code of Virginia * * *."

I am, therefore, of the opinion that all school funds arising from State appropriations, and all school funds arising from local sources, whether from levies or tuition, must be handled by the county treasurer, with one exception. That exception is found in section 698 of the Code (School Code), which authorizes councils in the incorporated towns of any county to levy an additional tax on property in such town for the maintenance and support of the public schools therein. This tax, in my opinion, would be collected and disbursed by such town treasurer.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

SCHOOLS—County treasurer custodian of school funds.RICHMOND, VA., *December 26, 1928.*

MR. H. H. LINN,
509 West 121st St.,
New York City.

MY DEAR SIR:

Acknowledgment is made of your letter of December 21, 1928, in which you ask the following questions:

"Does Virginia have any statutes requiring that banks carrying local public school funds on deposit must protect these funds against loss by putting up security? If so, where will I get the information?"

"If Virginia does not require that banks carrying local school deposits must put up security, is the public treasurer liable on his bond for any losses that may occur due to bank failure? If so, may this treasurer furnish a personal bond?"

Section 700 of the Code of Virginia, enacted into law at the session of 1928 in place of the former section having that number (Acts 1928, page 1221) makes the county treasurer the custodian of school funds. In the case of *Mecklenburg v. Beales*, 111 Va. 691 (1911) the Court of Appeals of this State held that a county treasurer was an insurer of the official bonds entrusted to him and, therefore, where he deposited such funds in a bank and they were lost through the failure of the bank, the treasurer and the sureties on his bond remained liable for the loss of the funds.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

SCHOOLS—Bond issue—Special school districts.

RICHMOND, VA., *January 31, 1929.*

HON. ROLAND E. COOK,
Superintendent of Schools,
Salem, Virginia.

MY DEAR MR. COOK:

A few days ago I received a letter from Mr. A. M. Bruce, Principal of the Salem High School, in which he submitted the following question for an opinion:

"Will you please advise us how to proceed in the following matter? The town of Salem and one school district of Roanoke county want to have a bond issue for the erection of a joint high school.

"The terms of office of two members of the Salem school board have expired. The attorney for the town of Salem has ruled that, according to the present School Code, the town of Salem is no longer a separate school district; that it is a part of Roanoke county, and that the town council does not have authority to appoint a school board for the town of Salem. Is Salem a separate school district with the same status it had before the new School Code was passed by the General Assembly? Who should appoint the town of Salem school board? What order of procedure shall we have to follow in order to have a bond issue for the town of Salem and one other school district in Roanoke county?"

As I have received a similar request from you, I am, therefore, writing you direct and mailing a copy of my reply to Mr. Bruce.

Section 653 of the Code (School Code) provides in part:

" * * All special school districts and special town school districts are hereby expressly retained as they exist at the present time * *."

While the question is not free from doubt, I held in an opinion given on November 24, 1928, to Hon. A. W. Bohannon, Treasurer, Surry, Virginia, that the Legislature intended, by this language, that the special town districts should be

retained not merely in their geographical limitations but also in their functions as school districts, and that such districts would, therefore, have boards of three members appointed by the town council for the purpose of operating the schools in such independent town districts.

It is true that all districts, except special school districts and special town school districts, were abolished by the Act of 1928, except for purposes of representation, for the making of levies, for capital expenditures, and for the payment of present existing indebtedness, but, due to the amendment to section 653 of the Code (School Code) above quoted, the special school districts and special town school districts were retained as they existed prior to the Act of 1928, enacting into law the School Code.

Therefore, if the town of Salem was a separate school district at the time the Act of 1928 was passed, it has remained a separate school district as it existed at that time, with this exception, that its representation on the county board is by appointment of one member by the trustee electoral board as provided by section 653 of the Code (School Code). The town school board would be appointed, however, as heretofore.

The machinery for issuing bonds for school purposes is provided for in section 673 of the Code (School Code) and the Code sections therein referred to. You will see from an examination of this section that the loan must be contracted by the county school board on the credit of the county, but that the election shall be held in the district against which the proposed building will be a charge.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

SCHOOLS—Tax.

RICHMOND, VA., *January 2, 1929.*

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

MY DEAR MR. HALL:

Acknowledgment is made of your letter of December 17, 1928, in which you say:

"I am after you again about your school law, which you drafted last session of the Legislature.

"I want to know if, under this law, where a district tax is imposed for operating the schools, that is a magisterial district, all of it has to be merged into one fund and the expense of the particular district disregarded.

"In other words, I want to know if they cannot go ahead in the county where we have six magisterial districts and impose a district tax and take care of the expenses of each particular district."

Section 653 of the School Code, in the last paragraph thereof, provides as follows:

"For the purpose of representation and the levying of a tax sufficient to pay the present existing school district indebtedness and for future capital expenditures only, each magisterial district shall constitute a separate school district, but for all other school purposes, taxation, management, control and operation, the county shall be the unit, and the school affairs of such county

managed as if the county constituted but one school district. All special school districts and special town school districts are hereby expressly retained as they exist at the present time provided, however, in the counties of Henrico and Sussex in the discretion of the board of supervisors thereof, a district levy may be made in the several districts of said counties for the operation of the schools therein."

Section 698 of the School Code authorizes each county and city to raise sums by tax on all property subject to local taxation of not less than 50 cents nor more than one dollar, etc., to be expended for school purposes in such counties and cities. You will find near the end of this section certain exceptions made as to the amount of tax in certain enumerated counties.

It seems to me, from an examination of these two sections, that beginning with the year 1929 all school taxes, except for the purposes of paying present existing school district indebtedness and for capital expenditures, must be levied as a county and not as a district tax except in the counties of Henrico and Sussex. In other words, under the law, the county of Loudoun will be one unit, so far as the schools are concerned, with the exceptions as to the payment of existing district indebtedness and for capital expenditures.

Sincerely yours,

LEON M. BAZILE,

Assistant Attorney General.

SCHOOLS—Levies for schools must be laid in counties as a unit—No district school tax can be laid except as expressly authorized by law.

RICHMOND, VA., February 18, 1929.

MR. W. R. ASHBURN,
Attorney at Law,
Citizens Bank Building,
Norfolk, Virginia.

MY DEAR MR. ASHBURN:

Acknowledgment is made of your letter of February 14, 1929, with reference to the county school levy.

Section 653 of the Code (School Code) makes the county the unit for all purposes, except representation and the levying of a tax sufficient to pay the present existing school district indebtedness and for future capital expenditures. It is true that this section expressly retains all special school districts and special town school districts in existence at the time of the passage of this law, but this does not mean, in my opinion, that a district school tax can be laid for any purpose except for the payment of present existing school district indebtedness and for future capital expenditures. This opinion is confirmed by the provision of the last sentence of section 653 of the Code containing an exception as to this with reference to the counties of Henrico and Sussex.

Section 698 of the Code (School Code), which authorizes the laying of a tax, requires the school tax to be laid as a county school levy. This section further provides that, for capital expenditures and for the payment of present

existing school district indebtedness, the board may levy a district tax in the magisterial district in which the money is to be spent, or the debts exist, not exceeding twenty-five cents on the one hundred dollars of the assessed value of the property in the magisterial district in any one year, to be expended for the purpose for which the tax is laid. It then provides, "but no other district tax for schools for any purpose other than herein expressly authorized shall be laid."

You will see from this that county school taxes are to be laid as a county school levy and not as a district levy, except in those cases where district levies are expressly authorized.

Towns, unlike cities, are parts of the county in which they are located, and, therefore, property in a town is subject to the county school levy.

Trusting this gives you the desired information, I am

Very truly yours,

JNO. R. SAUNDERS,
Attorney General.

SCHOOLS—Power of board of supervisors to make cash appropriation for schools in lieu of making county levy.

RICHMOND, VA., *April 4, 1929.*

MR. P. C. WILLIAMS,
*Superintendent of Schools,
Powhatan, Virginia.*

MY DEAR MR. WILLIAMS:

Acknowledgment is made of your request of April 4, 1929, that I advise you whether, in my opinion, the Board of Supervisors of a county may lawfully, in lieu of making a school levy, make a cash appropriation from the county levy for schools.

Section 698 of the Code (School Code) provides in part:

" * * In lieu of making such school levy, the board of supervisors in the counties and the councils in the cities may, in their discretion, make a cash appropriation from the county or city levy of an amount not less than the sum required by the county or city school budget provided by section six hundred and fifty-seven approved by the board of supervisors in no event to be less than the amount which would result from the laying of the minimum school levy authorized by this section for the establishment, maintenance and operation of the schools of such county or city without the express permission of the State Board of Education. * * *"

This section of the Code, which was passed by the General Assembly in 1928 in the interest of better efficiency, clearly authorizes the Board of Supervisors of a county to make a cash appropriation in lieu of authorizing a local school tax. The cities of the Commonwealth for many years have followed this procedure, and it worked so well that the General Assembly determined to make it equally applicable to the counties of the State in order that the county schools might enjoy the advantage heretofore enjoyed by the schools in cities.

In my talk with you, you suggested that some question had been raised as to whether or not this provision of section 698 of the Code (School Code) was in conflict with section 136 of the Constitution.

I have examined section 136 of the Constitution with care, and I can see nothing in section 698 of the Code (School Code) which conflicts with the pro-

visions of section 136 of the Constitution. This section of the Constitution, while conferring authority upon localities to raise local funds for school purposes, does not, in my opinion, compel the laying of such local levy where provision is otherwise made by the Board of Supervisors or the city council for providing funds which can be raised by such levy.

I am, therefore, of the opinion that section 698 of the Code (School Code) is a valid and constitutional enactment.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

SCHOOLS—County tax, payment of district indebtedness with.

RICHMOND, VA., March 14, 1929.

HON. F. B. WATSON,
*Superintendent of Schools,
Chatham, Virginia.*

MY DEAR MR. WATSON:

Acknowledgment is made of your letter of March 9, 1929, in which you say:

"On December 1, 1921, Dan River Magisterial District voted a bond issue of \$60,000 for schools. On September 1, 1922, you will recall the county unit system became operative in Virginia. As we operate on this kind of unit system in Pittsylvania, I am writing to know if it is legal for the Pittsylvania County Board of Supervisors to arrange a uniform school levy for this county. At present Dan River Magisterial District pays thirty cents more school tax than the other six districts of the county and the schools are operated on the same basis as the other schools. If there is any way to arrange this matter so that the burden may be borne alike, I will greatly appreciate your advising me at your convenience."

