

ANNUAL REPORT

OF THE

ATTORNEY GENERAL

TO THE

GOVERNOR OF VIRGINIA

FOR THE

YEAR 1915

RICHMOND:
DAVIS BOTTOM, SUPERINTENDENT PUBLIC PRINTING
1916

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ATTORNEYS GENERAL OF VIRGINIA

From 1775 to 1915

Edmund Randolph	1776-1786
James Innes	1786-1796
Robert Brooke	1796-1799
Philip Norborne Nicholas	1799-1819
John 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
Jno. Garland Pollard	1914-

Office of the Attorney General.

JNO. GARLAND POLLARD.....	<i>Attorney General</i>
CHRISTOPHER B. GARNETT.....	<i>Assistant Attorney General</i>
MORTON L. WALLERSTEIN.....	<i>Law Clerk</i>
MAURICE A. POWERS.....	<i>Secretary</i>
MALRIE L. HUNTER.....	<i>Stenographer</i>

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REPORT

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, November 1, 1915.

His Excellency, HENRY C. STUART,
Governor of Virginia.

DEAR SIR:

In accordance with section 3025 of the Code of Virginia, I hereby deliver you a report of the state and condition of the several causes in which the Commonwealth is a party pending November 1, 1915. I have added a number of opinions on questions of public importance, as well as a statement of the expenditures of this office for the year ending October 31, 1915.

The opinions here appended and statements of suits pending and disposed of by no means represent all of the work of the office, the records of which show that the Attorney General has an average of one hundred and eighty-six inquiries, through the mails, per month from the various officers of the State and others, making inquiry concerning public business. Many of these inquiries require considerable time and research to answer.

Very truly yours,
JOHN GARLAND POLLARD,
Attorney General of Virginia.

Cases Decided in the Supreme Court of the United States.

1. *Virginia v. West Virginia.* Since the last report this important case has been argued and decided in favor of the Commonwealth of Virginia. The opinion of the court and the decree thereon are hereto appended as a part of this report. It will be seen by the decree that the amount found due the State of Virginia is \$12,393,929.50, with interest at five per cent. from the first day of July, 1915.

For the successful termination of this long-drawn-out litigation too much credit cannot be given to Honorable William A. Anderson and Honorable Randolph Harrison, who with great ability and industry represented the State of Virginia.

The opinion was handed down on the 14th day of June, 1915, and on the 19th day of October, 1915, the Virginia Commission addressed a letter, approved by the Attorney General to Honorable Henry D. Hatfield, Governor of West Virginia, asking that steps be taken towards the settlement of the amount found due.

2. *Dalton Adding Machine Co. v. State Corporation Commission of Virginia.* This was an application made to the United States District Court for the Eastern District of Virginia on behalf of the complainant, a foreign corporation, asking for an injunction to restrain the State Corporation Commission of Virginia from instituting proceedings against said company to compel it to comply with the statute requiring foreign corporations doing business in this State to procure a certificate of authority to do business in this State, etc. The ground relied upon was that the company was doing only interstate business in Virginia, and, therefore, could not

be compelled to take out a license here. The district court denied the injunction prayed for, whereupon the Dalton Adding Machine Company appealed the case to the Supreme Court of the United States. Affirmed.

3. *C. J. Rixey, An Insane Person, by C. J. Rixey, Jr., his son and next friend, v. Robert H. Cox, Sergeant of the City of Alexandria.* C. J. Rixey was indicted in the corporation court of the city of Alexandria for felony. Before he could be tried he was adjudged insane and committed to the Western State Hospital at Staunton. Subsequently, by order of the court, it was directed that he be transferred to the Southwestern State Hospital at Marion and confined in the ward for the criminal insane. An appeal from the order of the court confining him to the ward for the criminal insane was taken to the Supreme Court of Appeals and refused, whereupon a writ of *habeas corpus* was applied for in the United States Court for the Eastern District of Virginia, and the writ having been refused, the case was appealed to the Supreme Court of the United States. Affirmed.

4. *J. G. Davis v. Commonwealth of Virginia.* This case involved the question as to whether the peddler's act, section 50 of the tax bill, as construed by the Supreme Court of Appeals of Virginia, is not a regulation of interstate commerce, and, therefore, invalid. Reversed.