By sections 653 and 698 of the School Code district taxes have been abolished for all purposes except for capital expenditures and for the payment of existing district indebtedness. The language of section 698 of the Code is:

" * * * for capital expenditures and for the payment of existing district indebtedness, the board may levy a district tax in the magisterial district in which the money is to be spent or the debts exist not exceeding 25 cents on the one hundred dollars of the assessed value of the property in the magisterial district in any one year to be expended for the purposes for which the tax is laid."

This language, it seems to me, is permissive and not mandatory and, if the board can operate the schools in Pittsylvania county and pay the debt referred to in your letter from the county school levy authorized by section 698 of the Code, it is my opinion that it would have the right to do so without laying a district levy to take care of this debt. In no event, however, if a district tax is laid, could the district levy exceed 25 cents on the one hundred dollars of the assessed value of the property in the district.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

SCHOOLS—Loan from literary fund—Interest and sinking fund.

RICHMOND, VA., June 18, 1929.

HON. W. EARLE CRANK,
*Attorney for the Commonwealth,
Louisa, Virginia.*

DEAR MR. CRANK:

I am in receipt of your letter of the 10th instant, in further reference to the question of the right of the school board of Louisa county to borrow certain moneys from the Literary Fund and provisions for taking care of the interest and a sinking fund. I quote from your letter:

"The school board of Louisa county has applied to the board of supervisors for permission to borrow the sum of \$15,000 from the Literary Fund for the purpose of erecting a new auditorium at one of the high schools in the county. Last year the board of supervisors raised the general county levy ten cents on the hundred dollar valuation in order to meet some emergencies for last year and this year. The board is of opinion that with these emergencies taken care of at the end of this year, if the general county levy remains at the present rate for the year 1930, the board can take care of the sinking fund and interest on this proposed loan out of the general county funds. If the loan were authorized at this time, it would not be obtained before the fall of the present year, and the first payment would not be due until the fall of 1930. The board wants to know if it has the authority to authorize the school board to borrow the money from the Literary Fund at this time, or whether it will be necessary to wait and take the matter up when the budget for next year is arranged and the 1930 levies laid."

With the consent of the board of supervisors of your county, the county school board is authorized to borrow the amount mentioned in your letter, it being my understanding that no additional taxation for the current year is necessitated, and that the board of supervisors now have on hand a sum sufficient to take care of the interest on the loan and provide a sinking fund, and that it will not be necessary to increase the county levy until 1930.

Under section 698 of the Tax Code, your board of supervisors is authorized to appropriate such available funds as the board deems necessary or expedient for the establishment, maintenance and operation of the public schools. Of course, if the board of supervisors authorizes the loan, and the county school board borrows the money, the board of supervisors are compellable under section 644 of the Tax Code to make provision for the interest and payment of the principal.

In our talk with your supervisor, Mr. J. F. Bickers, we were under the impression that there were no funds available to take care of the interest and the sinking fund, and an increase in the county or district levy was contemplated for the current year. I see that I misunderstood the situation.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

SCHOOLS—Taxation.

RICHMOND, VA., April 12, 1929.

MR. V. L. SEXTON,
Attorney at Law,
Bluefield, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of April 11, 1929, in which you call my attention to sections 698 and 673 of the Code, especial attention being called to the limitation as to district school taxes contained in section 698.

You then say:

"The Board of Supervisors of this county has already levied the full amount allowed, \$1.00 county levy and 25c district levy, for the purposes provided by the act. In order to obtain relief by securing a loan from the Literary Fund, resort must be had to either a 'cash appropriation' by the board (which is extremely improbable), or resort to a bond election in the district under the provisions of section 673 of the Code, if the limitation embodied in the provisions of section 698 of the Code does not prohibit it.

"I know of no court decision construing this provision and I will greatly appreciate it if you will have me advised whether the provisions, in your opinion, of section 673 of the Code are to be construed as providing means for additional revenues for capital expenditures in the districts when the local levy of not exceeding 25c, made by the Board of Supervisors, is not sufficient for the needs of the district. In other words, is the total maximum fixed by the statute of \$1.00 for the general county levy and 25c for the district levy, under section 698 of the Code, the limit of power to levy for school purposes, or can the voters of the county or district, as the case may be, raise additional funds by an election, under the provisions of section 673 of the Code, for capital expenditures?"

Section 698 of the Code authorizes a county school tax of not less than fifty cents nor more than one dollar on the one hundred dollars of the assessed value of the property in such county. In lieu of this, the Board of Supervisors of a county may levy a general county levy, as to which there is no limitation, and appropriate the amount needed for schools from such county levy. This section then provides:

" * * For capital expenditures and for the payment of existing district indebtedness, the board may levy a district tax in the magisterial district in which the money is to be spent, or the debts exist, not exceeding twenty-five cents on the one hundred dollars of the assessed value of the property in the magisterial district * * * but no other district tax for schools for any purpose *other than herein expressly authorized shall be laid.* * * *." (Italics supplied.)

Section 673 of the Code provides as follows:

"Whenever it shall be necessary for a county to erect a school house, it shall be lawful for the school board of such county to contract a loan for said purpose, on the credit of the county, in the manner other loans are authorized to be contracted by sections twenty-seven hundred and thirty-eight, twenty-seven hundred and thirty-nine, twenty-seven hundred and forty and twenty-seven hundred and forty-one of the Code of Virginia; provided, that when such school house is erected at the expense of the school district, the election provided for by the Code sections referred to in this section shall be held only in the district against which such building will be a charge; and provided, further, that in such case the tax sufficient to pay the interest on said bonds, and the sinking fund to redeem the same, shall be levied in the school district only. In all other respects the procedure shall be as required by said Code sections."

Sections 611-718 of the Code, both inclusive, were enacted into law as a part of one bill, which attempted to codify the school laws, and are to be read together. In my opinion section 673 of the Code (School Code), which is a general statute authorizing the people of such county or district to increase the indebtedness thereof, is to be construed as an exception to the limitation contained in section 698 thereof, which exception was contemplated by the above quoted portion of section 698 that I have italicized.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,

Attorney General.

SCHOOLS—Taxation.

RICHMOND, VA., *April 12, 1929.*

HON. SAMUEL H. STYLES, *Clerk,*
Town of Falls Church School Board,
Falls Church, Virginia.

MY DEAR MR. STYLES:

Acknowledgment is made of your letter of April 11, 1929, in which you state that the Board of Supervisors of Fairfax county, in laying the county school levy, excluded the town of Falls Church from the operation thereof. You also state that the charter of the town of Falls Church limits your corporation tax to \$1.40, and request me to advise you whether there is any way by which this situation can be remedied so that the money necessary to operate your schools can be raised, the amount raised by the corporate levy not being sufficient for this purpose.

In an opinion given by me on February 18, 1929, to Mr. W. R. Ashburn, of Norfolk, Virginia, I had before me a somewhat similar situation. At that time I held that, under the provisions of sections 653 and 698 of the Code (School Code), county school taxes were to be laid as a county school levy, uniform throughout the county, and not as a district levy, except in those cases where district levies were expressly authorized. I further held that towns were parts of the county in which they were located, and, therefore, property in such was subject to the county school levy.

I do not think that the board of supervisors, in laying the Fairfax county school levy, had any authority under the law to exclude the property in the town of Falls Church from this levy. The action of the Board of Supervisors, in excluding the property in the town of Falls Church from this levy, being without authority of law, it seems to me that the duty of the Commissioner of the Revenue would be to extend the tax on all property in Fairfax county, including that located in the town of Falls Church.

Aside from this, however, I call your attention to the provision of section 698 of the Code (School Code) which reads as follows:

“ * * * Councils in the incorporated towns in any county in the State are authorized to levy an additional tax of not more than one dollar on the one hundred dollars taxable values of property in said town subject to taxation by the local town authorities, for the support and maintenance of the public schools in said town * * *.”

I think the effect of this section was to authorize a town to levy a school tax, in addition to any limitation on its power to lay a general levy, but the laying of this tax, in my opinion, could not justify the Board of Supervisors in excluding the property in such town from the county school levy, nor the property in such town from liability therefor when the county levy has once been laid (see sections 653 and 698 of the Code).

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

SCHOOLS—Insurance of buildings.

RICHMOND, VA., *March 5, 1929.*

C. W. COLBERT, ESQ.,
Guinea, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of March 1, 1929, in which you request me to advise you whether it is legal for a school board to insure school buildings with mutual insurance companies.

It is my opinion that school buildings and other public buildings cannot be insured with a mutual insurance company, unless the policy issued by such company expressly provides that there will be no assessment liability whatever. Unless the policy carries no assessment liability, it is my opinion that the school board is without authority to make such contract.

As to schools specifically, see section 708 of the Code (School Code) enacted into law in 1928.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

SCHOOLS—Separate school districts—Taxes, how levied and collected.

RICHMOND, VA., *October 19, 1928.*

MR. GEORGE R. BREADY, *Chairman,*
School Board of the Town of Herndon,
Herndon, Virginia.

MY DEAR SIR:

I am in receipt of your letter of the 12th instant, in which you inform me of the charter of the town of Herndon and call my attention to an amendment of the charter contained in section 11 of chapter 201 of the Acts of 1926, page 358, concerning the question of a separate school district for the town of Herndon, in which you state:

"It is the contention, so we are advised, of the school board of the county of Fairfax to collect and pay into the office of the treasurer of Fairfax county this school tax, and it would be appreciated if you would advise this board as to whether the law of 1926, referred to above, applies to the town of Herndon. In other words, it is our belief that the law of 1928 expressly exempts from its operation incorporated towns which have special school districts and that the council of the town of Herndon should con-

tinue to assess its taxes for the maintenance and operation of its school and that these funds should be collected by the treasurer of the town and disbursed on order of the school board of the town, as provided in its charter, referred to above."

The status of separate school districts and separate town school districts has given me much concern, as I have been asked to consider certain questions having reference to this matter by the Superintendent of Public Instruction.