5. *Commonwealth of Virginia v. J. P. Morgan.* This was a suit for recovery of the will of Martha Washington, and was brought in pursuance of chapter 5 of the Acts of Assembly, 1914. Before an answer was filed, the defendant surrendered the will and it has been delivered to the clerk of the court of Fairfax county, where it was originally admitted to probate.

Cases Decided in the District Court of the United States for the Eastern District of Virginia.

1. *Oliver Durant v. C. H. Tinsley, Commissioner, and others.* This was a bill in chancery praying for an injunction to restrain the collection of certain taxes assessed against the complainant in the county of Culpeper. Decided in favor of the Commonwealth.

Cases Pending in the District Court of the United States for the Eastern District of Virginia.

Commonwealth v. Co-operative Supply Company, Inc.

Cases Decided in the Supreme Court of Appeals of Virginia.

1. *Garnett & Cosby v. Commonwealth.* From the circuit court of King William county. Burglary. Reversed on the grounds of an erroneous instruction being given to the jury, as well as the admission of illegal evidence. Reported in 10 Va. App. 32; 83 S. E. 1083.

2. *Buck v. Commonwealth.* From the circuit court of Craig county. Felony. Reversed on the ground of insufficiency of evidence to prove accused to be an accessory after the fact. Reported in 116 Va. 912; 83 S. E. 90.

3. *Commonwealth v. Round Mountain Mining and Manufacturing Co.* From the circuit court of Tazewell county. Erroneous assessment of taxes. Writ of error dismissed because of misjoinder of assignments of error in single writ. Reported in 10 Va. App. 23; 83 S. E. 1061.

4. *Morris & Co. v. Commonwealth*. From the corporation court of the city of Roanoke. Correction of erroneous assessment. Reversed, the court holding that non-resident packing houses maintaining an establishment in Virginia were not merchants as that term was used in the Tax Bill. Reported in 116 Va. 912; 83 S. E. 408.

5. *Hallie Rawley v. Commonwealth*. From the circuit court of Middlesex county. Felony. Error confessed on account of instruction incorrectly distinguishing murder and manslaughter.

6. *F. W. Starke v. Commonwealth*. From the circuit court of Brunswick county. Malicious shooting. Reversed; insufficiency of evidence. Reported in 116 Va. 1039; 83 S. E. 545.

7. *Wiseman v. Commonwealth*. From the circuit court of Louisa county. Misdemeanor. Reversed. Indictment held insufficient as to soliciting orders for intoxicating liquors in no-license territory. Reported in 10 Va. App. 91; 83 S. E. 1052.

8. *F. C. Taylor v. Commonwealth*. From the circuit court of Accomac county. Misdemeanor. Affirmed. This case recognized the power of the Commonwealth, under the act of Congress known as the Webb-Kenyon law, to punish a station agent for delivering an interstate shipment of intoxicating liquors to a person other than the bona fide consignee or his agent upon his written order. Reported in 10 Va. App. 454; 85 S. E. 499.

9. *F. C. Taylor v. Commonwealth*. From the circuit court of Accomac county. Misdemeanor. Affirmed under doctrine of above case.

10. *Standard Oil Co. v. Commonwealth*. From the hustings court of the city of Richmond. Correction of erroneous assessment. Governed by the case of *Morris & Co. v. Commonwealth*, which was reversed.

11. *Commonwealth v. Groome, Guardian*. From the circuit court of Fauquier county. Correction of erroneous assessment. Appeal refused. The case involved the question as to whether a decree or order exempting income from taxation is in a subsequent proceeding under the same statute against the same party *res adjudicata* as to the liability of said income for taxation in a succeeding year when the facts affecting the liability are the same in the two cases.

Cases Pending in the Supreme Court of Appeals of Virginia.

1. *Robinson v. Commonwealth*. Misdemeanor. From the corporation court of the city of Danville. Pending.

2. *Commonwealth v. Barrow*. Misdemeanor. From the circuit court of Brunswick county. Pending.

3. *Ella Eddy v. Commonwealth*. Misdemeanor. From the corporation court of the city of Roanoke. Pending.

4. *Conaway Nobie v. Commonwealth*. Murder. From the circuit court of Lancaster county. Pending.

5. *Commonwealth, ex rel. City of Richmond, v. Virginia Railway & Power Co., et als.* Rolling stock tax. From the State Corporation Commission. Pending.

6. *Commonwealth, ex rel. City of Richmond, v. Chesapeake & Ohio Ry. Co., et als.* Rolling stock tax. From the State Corporation Commission. Pending.

7. *Commonwealth v. Armour & Company*. License tax. From the circuit court of the city of Richmond. Pending.

8. *General Railway Signal Co. v. Commonwealth*. License tax. From the State Corporation Commission. Pending.

9. *Canter v. Commonwealth*. Murder. From the circuit court of Washington county. Pending.

10. *Commonwealth v. United Cigarette Machine Co., Ltd.* License tax. From the circuit court of Campbell county. Pending.

11. *Hotel Richmond Corporation, et als. v. Commonwealth*. License tax. From the hustings court of the city of Richmond. Pending.

12. *Dalton Adding Machine Co. v. Commonwealth*. License tax. From the State Corporation Commission. Pending.

Cases Decided by the State Corporation Commission.

1. *Commonwealth v. Dalton Adding Machine Co.* Action by State Corporation Commission against defendant, a foreign corporation, for doing business in Virginia without a license. Defendant alleged that it was engaged in interstate commerce and, therefore, not taxable. Fine of \$1,000.00 imposed; appeal taken and now pending in Supreme Court of Appeals.

2. *Commonwealth v. General Railway Signal Co.* Action by State Corporation Commission against defendant, a foreign corporation, for erecting a system of block signals in Virginia without taking out a license therefor. The question involved was whether defendant was engaged in interstate commerce. Fine of \$1,000.00 imposed, from which an appeal was taken and the case is now pending before the Supreme Court of Appeals.

Cases Pending Before State Corporation Commission.

1. *Commonwealth v. New York and Pennsylvania Co.* License tax involving interstate commerce.

2. *Commonwealth v. Baltimore Steam Packet Co.* License tax involving constitutional questions.

3. *Commonwealth v. Fruit Growers Express*. Constitutionality of license tax.

4. *Commonwealth v. Union Trunk Line*. Constitutionality of license tax.

5. *Commonwealth v. Wells Fargo Co.* Constitutionality of registration fee required of foreign corporations.

Cases Decided in the Circuit Court of the City of Richmond.

IN EQUITY.

Armour & Co. v. Commonwealth. Merchants' license tax. Injunction granted to plaintiff.

Commonwealth v. Atlantic Coast Line Railway, et als. Foot and mouth disease. Injunction granted to plaintiff.

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

AT LAW.

1. *Commonwealth v. O. B. Thomas, Treasurer Fluvanna County, et als.* Official bond.

2. *Commonwealth v. G. P. Barr, Treasurer Washington County, et als.* Official bond.

3. *Commonwealth v. W. M. Gray and J. J. Geisler, Washington County.* Official bond.

4. *Commonwealth v. O. D. Foster, Administrator R. D. Adams.*
5. *Commonwealth v. A. A. Chapman.*
6. *Commonwealth v. D. Mott Robertson, et als.*
7. *Commonwealth, ex rel. Auditor Public Accounts, v. Gray National Telautograph Company.* Taxation.
8. *Seaboard Air Line Railroad Company v. State Corporation Commission.* Taxation.
9. *Life Insurance Co. of Virginia v. Commonwealth.* Taxation.
10. *The Ferries Company v. Commonwealth.* Taxation.
11. *Commonwealth v. Bowman's Admr.* Official bond.

IN CHANCERY.

1. *Commonwealth v. P. H. Huffman, et als.*
2. *Commonwealth v. Walter Milan.*
3. *Commonwealth v. Jas. Hilton's Administrator.*
4. *Commonwealth v. J. T. Young.*
5. *Commonwealth v. A. A. Chapman.*
6. *Commonwealth v. B. Vandegrift, et als.*
7. *Commonwealth v. Sarah E. French.* Creditors' bill.
8. *Hunter and Jones, Executors of R. M. Stuart, deceased, v. Board of Sinking Fund Commissioners.* Appropriation of General Assembly.
9. *Commonwealth v. Employers Indemnity Co.* Bureau of Insurance.
10. *Commonwealth v. American Union Fire Insurance Co.* Bureau of Insurance.
11. *Commonwealth v. Empire State Surety Co.* Bureau of Insurance.

Cases Pending in the Hustings Court of the City of Richmond.

- Woodward v. Commonwealth.* Taxation.
Stephen Putney's Admr. v. Commonwealth. Taxation.

Portraits of Former Attorneys General now in the Office of the Attorney General.