Chapter 423 of the Acts of 1922, page 737, undertook to abolish separate school districts. The original bill was evidently drawn for that purpose, but in section 4 of the act, page 738, an amendment was inserted providing:

"But nothing in this act shall be construed as conveying the administration of the public school system in any city or in any town now constituting, or which may hereafter be constituted, a separate school division in pursuance of law."

You will notice that section 1 of this same act provides:

"In each school district of a county there shall be one trustee selected in the manner provided by law, and for this purpose only each magisterial district shall constitute a separate school district."

Provision was made in sections 2 and 3 for the constitution and operation of county school boards, with the further provision in the first part of section 4 that district school boards and county school boards, other than such boards as were constituted in the act, were abolished.

Superintendent Hart informs me that, notwithstanding the language of chapter 423 of the Acts of 1922, school boards were continued in towns constituting separate school districts.

Section 653 of chapter 471 of the Acts of 1928, page 1186, a chapter which undertook to codify and regulate all school laws, provided for county school boards. One of its provisions I am quoting:

"For the purpose of representation and the levying of a tax sufficient to pay the present existing school district indebtedness and for future capital expenditures only, each magisterial district shall constitute a separate school district, but for all other school purposes, taxation, management, control and operation, the county shall be the unit, and the school affairs of such county managed as if the county constituted but one school district. All special school districts and special town school districts are hereby expressly retained as they exist at the present time provided * *."

That part of the provision retaining special school districts and special town school districts was inserted as an amendment to meet objections of members of the Legislature who had opposed the abolition of special school districts. Especial objection had been made by representatives of Fairfax county and representatives of the counties in which the town of Galax is located, the town of Falls Church in Fairfax county and the town of Galax, each being located in two different counties and it having been seen that it would be impossible without retaining special town school districts for the law to operate successfully in those towns.

Under these circumstances, it is my opinion that all special town school districts are retained, that school taxes are levied by councils of the towns, collected through town agencies, retained in the town treasury and paid out upon order of the local school trustees. Wherever local school boards are in existence

and where there are no such town district boards, the town school expenses are still retained by the local treasurer and paid out of the warrants of county school boards.

If this letter does not fully meet your questions, I shall be glad to advise you further.

Yours very truly,

JNO. R. SAUNDERS,

Attorney General.

SCHOOL BOARD—Appointment of members.

RICHMOND, VA., *August 14, 1928.*

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

DEAR MR. JONES:

I am in receipt of your letter of August 2, stating the situation in your city in reference to the appointment of a member of the city school board by your city council.

You ask my opinion as to whether or not, if the council does not make the appointment by the 1st of September, the member of the school board whose term expires on that day holds over.

Provided that there is nothing in your city charter having to do with the appointment of a school board for your city and the appointment of school trustees is covered by section 33 of the Constitution, I am of the opinion that the old member holds over for a new term. This was the holding of the Court of Appeals in *Chadduck v. Burke*, 103 Va. 698. In *Frantz v. Davis*, 144 Va. 320, *Chadduck v. Burke* is quoted with seeming approval, although it was held in that case that, where there had been no valid election, the incumbent did not hold over for a full term as treasurer of the city of Roanoke, the decision in the *Frantz* case being based upon the authority conferred upon the city council of Roanoke to make appointments.

The city council of Hopewell is authorized to make appointments within thirty days previous to the 1st of September of this year. The trustees appointed hold their office, under section 33 of the Constitution, until their successors have qualified. There is no provision of law for the appointment, by any authority, of a successor except in the case of a vacancy. The *Chadduck* case holds that there is no vacancy where there has been a failure to appoint. The council of Hopewell has no authority other than that conferred upon it by general law (or its charter) and, not having been given authority by general law to appoint except for a full term or for a vacancy, and there being no vacancy in case of a failure to appoint for a full term, the incumbent will hold over for the next succeeding full term.

Yours very truly,

JNO. R. SAUNDERS,

Attorney General.

SCHOOL BOARD—Daughter of member not eligible to teach.

RICHMOND, VA., July 2, 1928.

MR. C. W. STEELE, *Trustee,*
Meadow View, Virginia.

MY DEAR MR. STEELE:

I beg leave to acknowledge receipt of yours of the 28th in which you desire to be advised whether or not your daughter, who is qualified to teach school, can teach in the public schools of your county—you being a member of the school board.

In reply I will state that she cannot. Section 659 of the Code of Virginia, among other things, provides:

"No district school board shall employ, or pay any teacher from the public funds, if said teacher is the father, mother, brother, sister, wife, or daughter of any member of said board."

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

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

SCHOOL BOARDS—Authority to employ teacher.

RICHMOND, VA., July 28, 1928.

MISS BERTHA BALL,
State Teachers College,
East Radford, Virginia.

MY DEAR MISS BALL:

I am in receipt of your letter of July 27th. In reply thereto I beg leave to quote you that part of section 659 of the Code as amended by the Acts of 1928, which section is now 660, found on page 1205 of the Acts of the General Assembly, which deals with your inquiry:

"The school board shall not 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. If the school board violates these provisions, the individual members thereof shall be personally liable to refund to the local treasury any amounts paid in violation of this law, and such funds shall be recovered from members by action or suit in the name of the Commonwealth, at the relation of the attorney for the Commonwealth; such funds, when recovered, to be paid into the local treasury for the use of the public schools."

If the clerk of the school board is a member of the school board, the wife of the clerk is not eligible to be appointed as a teacher by the school board. It frequently happens that some member of the board acts as clerk, but oftener the clerk is a paid employee of the school board and not a member of the board.

The statute does not seem to include a daughter-in-law.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

SCHOOL BOARDS—Officers ineligible to appointment.RICHMOND, VA., *June 27, 1929.*

HON. H. B. GILLIAM,
*Chairman Electoral Board,
Petersburg, Virginia.*

MY DEAR SIR:

Acknowledgment is made of your letter of June 22, 1929, in which you say:

"I would thank you to let me have your opinion as to whether or not a member of the electoral board, or a registrar, or judge of election could legally at the same time be a member of the school board of the city of Petersburg. I notice that section 84 of the Election Laws prohibits either of these officers from holding an elective office in the State. The school board is elected by the city council and not by the vote of the people."

Section 86 of the Code prohibits a registrar from accepting any office, either elective or appointive, during his term of office.

Section 786 of the Code, as amended, relating to the qualifications of school trustees in cities, provides in part:

"No State officer, except a notary public, no city officer, no member of council, or any officer thereof, shall during his term of office be chosen or allowed to act, as a school trustee; but this provision shall not have the effect of prohibiting a referee in chancery or commissioner in bankruptcy, or member of the board of health, from holding such office."

I am, therefore, of the opinion that members of the electoral board, registrars and judges of election are ineligible for membership on a city school board.

Trusting this gives you the desired information, I am

Very truly yours,

JNO. R. SAUNDERS,
Attorney General.

SCHOOL BOARD—Illegal for member of to sell supplies to public schools of his county.RICHMOND, VA., *July 5, 1928.*

MR. C. G. BURTON,
Belona, Virginia.

MY DEAR MR. BURTON:

Your letter of the 3rd did not reach me until this morning, as yesterday was a legal holiday and no mail was delivered.

In this you desire to be advised whether or not, in view of the provisions of the law as contained in section 708 of the revised school code, which is found on page 1224 of the Acts of 1928, a merchant who is a member of the school board can "legally" sell supplies, such as school books, truck tires, inner tubes, and other things needed in and about the schools, to the public schools of his county.

This section is practically the same as the provisions contained in section 682 of the Code of Virginia. The Code of Virginia also contained another section which bore on this question, namely, section 683. This section provided that it shall be unlawful for any trustee, or any officer, to sell, convey, or deliver

any goods, wares, merchandise, or other supplies of any kind to a school board, or a committee of such board, or to receive, directly or indirectly, any profit or emolument from any contract with, or sale to, such board or a committee thereof, except as provided in this section.

You will therefore see that under the foregoing provision, as contained in section 683, a merchant who is a member of the county school board is prohibited from selling supplies of the character mentioned in your letter.

I find, however, at the end of chapter 471 of the Acts of 1928, in which chapter section 708 just referred to is contained, that sections 611 to 773 of the Code of Virginia were repealed, which provision, of course, repealed section 683 of the Code above referred to.

The exception contained in section 708 referred to by you provides as follows: "That in the case of a merchant who, in the regular course of trade and without employing agents to solicit such business, sells either books selected and adopted by the State Board of Education, or supplies used in the schools and by the pupils."

This section does not deal with the question submitted by you in your letter, except that it permits a merchant to sell supplies used in the schools and by the pupils. It, therefore, seems to me that, section 683 referred to above having been repealed, a merchant even though he may be a trustee is not prohibited from selling certain supplies to schools.

However, since the State has established the State Purchasing Agency, it should be the policy of the county school boards to purchase all such supplies as are referred to in your letter in bulk, which can be obtained at a wholesale price through the State Purchasing Agent.

I have given this matter very careful consideration, and it seems to me rather strange that the Legislature should have omitted section 683 referred to above.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

SCHOOL BOARDS—Members cannot be interested directly or indirectly in contract to build school.

RICHMOND, VA., July 7, 1928.

MR. JAMES B. LYON,
Member City School Board,
Bristol, Virginia.

MY DEAR SIR:

I beg leave to acknowledge receipt of your letter of July 5th. In this you quote section 682 of the Code of Virginia, and ask for an opinion relative to certain provisions contained therein. This section was amended at the last session of the Legislature, and the amendment is section 708 of the School Code found on pages 1223 and 1224 of the Acts of 1928.

I would suggest that you examine the Acts, which you can find either in the clerk's office, or in the office of some attorney. The section is rather long to be quoted in my letter. I will quote, however, that portion of it which is applicable to your question, and reads as follows:

"It shall be unlawful for any member of the State Board of Education, division superintendent of schools, member of the school board or any other school officer, principal or teacher in a public school, except by permission of the State Board of Education evidenced by resolution spread on the minutes of said board, to have any pecuniary interest, *directly or indirectly*, in any contract for building a public school house, or in furnishing material to a contractor for building such school house, * * *."

Unquestionably, the president of a corporation, who is a member of the school board, would certainly be indirectly interested in the profit arising in the furnishing of such material. It, therefore, follows that the corporation, the president of which is a member of the school board, could not furnish building material for the school house.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

SHENANDOAH NATIONAL PARK—Funds for the proceedings of acquisition.

RICHMOND, VA., July 20, 1928.

HON. WM. E. CARSON, *Chairman,*
State Conservation and Development Commission,
Richmond, Virginia.

MY DEAR MR. CARSON:

I beg leave to acknowledge receipt of your letter of this date, in which you state your Commission has reached a place in the acquirement of the Shenandoah National Park where it is necessary to have funds for the proceedings for the acquisition of the Park. You then call my attention to the appropriation made by the Legislature of Virginia, which is found in "Supplemental Appropriations for Special Capital Outlays—1928-1929"; the appropriation to the Department of Conservation and Development being found on page 503 of the Acts of the General Assembly of 1928. This Act appropriates to the Department of Conservation and Development one million dollars. That part of the appropriation which is applicable to your question reads as follows:

"It is provided that this appropriation of \$1,000,000 shall be used only for proceedings for the acquisition and the acquisition, by the State Commission on Conservation and Development, at a reasonable price, of land lying within the area recommended by the Secretary of the Interior for inclusion in the proposed Shenandoah National Park. * * *"

It is clearly the intention of the Legislature of Virginia that this appropriation of \$1,000,000 made to the Department of Conservation and Development was made for two purposes, namely, "for proceedings for the acquisition" of the park, and "the acquisition" of the park. While the language is a little confusing, there can be no acquisition of the park until certain proceedings have been consummated by the Department of Conservation and Development. Such being the case, I am of the opinion that your Commission has a right to draw on this appropriation of \$1,000,000 to be used for such proceedings as may be necessary for the acquisition of the land lying within the area recommended by the Secretary of the Interior and so forth.

You then ask if it is necessary that your Commission submit a report to the Governor for his approval to the Comptroller on the withdrawal of funds for the proceedings for acquisition of the park. I am of the opinion that this is unnecessary, because the Act seems to contemplate that the report which is required of the Governor, and which he must transmit to the Comptroller, is to be made when your Commission proceeds to purchase the land within the area contemplated for the park.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

SHENANDOAH NATIONAL PARK—Subscription to is legal obligation.

RICHMOND, VA., July 11, 1928.

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

MY DEAR MR. FIPPIN:

Acknowledgment is made of your request of January 11 that I advise you, after examining two of the subscription agreements between the Shenandoah National Park Association, Incorporated, and persons who subscribed, first, land and, second, money towards the acquisition of the park area, whether the same constitute legal and binding obligations enforceable in a court of law.

I have examined both of the subscription contracts submitted by you, and it is my opinion that they are legal and binding obligations in this State, and that collection of the unpaid balance of such subscriptions may be enforced by appropriate action in a court of law or by a warrant before a justice of the peace.

I am also of the opinion that the balance due under these contracts carries interest from the date of demand, provided such demand was made after Congress designated the area as a national park.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

STATE COLONY FOR EPILEPTIC AND FEEBLE-MINDED—Child who has been committed to institution cannot be discharged because parents have ceased to be residents of this State.

RICHMOND, VA., December 6, 1928.

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

MY DEAR DR. BELL:

Acknowledgment is made of your letter of December 3, 1928, in which you say:

"In case a minor child is committed to an institution in Virginia while her parents are legal residents of the State and, after the admission of the child to the institution, they move their habitation to another State and obtain legal residence in that State, is the child entitled to institutionalization in Virginia or does the minor child's legal residence move with that of the parents?"

Of course, no infant should be committed to a State institution who is not a resident of Virginia. However, it is my opinion that, when once an infant who is a resident of Virginia has been committed to an institution such as your Colony, such person cannot be discharged by reason of the fact that the parents have, since the commitment of the child, ceased to be residents of this State.

Very truly yours,

JNO. R. SAUNDERS,

Attorney General.

STATUTES—Chapter 401, Acts 1928, repealed by implication by enactment of section 45 of chapter 507, Acts 1928.

RICHMOND, VA., *January 15, 1929.*

W. A. CLARKE, JR., ESQ., *Secretary,*
Retail Merchants' Association,
Richmond, Virginia.

MY DEAR MR. CLARKE:

Acknowledgment is made of your letter of January 11, 1928, in which you call my attention to chapter 401 and section 45 of chapter 507 of the Acts of 1928, both of which prohibit the giving of checks, drafts, or orders where the drawer is without sufficient funds on deposit to meet such checks, drafts, or orders. You ask me to advise you whether, in my opinion, these laws are in conflict, and, if so, which will prevail.

Chapter 401 of the Acts of 1928 was approved March 23, 1928, and chapter 507 of the Acts of 1928 was approved March 27, 1928, and both of them went into effect on the same day, namely, ninety days after the adjournment of the General Assembly. I have examined both of these statutes with care. They relate to the same subject matter, they declare the same acts to be crimes, and each of these laws prescribes the penalties to be imposed for the commission of the acts therein prohibited.

Chapter 401 of the Acts of 1928 makes the giving of a worthless check, draft, or order for the payment of money, upon any banking institution, or other depository, under certain conditions larceny, thereby making certain offenses under the act felonies. Section 45 of chapter 507 of the Acts of 1928, on the other hand, prescribes an entirely different punishment for the giving of checks, drafts or orders under similar circumstances, in all cases declaring the offenses committed under this section to be misdemeanors regardless of the amount involved in the transaction.

The rule is well settled in Virginia that repeals by implication are not favored, and that, where two acts in apparent conflict exist, it is the duty to so construe them, if possible, as to enable both acts to stand. It is equally well settled, however, that, where the conflict between two acts is such that no way

exists by which they can be reconciled, the latter of the two acts must prevail. *Fulkerson v. Treasurer*, 95 Va. 1 27 S. E. 815; *Winn v. Jones*, 6 Leigh 74.

Section 45 of chapter 507 of the Acts of 1928, commonly designated as the Bank Code, having covered the whole subject to which chapter 401 of the Acts of 1928 relates and having prescribed different punishments for the offenses prohibited by these statutes from the punishment prescribed by chapter 401 of the Acts of 1928, it is my opinion that chapter 401 of the Acts of 1928 was repealed by implication by the enactment of section 45 of chapter 507 of the Acts of 1928, that being the last statute on the subject.

Yours very truly,

LEON M. BAZILE,

Assistant Attorney General.

TAXATION—Property exempt from levies.

RICHMOND, VA., June 17, 1929.

HON. WM. A. ADAIR,

*Treasurer Rockbridge County,
Lexington, Virginia.*

MY DEAR MR. ADAIR:

I beg leave to acknowledge receipt of your letter of recent date in which you desire to be advised whether or not certain property mentioned in sections 6552 and 6553 of the Code of Virginia are exempt from levy or distress for taxes.

In reply I will state that I know of no property which cannot be levied upon for taxes. If you will read section 6563 of the Code of Virginia, you will see that the exemptions under the two sections quoted by you, namely, 6552 and 6553, and also sections 6555 and 6562, shall not extend to distress for State, county, or corporation taxes, or levies, and so forth.

It therefore follows that any property owned by a tax payer is liable for his taxes.

Yours very truly,

JNO. R. SAUNDERS,

Attorney General.

TAXATION—Real estate and tangible personal property.

RICHMOND, VA., September 26, 1928.

MR. C. H. MURPHY,

*First National Bank,
El Dorado, Arkansas.*

MY DEAR MR. MURPHY:

Your letter of September 21st just received.

In 1926 the Legislature of Virginia passed a law removing a State property tax for State purposes on real estate and tangible personal property, except the rolling stock of public service corporations. Since that time no tax has been levied on real estate in Virginia for State purposes. The 19th of last June the Constitution was amended by the voters in Virginia, and section 171, which deals with this question, reads as follows:

"No State property tax for State purposes shall be levied on real estate or tangible personal property, except the rolling stock of public service corporations. Real estate and tangible personal property, except the rolling stock of public service corporations, are hereby segregated for, and made subject to, local taxation only, and shall be assessed or reassessed for local taxation in such manner and at such times as the General Assembly has heretofore prescribed, or may hereafter prescribe, by general laws."

Of course, so far as your real estate in Middlesex is concerned there will be no levy of any tax on it for State purposes, but the county has a perfect right to levy a tax thereon, which it has always done and which it will continue to do.

Very truly yours,

JNO. R. SAUNDERS,
Attorney General.

TAXATION—Deeds—Deed to Federal Land Bank subject to recordation tax.

RICHMOND, VA., *June 19, 1929.*

EUGENE C. HURT, JR., ESQ.,
Attorney at Law,
Chatham, Virginia.

MY DEAR MR. HURT:

Acknowledgment is made of your letter of June 14, 1929, in which you say:

"I am writing to ask if you would be kind enough to advise me whether or not it would be proper for the clerk of the court to place a State tax on a deed of bargain and sale, when recorded, where real estate is conveyed to The North Carolina Joint Stock Land Bank of Durham.

"I will state that my information is that The North Carolina Joint Stock Land Bank of Durham is a corporation organized, created and existing under and by virtue of an Act of Congress of the United States of America entitled 'The Federal Farm Loan Act,' and I do not know whether it is proper for the clerk to place a State tax on deeds of bargain and sale to them when recorded or not and would appreciate an opinion from you on this."

Section 931, title 12, U. S. C. A., exempts from taxation such banks and first mortgages executed under this chapter. Under authority of this section, the Supreme Court of the United States in *Federal Land Bank of New Orleans v. Crosland*, 261 U. S. 374, 67 L. ed. 703, 29 A. L. R. 1 (1923), held that a State could not impose a registration tax on such a mortgage.

Section 933, title 12, U. S. C. A., provides:

"Nothing herein shall be construed to exempt the real property of Federal and joint-stock land banks and national farm loan associations from either State, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed."

In view of this provision, it is my opinion that a deed of bargain and sale conveying property to a Federal land bank, or a joint land bank, or farm loan association, would be subject to the recordation tax imposed for the recordation of other deeds. If the property itself is subject to the tax, the deed conveying it would be subject thereto.

In the case of *Federal Land Bank of New Orleans v. Crosland, supra*, the mortgage offered for registration and the debt secured thereby were expressly declared to be instrumentalities of the Federal government and exempt from Federal, State, municipal and local taxation. No such provision, however, is made in the case of a deed as distinguished from a mortgage.

Yours very truly,

LEON M. BAZILE,

Assistant Attorney General.

TAXATION—Deeds.

RICHMOND, VA., January 14, 1929.

HON. G. B. WALLACE,

Attorney at Law,

Fredericksburg, Virginia.

MY DEAR JUDGE:

Acknowledgment is made of your letter of January 11, 1929, in which you request my opinion on the following statement of facts:

"In 1923 a piece of real estate is conveyed to A. and B. in consideration of \$35,500.00. In 1925 B. conveys his interest in the same to A. and C. share and share alike. Now the question is the amount of tax on the deed from B. to A. and C. Section 121 of the 1928 Tax Bill says that the tax on partition deeds and deeds from one joint tenant to another and deeds between co-partners shall be 50 cents. A. and B. being joint tenants, it seems that 50 cents is all the tax that should be imposed on the interest conveyed from B. to A. However, the regular rule of \$1.20 per thousand should apply on the interest conveyed to C., or would the tax on this deed be based on a consideration of \$17,750.00, one-half of \$35,500.00 at \$1.20, which would be \$21.30."

Partition can only be made between co-tenants, as there can be no partition unless each of the parties has an interest in the property. *Patterson v. Martin*, 33 W. Va. 494, 10 S. E. 817. As one of the parties to this deed is not a co-tenant, it is my opinion that the deed cannot be admitted to record as a deed of partition. Section 121 of the Tax Code provides:

"The tax on any deed of partition among joint tenants, tenants in common or co-partners shall be 50 cents."

thereby limiting the 50 cents tax to deeds which are strictly deeds of partition between co-tenants.

It is, therefore, my opinion that this deed of trust should be taxed on the consideration of the deed, or, if no consideration was paid, on the actual value of the property conveyed, as provided in the first paragraph of section 121 of the Tax Code.

Yours very truly,

JNO. R. SAUNDERS,

Attorney General.

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TAXATION—Deeds.RICHMOND, VA., *February 25, 1929.*HON. GEORGE G. TYLER, *Clerk,*
Manassas, Virginia.

MY DEAR MR. TYLER:

Acknowledgment is made of your letter of February 25, 1929, in which you say:

"There has just been presented for record in this office an indenture dated February 1, 1926, from the Virginia Public Service Company to the New York Trust Company as trustee, in which the consideration or amount secured, is eleven million five hundred thousand dollars. Accompanying this indenture is a certificate from the clerk of the circuit court of Alleghany county, dated March 22, 1926, showing that he collected a tax of eleven thousand five hundred dollars when the said indenture was admitted to record in that county. As the rate of tax at that time was ten cents on each one hundred dollars, and is now twelve cents on the hundred, I am writing to ask if I am required to collect the additional two cents tax before admitting the indenture to record."

Section 121 of the Tax Code provides in next to the last paragraph thereof:

"The tax on every deed, contract or other instrument shall be determined and collected by the clerk in whose office it is first offered for recordation, and may thereafter be recorded in the office of any other clerk without the payment of any tax."

It is my opinion that, if the tax imposed by law on the recordation of the deed of trust in question at the time it was first recorded was paid, it can be again recorded in any clerk's office at this time without the payment of any tax thereon, even though the tax for the recordation of instruments at this time is more than it was at the time the deed of trust was originally recorded.

With kindest regards and best wishes, I am

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

TAXATION—Deeds—Tax required on every deed unless it comes within exceptions noted in section 121.RICHMOND, VA., *January 25, 1929.*HON. A. B. CARNEY, *Clerk,*
Norfolk, Virginia.

MY DEAR MR. CARNEY:

Acknowledgment is made of your letter of January 24, 1929, in which you state that in September, 1928, a deed of trust was made by certain individuals owning an undivided three-sevenths interest in the property conveyed. You further state that, due to a mistake on the part of the draftsman and ignorance on the part of the grantors, the property conveyed was described as the whole interest in the tract of land instead of three-sevenths interest therein, and that, the mistake having been discovered, the parties now desire to correct it. You wish to know whether the new deed can be placed on record without the payment of any tax therefor, the full tax having been paid when the instrument first above referred to was recorded.

The question depends entirely upon whether the new deed takes the form of a deed of correction or a transaction complete in itself. I would say that, if the deed recites these facts and merely seeks to correct the mistake made, it should be admitted to record free of tax. If, on the other hand, it is an obligation complete on its face, or attempts to change the date or character of the obligation secured, it must be treated as the original instrument and the full tax paid thereon.

The general language of section 121 of the Tax Code is that a tax shall be required on every deed admitted to record. To escape this tax, the deed must come within one of the exceptions found in this or some other section of the Code.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

TAXATION—Deeds.

RICHMOND, VA., April 27, 1929.

CATESBY G. JONES, ESQ.,
Attorney at Law,
Gloucester, Virginia.

MY DEAR MR. JONES:

Acknowledgment is made of your letter of April 25, 1929, written to me at the suggestion of the clerk of your county, in which my opinion is requested on the following statement of facts:

"A and B apply to my bank for a loan of \$5,000.00, offering as security a deed of trust on land of A's. The bank approves the loan, provided that B executes a deed of trust securing the same on a tract of land owned by him, this deed of trust to be additional security.

"I am requested to prepare the papers in accordance with the above. Two notes of \$2,500.00 each are made, one of which is made by A and endorsed by B, and the other note is made by B and endorsed by A. A deed of trust to secure both notes is given by A. On the same day B executes a deed of trust conveying his land to secure the notes, in which deed of trust it is stated that such deed of trust is given supplemental to and as additional security for the payment of the two notes named in A's deed of trust. Both notes and both deeds of trust are signed on the same date.

"A's deed of trust is recorded and, after the clerk admits it to record, the deed of trust of B is offered. The sum of \$6.00 is taxed against A's deed of trust. Should B's deed of trust be taxed?

The ninth paragraph of section 121 of the Tax Code reads as follows:

"This section is not to be construed as requiring the payment of any tax for the admitting to record of any deed of trust, mortgage, contract, agreement, or other writing supplemental to any deed of trust, mortgage, contract, agreement, or other writing *theretofore* admitted to record and upon which the tax herein imposed has been paid, hereinafter called the original instrument, where the sole purpose and effect of the said supplemental deed of trust, mortgage, contract, agreement, or other writing is to convey, set over, or pledge property, real or personal, in addition to or in substitution (in whole or in part) of the property conveyed, set over, or pledged in the original instrument, to secure or to better secure the payment of the amount contracted for in the original instrument; but

in such case there shall be no tax for the admitting to record of said supplemental deed of trust, mortgage, contract, agreement, or other writing." (*Italics supplied.*)

It is my opinion that this section contemplates a deed of trust executed subsequent to the original transaction. Aside from any question which may be involved as to whether a supplemental deed of trust can be executed by one not a party to the original deed of trust, I am of the opinion that the deed of trust referred to in your letter cannot be admitted to record as a supplemental deed of trust but that the tax thereon must be paid.

For your information, I will state that before writing this letter I conferred with Hon. W. W. Martin, counsel for the State Tax Commission, and he concurred in this opinion.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

TAXATION—Recordation of deeds.

RICHMOND, VA., February 19, 1929.

HON. B. C. GARRETT, JR., *Clerk,*
King William, Virginia.

MY DEAR MR. GARRETT:

Acknowledgment is made of your letter of February 19, 1929, in which you say:

"I am enclosing a deed from Messrs. W. A. Roper and Robert N. Pollard, Trustees, dated January 20, 1929, to Mrs. Evelina Gregory and Mrs. Mary Cole Gregory Magruder, parties of the second part, and Roger Gregory and Mrs. Alice M. Gregory, parties of the third part. Will you kindly examine this deed and advise me the amount which should be taxed by me as clerk for the recordation of the conveyance?"

I have carefully examined the deed referred to. It recites that the grantees made the last and highest bid therefor and became the purchasers thereof at the price of \$48,000, payable as follows: the sum of \$23,575.27 by conveyance of said property subject to the said unpaid mortgage debt of that amount, and the residue, to-wit, the sum of \$24,424.73, in cash. It will be seen from this that the property was bought by the grantees subject to a first deed of trust amounting to \$23,575.27, but that the purchasers did not in terms assume the payment of said first mortgage lien. The question is, should the clerk collect a tax on the basis of \$24,424.73, or on the basis of the actual value of the property.

The identical question submitted to me by you was submitted to this office on April 17, 1914 (Report of the Attorney General, 1914, pages 126-128), by Hon. C. Lee Moore, Auditor of Public Accounts, and, in an able and exhaustive opinion, Hon. Christopher B. Garnett, then Assistant Attorney General, held that the tax was to be based not only upon the cash paid but upon the amount of the deed of trust subject to which the property was conveyed to the grantee. After calling attention to the fact that the statute (section 13 of the Tax Bill, now section 121 of the Tax Code) provided that the amount of the tax to be collected by the clerk was "made to depend upon *the consideration of the deed or the actual value of the property conveyed*, Mr. Garnett said:

" * * While it is perfectly clear that the purchaser of the land is not *personally bound to pay the deed of trust* unless he personally assumes payment thereof (1 Minor on Real Property, sec. 647, p. 726), on the other hand the property itself is liable for the deed of trust, and unless the purchaser pays off the deed of trust, the holder of the deed of trust may foreclose and the purchaser will not only lose the land, but his \$10,000 invested.

"So far as the clerk is concerned, I cannot see why he should tax a less fee in such a case than he would be authorized to tax in case the purchaser directly and personally assumed the deed of trust. It is a common transaction in the sale of land for the purchaser to pay only a portion of the purchase price and to give a deed of trust for the balance. In such a case, the tax would be the consideration of the deed or the actual value of the property, that is, money agreed to be paid; and the fact that there was a deed of trust given at the same time would not authorize the clerk to charge a less tax than if the whole consideration had been paid * * *."

It is, therefore, my opinion that the tax is to be based in the case submitted to me by you on the consideration of \$48,000. I regret very much to have to disagree with the opinion expressed by Hon. C. H. Morrisett, State Tax Commissioner, but I am of the opinion that Mr. Garnett correctly interpreted section 13 of the Tax Bill in the opinion above referred to. The language of that section of the tax bill construed by Mr. Garnett has not been changed, and that opinion has been uniformly followed by this office and the Auditor's office since 1914.

Sincerely yours,

JNO. R. SAUNDERS,
Attorney General.

TAXATION—Deeds of trust.

RICHMOND, VA., October 29, 1928.

ERNEST JONES, ESQ.,
Attorney at Law,
Altavista, Virginia.

MY DEAR SIR:

Acknowledgment is made of your communication of October 26, 1928, in which you request me to advise you as to the amount on which the tax should be paid for the recordation of the deed of trust from C. N. Cummock and wife to S. V. Kemp and James R. Gilliam, Jr., Trustees, dated October 23, 1928, securing lot 3, block 12, in the town of Altavista, Virginia. The deed secures, first, \$9,500.00, evidenced by notes bearing interest at six per centum per annum, and, second, any sum of money in which the parties of the first part may become indebted to The Lynchburg Trust and Savings Bank, Lynchburg, Virginia, whether evidenced by note or bond, as maker or endorser, not to exceed, however, \$10,000.00.

It is my opinion that the amount to be taxed for this deed of trust is \$19,500.00. See section 121 of the Tax Code and *Pocahontas Consolidated Collieries Co., Inc., v. Commonwealth*, 113 Va. 108 (1912). This deed of trust is not so drawn as to come within the exception contained in the eleventh paragraph of section 121 of the Tax Code. The tax, therefore, should be twelve cents per one hundred on \$19,500.00.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

TAXATION—Counties not required to pay postage for mailing out notices of taxes.RICHMOND, VA., *October 15, 1928.*HON. E. D. DURRETTE, *Treasurer,*
Stanardsville, Virginia.

DEAR SIR:

I am in receipt of your letter of the 11th instant, in which you ask whether or not, under section 371 of the Tax Code of Virginia, county treasurers mailing notices of taxes to taxpayers are entitled to have the postage paid by counties.

Unfortunately, the statute which imposes the duty of mailing notices to taxpayers of the amount due by them for taxes did not provide for repayment to the treasurer, and, as the law specifically provides for certain expenses of the treasurer to be paid by counties and cities and does not include postage, this office has held that there is no legal obligation upon the county to take care of the postage item.

The only case in which this can be taken care of is where the commissions of a treasurer exceed his allowance under the West Fee Bill, in which case the Comptroller, succeeding to the duty and authority of the fee commission, may, under section 3516-e, allow postage as a part of the treasurer's office expenses.

I am enclosing you copy of a letter under date of August 14 of this year to Honorable W. E. Ramsey, Treasurer of Pittsylvania county, covering this subject.

Yours very truly,

JNO. R. SAUNDERS,
*Attorney General.***TAXATION—Refund of capitation taxes.**RICHMOND, VA., *February 8, 1929.*HON. E. R. COMBS,
State Comptroller,
Richmond, Virginia.

DEAR MR. COMBS:

I have before me your file in the matter of an order of the hustings court of the city of Richmond, under date of January 21, 1929, ordering the refund to Genevieve N. Bootwright of \$1.58 capitation tax and penalty on account of a double assessment. This order shows that all of the requirements of law concerning the refund of taxes were complied with.

I note that you have a memorandum from Mr. W. W. Martin, Counsel for the Department of Taxation, in which he holds that there is no provision of law for the refund of an erroneous assessment of capitation tax.

It is very true that the law does not specifically mention capitation tax, but the evident intent and purpose of the sections providing for the refund of double assessments and erroneous assessments is to the effect that the State undertakes to deal fairly and squarely with taxpayers, and, while I agree with Mr. Martin that there is no specific reference and provision for the refund of capitation tax, I am of the opinion that the order of the court allowing such tax is a determina-

tion of the right of the taxpayer to relief, and that the refund should be made by your department.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

TAXATION—Collection of penalty and interest on omitted capitation taxes.

RICHMOND, VA., December 1, 1928.

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

DEAR MR. WATSON:

I am in receipt of your letter of the 23rd instant, in reference to the collection of penalty and interest on omitted capitation taxes.

While it is true that section 420, providing for the assessment and collection of omitted capitation taxes, does not refer to penalty or interest, section 373 provides for a penalty "upon all State, county, district, city and town taxes or levies which may have heretofore not been paid, or may hereafter remain unpaid * * * Such additional penalty shall be computed upon the taxes and the prior penalty of five per centum; and interest at the rate of six per centum per annum shall be collected upon the principal and penalties of said taxes and levies from the 16th day of June in the year after which such unpaid taxes or levies were assessed. * * "

The Department of Taxation holds that interest is payable upon omitted capitation taxes under the provisions of this section. While it is not entirely plain, it is safe to follow the interpretation of the Commissioner of Taxation.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

TAXATION—Right of towns to collect capitation tax.

RICHMOND, VA., December 3, 1928.

MR. C. F. MATTHEWS, *Clerk,*
Chincoteague Island, Virginia.

MY DEAR SIR:

I am in receipt of your undated letter, which I quote:

"Mayor John W. Winder of the above named town of Chincoteague has requested me to ask you for information on the collection of capitation tax by the town of Chincoteague.

"In the Articles of Incorporation of the town, approved March 13, 1908, we are authorized to collect capitation tax and we have been collecting for years. During the past election it seems that the voters were told we could not collect by law.

"Please advise if we can collect and the restrictions, if any, imposed by the three year rule or any other law."

Under section 173 of the Constitution, the "General Assembly may authorize the board of supervisors of any county, or the council of any city or town, to

levy an additional capitation tax not exceeding \$1.00 per annum on each such resident within its limits, to be applied to city, town or county purposes." The general law allowing towns to levy capitation taxes is contained in section 293 of the tax law, section 3073 of the Code.

In my opinion, the provisions of law preventing the collection of capitation taxes by levy or other legal process for three years after due does not apply to capitation taxes levied by towns.

The prepayment of town or city capitation taxes is not a prerequisite to the right to vote. It may have been some such idea as that which was being expressed by voters of your town during the recent election.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

TAXATION—Jobber who has been duly licensed to do business in one city can send his truck to another city and there sell to dealers and retailers without paying an additional tax.

RICHMOND, VA., *January 7, 1929.*

MORRIS L. MASINTER, ESQ.,
Attorney at Law,
American National Bank Building,
Roanoke, Virginia.

MY DEAR MR. MASINTER:

I am just in receipt of your letter of January 5th. In this you quote the following paragraph from the Tax Code of Virginia, which is found in section 188:

"A merchant, who has been duly licensed by the State, and duly licensed by the city or town, if his place of business be in a city or town, or in lieu of a license tax to the city or town, has been taxed by the city or town on the capital employed in business, may, other than at a definite place of business, sell and deliver at the same time to licensed dealers or retailers, but not to consumers, anywhere in the State, without the payment of any additional license tax of any kind for such privilege to the State, or to any city or town."

You further state in your letter that according to your interpretation of this section, a jobber who is duly licensed to do business in the city of Roanoke, Virginia, can send his truck to Covington, Virginia, and there sell to dealers and retailers without paying an additional license in Covington.

You also state that Mr. Bryant, the Commonwealth's Attorney of Alleghany contends that Covington can require an additional license of this party. While I dislike very much to differ with Mr. Bryant with his interpretation of the law, at the same time I must admit that your interpretation is correct.

I would further add that I have just discussed the matter with Hon. C. H. Morrissett, State Tax Commissioner, and he fully accords in your interpretation.

I am sending a copy of this letter to Mr. Bryant.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

TAXATION—Notary public—Capitation tax.RICHMOND, VA., *January 7, 1928.*

JAMES D. JOHNSTON, ESQ.,
Attorney at Law,
Roanoke, Virginia.

MY DEAR MR. JOHNSTON:

I am just in receipt of your letter of January 5th. In this you state that Miss Ronald, who has been a notary public for several years in Roanoke, was required, before she was permitted to qualify, to pay her poll taxes for three years. You then ask if this is proper.

In reply I call your attention to chapter 276 of the Acts of Assembly, 1924. You will observe from the reading of the first paragraph of this Act that the only capitation tax which Miss Ronald would be required to pay is the capitation tax for the year immediately preceding the last preceding tax year before she could obtain a commission as notary public. When Miss Ronald applies for a renewal of her commission as a notary public next month, she is only required to pay her capitation tax for the year 1927, and not for three years, as stated in your letter.

If you will examine one of the application blanks used for notary public, you will observe that it states that only one year's capitation tax is required to be paid.

Trusting this gives you the desired information, I am

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

TRANSPORTATION—Free service to members of police force and fire department.RICHMOND, VA., *September 22, 1928.*

MAJOR R. B. JORDAN, *Chief of Police, and*
President, Police Executives Association,
Richmond, Virginia.

MY DEAR MAJOR:

Honorable Dave E. Satterfield, Jr., Attorney for the Commonwealth for the city of Richmond, has handed me for reply your letter of the 19th instant, asking an opinion concerning the construction of section 161 of the present Constitution of Virginia relative to the right of a transportation or transmission company to furnish free service within the State of Virginia to members of the police force or fire department while in the discharge of official duties.

Section 161 of the Constitution of 1902 prevented free transportation of police and firemen except upon street railways.

The amended section provides that nothing in section 161 shall prevent a street railway, transportation or transmission company from granting free transportation or free service, within the State, to any member of the police force or fire department while in the discharge of official duties, nor prohibit policemen or firemen from accepting free transportation.

There can be no doubt of the right of a railway or transmission company to furnish free transportation or service to policemen or firemen while in the dis-

charge of official duties, nor is there anything to prevent the acceptance of police and firemen of such free transportation or service.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

TREASURERS—Capitation taxes—Can be paid without payment of personal property taxes.

RICHMOND, VA., *April 22, 1929.*

MR. F. S. COLLIER,
Attorney at Law,
Hampton, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of April 20, 1929, in which you request me to advise you whether a county or city treasurer can refuse to receive one's capitation tax, when properly tendered to him, for the reason that such person assessed therewith does not at that time pay his personal property taxes.

It is my opinion that a treasurer must receive one's capitation tax whenever tendered to him, and that he is without authority to affix any such condition as is suggested by you as a prerequisite to receiving such tax (*Smith v. Bell*, 113 Va. 667).

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

TREASURER—Expenses of office.

RICHMOND, VA., *August 14, 1928.*

HON. W. E. RAMSEY, *Treasurer,*
Chatham, Virginia.

MY DEAR SIR:

I am in receipt of your letter of August 4, in which you call my attention to the law requiring county treasurers to mail tax tickets to taxpayers paying \$5.00 and over, stating that you do not find any provision for the payment of postage, and asking my opinion as to whether or not a treasurer must himself bear the postage expense.

Unless the commissions of a treasurer overrun his allowance under the West Fee Bill, he has to take care of the postage costs. Where they do overrun his allowance, the Comptroller, succeeding to the duty and authority of the fee commission, may, under section 3516-e, allow postage as a part of a treasurer's office expenses.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

TREASURER—Compensation for receiving and disbursing funds of counties.

RICHMOND, VA., July 19, 1928.

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

MY DEAR MR. MOORE:

I am in receipt of your letter of July 17, which is as follows:

"Code section 2431, as amended by chapter 436, page 757, Acts 1922, fixes the compensation of treasurers for receiving and disbursing funds of the counties, cities, school districts, magisterial districts and local revenues. The fourth paragraph of page 759, Acts 1922, of the Act provides as follows:

"General county or city bonds and district road, bridge or school bonds. —For receiving and disbursing the money derived from the sale of general county or city bonds, or district road, bridge or school bonds, the treasurer shall receive as compensation for his services one-fourth of one per centum of the amount of proceeds of sale of such bonds, and, in addition, the reasonable costs to him of additional surety bond required to be given by him on account of such bond issue."

"Chapter 513, section 6, page 891, Acts 1922, changes the rate of commission of the treasurer from $\frac{1}{4}$ to $\frac{1}{8}$ of 1 per centum, as does also chapter 527, section 6, bottom of page 876, Acts 1926. The Acts of 1928, chapter 471, which is designated as a codification of the school laws of Virginia, on page 1221, provides in section 702, as follows:

"No treasurer shall receive any commission upon any money loaned from the literary fund, or upon donations by individuals or foundations, or upon funds from insurance on any school building destroyed by fire, or from money derived from the sale of school property or on funds derived from loans or bond issues. (Code 2431)."

"You will notice there is parenthetical reference to Code section 2431 (which is the Code section providing for the compensation of treasurers receiving and disbursing local funds, etc.) and while it may have been the intention to limit provisions of section 702 to loans or bond issues for school funds, in my opinion, the language used is broad enough to forbid the treasurer from receiving commissions on loans or bond issues for any purpose, general county, city, district, road, bridge or school bonds or loans, but I am further of the opinion, as this chapter codifying school laws is not in force until June 17, 1928, the provisions of section 702 will apply for the fiscal year of the county commencing July 1, 1928."

I have carefully read and considered its contents. It is my opinion that section 702 of the "School Code," found in the Acts of Assembly on page 1221, is limited to school funds and has no reference to other funds handled by the treasurer the commission on which is provided for in section 2431 of the Code, which remains in full force and effect except insofar as amended by implication by section 702 of the "School Code" with reference to school funds.

I think the reference to section 2431 in parentheses, which is found at the end of section 702 of the "School Code," was merely intended by the draftsman to advise the General Assembly as to the source from which this section of the

"School Code" was drafted, and not as a repeal of any portion of section 2431 of the Code, which is not covered by section 702 of the "School Code."

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

TREASURER—Receiving commissions upon donations by individuals or foundations.

RICHMOND, VA., July 10, 1928.

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

MY DEAR MR. CROWGEY:

Acknowledgment is made of your letter of July 6, 1928, in which you say:

"I note in section 702 of the new School Code of Virginia that no treasurer shall receive any commission upon donations by individuals or foundations. I am wondering whether or not tuitions paid by patrons for high school work fall under the heading of donations? If not, how would funds of this kind be classed? This question has arisen in connection with our passing through the county treasurer's office the tuition funds turned in to us from the different high schools of the county."

If you will examine section 672 of the School Code, you will see that it is there provided in part:

"The county school boards and city school boards are authorized to charge, under regulations prescribed by the State Board of Education, tuition for pupils attending high school, but such tuition shall, in no case exceed the actual per capita cost for instruction and maintenance in the high school department."

It is my opinion that tuition thus charged cannot in any sense be regarded as falling within any of the classes mentioned in section 702 of the School Code, therefore, the treasurer is entitled to compensation on a fund arising from such source.

Very truly yours,

JNO. R. SAUNDERS,
Attorney General.

TREASURY—Payments from—Lump sum payments.

RICHMOND, VA., January 14, 1929.

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

MY DEAR MR. COMBS:

On December 5, 1928, I replied to a request of yours as to whether you could pay in a lump sum to the V. M. I. Athletic Association \$3,000.00 on the first installment of fees collected by that association.

In reply to your letter I quoted sub-section (k) of section 10 of the re-organization act, as amended by chapter 79 of the Acts of 1928, which reads as follows:

" * * * Lump-sum transfers of appropriations to State departments, divisions, officers, boards, commissions, institutions and other agencies owned or controlled by the State, whether at the seat of government or not, are prohibited * * *."

I was under the impression at that time that that provision of the law was applicable to the question in issue. Since expressing that opinion I have received a letter from General Wm. H. Cocke, Superintendent of V. M. I., a copy of which I am enclosing you.

I am satisfied from the explanation contained in General Cocke's letter that the law I quoted to you is not applicable to this case, as the amount is not in any sense an appropriation made by the Legislature of Virginia, and, in my judgment, the Athletic Association of V. M. I. has a perfect right to withdraw the \$6,940.00 in the lump sum.

I am herein enclosing you a voucher for this amount, which you can honor.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

TRIALS—Service of process.

RICHMOND, VA., July 10, 1928.

ELIJAH NEWTON, ESQ.,
Justice of the Peace,
Allens Level, Virginia.

DEAR SIR:

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

"Please refer to page 1030 of the Acts of 1928, and advise me whether or not the amendments on that page to Code section 6020 also include civil warrants as well as notices of motion, that is, whether or not it requires ten days from date of serving a warrant before trial."

I have examined section 6020 of the Code, as amended by chapter 394 of the Acts of 1928, with care and it is my opinion that the provision contained in the second paragraph of that section, requiring a notice of motion before a justice to be executed not less than ten days before the return date, is limited to notices of motion and has no application to warrants.

The time for the service of warrants is fixed by section 6022 of the Code, as amended, which requires execution at least five days prior to the trial, except with the consent of the parties.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

TREASURY, STATE—Payments out of tuberculosis eradication fund.

RICHMOND, VA., June 10, 1929.

DR. ENNION G. WILLIAMS, *Commissioner,*
Department of Health,
Richmond, Virginia.

DEAR DR. WILLIAMS:

I have your letter of June 10, 1929, in re: that part of the tuberculosis fund which was paid into the general fund of the State treasury with your consent in 1928. You ask me to advise you whether, with the consent and approval of the Governor, this sum, amounting to \$25,000.00, can now be used for health sanitation work as appears to have been authorized by section 13 of chapter 384 of the Acts of 1918.

Since the passage of the last cited act, the General Assembly has enacted chapter 33 of the Acts of 1927, commonly known as the State reorganization act. Sub-section (c) of section 9 of this act provides in part:

“ * * all balances of funds on March first, nineteen hundred and twenty-eight, in the possession or to the credit of any State department, division, officer, board, commission, institution or other agency owned or controlled by the State, whether at the seat of government or not, shall be then immediately paid into the treasury of the State; * * *.”

Sub-section (i) of the same section provides in part:

“No money shall be paid out of the State treasury except in pursuance of appropriations made by law. * * *”

I am, therefore, of the opinion that this money cannot be lawfully paid out of the State treasury at this time, unless it was included in the general appropriation bill for the years 1928-1929. See also the first paragraph of section 17 of the general appropriation bill (Acts of 1928, page 513).

Your attention is also called to the second paragraph of section 17 of the general appropriation bill (Acts of 1928, page 513), which reads as follows:

“No State department, institution or other agency receiving appropriations under the provisions of this act shall exceed the amount of its appropriations, except in an emergency, and then only with the consent and approval of the Governor in writing first obtained; and if any such State department, institution or other agency shall exceed the amount of its appropriation without such consent and approval of the Governor, there shall be no reimbursement of said excess, nor shall there be any liability or obligation upon the State to make any appropriation hereafter to meet such deficit, and the members of any governing board of any State department, institution or other agency, or, if there be no governing board, the head of any State department, institution or other agency, making any such excessive expenditures—in the case of members of governing boards, who shall have voted therefor—shall be personally liable for the full amount of such unauthorized deficit, and, in the discretion of the Governor, shall be deemed guilty of neglect of official duty, and be subject to removal therefor.”

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

TRUSTEES—Appointment and administration of committees for insane persons.

RICHMOND, VA., July 13, 1928.

HON. ROBERT THOMAS,
Regional Attorney,
United States Veterans Bureau,
Richmond, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of recent date, in which you call my attention to section 1050-A of the Code of Virginia, enacted into law by chapter 389 of the Acts of 1928, and request me to advise you whether, in my opinion, this statute is constitutional. You state that some question has been raised as to whether the ex-service man involved would be entitled to notice and a right to be heard in the matter of appointing a trustee.

You will observe that the last sentence of this statute provides as follows:

"Such trustee, in addition to such duties and obligations imposed upon him under his trust by the Federal government, shall be subject to such State laws as are now in force or hereafter enacted applicable to the appointment and administration of committees for insane persons."

This, in my opinion, requires exactly the same procedure to be followed in securing the appointment of a trustee as is pursued in securing the appointment of a committee, with the sole exception of having such ex-service man adjudged a lunatic.

Section 1051 of the Code of Virginia, as amended, would, therefore, be applicable to such a procedure. Under this section, it would be necessary to proceed by petition before the proper court, after due notice to the party affected who would have the opportunity of being heard. This, in my opinion, constitutes due process of law.

I am, therefore, of the opinion that section 1050-A of the Code of Virginia, as enacted into law by chapter 389 of the Acts of 1928, is a valid statute.

Trusting this gives you the desired information, I am

Very truly yours,

JNO. R. SAUNDERS,
Attorney General.

VIRGINIA MILITARY INSTITUTE—Comptroller prohibited from making lump-sum payment of fees to V. M. I. Athletic Association.

RICHMOND, VA., December 5, 1928.

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

MY DEAR MR. COMBS:

Acknowledgment is made of your request of recent date that I advise you whether you can pay in a lump sum to the V. M. I. Athletic Association \$3,000.00 as first installment of fees collected for that association.

It is provided in sub-section (k) of section 10 of the re-organization act, as amended by chapter 79 of the Acts of 1928, as follows:

" * * Lump-sum transfers of appropriations to State departments, divisions, officers, boards, commissions, institutions and other agencies owned or controlled by the State, whether at the seat of government or not, are prohibited * *."

It is, therefore, my opinion that the voucher forwarded by the Virginia Military Institute cannot be paid in this form.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

VIRGINIA MILITARY INSTITUTE—Without authority to donate money to Chamber of Commerce of town of Lexington.

RICHMOND, VA., *December 12, 1928.*

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

MY DEAR MR. COMBS:

Acknowledgment is made of your letter of December 11, 1928, in which you say:

"We attach hereto correspondence which we have had with the Virginia Military Institute with reference to a donation of \$50.00 to the Chamber of Commerce of the town of Lexington, Virginia, and will thank you to advise if, in your opinion, this item is a proper charge against the funds appropriated to the Virginia Military Institute."

This item is to be treated either as money expended for the purpose of advertising the Virginia Military Institute, or as a gift. If regarded as an advertisement, it is prohibited by section 13 of the general appropriation bill (Acts of 1928, page 509), since the appropriation for the Virginia Military Institute does not provide for advertising items. If regarded as a gift, it is prohibited, since no official of the State has the authority to donate any State money without express authority so to do from the General Assembly.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

VIRGINIA REAL ESTATE COMMISSION—Without jurisdiction to impose fines.

RICHMOND, VA., *March 14, 1929.*

MR. OTTO HOLLOWELL, *Secretary,*
Virginia Real Estate Commission,
Norfolk, Virginia.

MY DEAR SIR:

Acknowledgment is made of your letter of March 13, 1929, in which you request me to advise you whether the Virginia Real Estate Commission has the power to impose the penalties authorized by section 12 of chapter 461 of the Acts of 1924, the act creating that Commission.

I have carefully examined that section and it is my opinion that it confers no such power on the Virginia Real Estate Commission. The punishments there

prescribed are for misdemeanors and must, under the terms of the statute, be imposed by a court. If such a case originates in a circuit or corporation court instead of before a justice of the peace or a police justice, it will be the duty of the Commonwealth's Attorney to represent the Commonwealth in such circuit or corporation court.

With reference to the other troubles mentioned in your letter, I would suggest that the members of your Commission examine the law and ascertain just what defects exist which need correction and, when they have done so, that they submit a statement calling attention to the changes they desire in the law, and my assistant, Mr. Bazile, who is in charge of the Division of Legislative Drafting, will prepare the necessary amendments to be submitted by your Commission to the General Assembly.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

WESTERN STATE HOSPITAL—Authority of to receive donations.

RICHMOND, VA., March 5, 1929.

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

MY DEAR DOCTOR:

Acknowledgment is made of your letter of recent date, in which you sent me a letter addressed to you from Messrs. Alley & Geer, Counselors at Law, 111 Broadway, New York City, in which they request answers to the following questions:

"1. The exact corporate name of your hospital under which testamentary gifts may be left to it. It is, of course, of the first importance to have this name exactly so that there may be no doubt or uncertainty when the will is admitted to probate as to the hospital which gets the legacy. We desire to have the exact corporate name of your hospital.

"2. Whether your corporation is empowered to receive gifts under a will and whether there is any limit on this power.

"3. Whether it is authorized to receive the income from a trust fund as distinguished from a direct gift."

The corporate name of your hospital is Western State Hospital (Code section 1005). This hospital was originally incorporated and established under the name of the Western Lunatic Hospital (Chapter 35, Acts 1824-25, page 30), but its name has been changed since that time.

Section 2 of the last mentioned act authorizes the corporation "to take any estate, real or personal, given or to be given to the said hospital" or to the directors "for the use thereof; so as the annual income of such donations, shall not exceed the sum of three thousand dollars; any law or statute to the contrary notwithstanding."

Although this act has been amended from time to time in the last hundred years, I do not find any amendment to this section.

I would suggest that the best and safest way of making the proposed gift would be to the Commonwealth for the exclusive benefit of the Western State

Hospital. There can be no question about the right of the Commonwealth to receive such gift, and I can see no reason why the Commonwealth would not be authorized to receive either the corpus of the gift in trust for this purpose, or the income from a trust fund as distinguished from a direct gift.

There are several instances in which similar bequests have been made to the Commonwealth for particular institutions, one recent case being that of a citizen of New York who left a large fund to the Commonwealth in trust for the establishment of scholarships to the University of Virginia.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

WESTERN STATE HOSPITAL—Sterilization of inmates.

RICHMOND, VA., January 15, 1929.

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

MY DEAR DR. DEJARNETTE:

Acknowledgment is made of your letter of January 8, 1929, in which you say:

"Your letter received and I will be glad if you will advise me in regard to the sterilization of the misfits, insane, and feeble-minded in Virginia; if they have to be of insane ancestry or simply be insane themselves and their insanity inheritable and liable to be transmitted to their off springs."

The whole subject of your inquiry is governed by the Virginia statutes, sections 1095-h—1095-m, Virginia Code of 1924, Acts 1924, page 569, and the decision of the Court of Appeals in *Buck v. Bell*, 143 Va. 310, affirmed by the Supreme Court of the United States, 274 U. S. 200, 71 L. Ed. 663, 47 Sup. Ct. 584.

From the wording of section 1095-h of the Code of 1924, it would appear that only those persons who suffer with hereditary forms of insanity that are recurrent are subject to sterilization. It would appear to be otherwise, however, in cases of idiocy, imbecility, feeble-mindedness or epilepsy.

I am of the opinion that each case would depend upon its own facts and that it would be necessary for you to strictly comply with every requirement of the statute before you undertook to have any of the inmates of your institution sterilized. You cannot be too careful in a matter of this kind.

Yours very truly,

JNO. R. SAUNDERS,
Attorney General.

WESTERN STATE HOSPITAL—Who eligible for admission to.RICHMOND, VA., *August 22, 1928.*

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

MY DEAR DOCTOR:

I am in receipt of your letter of August 16, in which you write:

"Upon a recent examination of the laws relative to the commitment of inebriates and addicts to State institutions, I note that the section as formerly existing and as passed by the 1916 Legislature and adopted as a part of the Code of 1919 was amended by the 1926 Legislature, in that the condition necessary to be existing before an inebriate or addict may be committed have been changed and are now expressed in the conjunctive rather than in the disjunctive, as formerly was the case. A new phrase has been added relative to the committed party being a burden on the public.

"Kindly give me your opinion as to what conditions must exist before a person may be committed to a State hospital as an inebriate or an addict. Also please give your opinion as to what is the proper legal construction of the phrases, 'dangerous to the public and to himself,' 'unable to care for himself, his property or his family,' and 'a burden on the public.' In stating your views will you not indicate what facts must be shown before the terms of the statute are met, it to be strictly conserved, I take it. Does the drug addict or inebriate have to be dangerous to the public and to himself, unable to care for himself, his property or his family, and a burden to the public, or is it only necessary to have one of these complaints? This law will probably be attacked and I want to be certain about whom we should take."

Your letter contains two requests:

1. You desire to know my construction of chapter 82, page 84, of the Acts of 1926, amending and re-enacting section 1068 of the Code of Virginia, concerning inebriates, their commitment, care and treatment, and the expense therefor.

Ordinarily, where the language of the statute is changed, there is presumption that a change in the meaning was intended, and I note that the word "and" is substituted for the word "or" in that part of the section which undertakes to describe the character of person who may be committed to a State hospital because of the use of alcoholic liquors or habit forming drugs. Taking the whole sentence together and having especial reference to the fact that this sentence provides for a commission for an examination of a person "who, through use of alcoholic liquors or habit-forming drugs, has become dangerous to the public or himself, and unable to care for himself or his property or family, and for either of these reasons has become a burden on the public," I am of the opinion that it was not the intention of the Legislature to limit the commitment of a person to one who has become both dangerous to the public or himself and unable to care for himself or his property or family, but to provide for the commitment of a person who is either dangerous to himself or to the public, or unable to care for himself, his property or his family.

2. I take it that the phrases you ask me to construe are such as will be met in every-day life, that there is nothing technical about them, that, so far as I know, there has been no legal construction of either of such phrases, that the language in each of the phrases must necessarily be applied to the circumstances

of each and every case as it arises. It is impossible for me to undertake to give an accurate construction or definition which would be applicable to all cases which may arise in which it would be found necessary to apply the phrases used by you in your second query.

The only thing I can say is that, if efforts are made to secure the release of persons committed to your charge as alcohol or drug addicts, you will have to answer for each case according to the facts and have the judge pass upon the applicability of the statute to the case.

Yours very truly,

JNO. R. SAUNDERS,

Attorney General.

Statement

Showing the Current Expense of the Office of the Attorney General from June 30, 1928, to July 1, 1929

General repairs	\$ 10 50
Telegrams	23 88
Telephone service and tolls	451 30
Subscriptions to and purchase of law books	192 00
Postage	240 00
Towels, drinking water, furniture, office supplies	356 29
Insurance premiums	10 00
Additional stenographic service	50 00
	<hr/>
	\$1,334 40

Statement

Showing Amounts Expended from the Appropriation for Traveling Expenses from June 30, 1928, to July 1, 1929

1928	
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