- Portrait of EDMUND RANDOLPH, first Attorney General of Virginia, 1776-1786. A copy made and loaned the office by Miss Emma Whitfield, artist, Richmond, Va.
- Portrait of JOHN ROBERTSON, Attorney General, June, 1819-1834. Loaned the Attorney General's office by the State Library Board.
- Portrait of JOHN RANDOLPH TUCKER, Attorney General, 1857-1865. Presented by his son, Hon. Harry St. George Tucker.
- Portrait of RALEIGH T. DANIEL, Attorney General, 1874-1877. Presented by his family.

OPINIONS

AGRICULTURE—*State Board—Power to conduct experiments to be paid for from fertilizer fund. Va. Code 1904, Sec. 1783d.*

The State Board of Agriculture has no authority to conduct experiments in feeding live stock to be paid for out of the fertilizer tax fund.

RICHMOND, VA., April 9, 1915.

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

DEAR SIR:

On January 21, 1915, you addressed a letter to Hon. Leslie C. Garnett, which went to him at the Mutual building. He has referred this letter to me as it was evidently intended for this office. In this letter you request my opinion as to the authority of the Board of Agriculture to conduct experiments in feeding live stock, the expense thereof to be paid from funds derived from tax on fertilizer in this State. Section 15 of the fertilizer law (section 1783d, Va. Code 1904, as amended by Acts 1914, p. 455) provides, so far as applicable to this question, as follows:

“The Board of Agriculture and Immigration shall have full and absolute control of all money arising from fees aforesaid and of all forfeitures and fines arising under this act, and shall adopt all necessary rules and regulations providing for the collection and distribution of said fees, forfeitures and fines, and shall require the same to be deposited with the Treasurer of the State and to be drawn therefrom upon warrant issued by the Commissioner and signed by the president of said board, upon the Auditor of the State, out of which shall be paid the expenses of carrying out the provisions of this act including the dissemination of useful information for farmers. And any surplus of said funds shall be used by the said board for carrying on experiments with plants and fertilizers and publishing and disseminating the results of said experiments, and for conducting other work and disseminating other knowledge and information useful to the farmers.”

I can find nothing in this section which would authorize the Board of Agriculture to pay for experiments in feeding live stock out of the funds derived from the tax on fertilizer, since experiments in feeding live stock could not be classified under the head of “experimenting with plants and fertilizers” nor does it seem to be possible to classify it under the head of carrying out the provisions of the act.

It might possibly be claimed that it might be classified under the head of “conducting other work and disseminating other knowledge and information useful to the farmers,” but this is such general language that, in my view of the case, it would have to be limited to other work of a similar kind to that enumerated, that is to say, other work connected with carrying out the provisions of the act or with carrying on experiments with plants and fertilizers. If we should adopt a broad and liberal policy in construing the act as to the conducting of other work it might include experiments with fowl, or with fuel, or with soil analysis, or with the thousand and

one innumerable things which would come under the head of work and knowledge and information useful to farmers. Therefore, it would seem to me that the statute does not authorize the board to experiment in feeding live stock and pay the expenses thereof from the taxes on fertilizer.

Very truly yours,

CHRISTOPHER B. GARNETT,
Assistant Attorney General.

ANIMALS—*Infected animals at large—Powers of live stock sanitary board. Va. Code 1904, Sec. 1599a (11) and (12).*

For the protection of uninfected cattle grazing on the State's land, the Live Stock Sanitary Board has the power to call upon the sheriff, deputy sheriff or constable to arrest persons, who, knowing their cattle to be infected with fever ticks, permit them to run at large.

RICHMOND, VA., August 27, 1915.

His Excellency, H. C. STUART,
Governor of Virginia,
Richmond, Va.

DEAR SIR:

You have asked my opinion as to what steps, if any, can be taken to prevent domestic animals infected with fever ticks from going upon the land owned by the State of Virginia in Poquoson district, in the county of York. It appears that the Virginia Live Stock Sanitary Board has placed in said district six concrete dipping vats which are used in the process of freeing cattle from fever ticks, and that the Bureau of Animal Industry of the United States has reported that it is impossible to "dip" all of the cattle in this district on account of being unable to locate their owners. The Bureau suggests that, for the protection of uninfected cattle grazing on the State's land, it is necessary to find some method of preventing infected cattle from coming upon the State's property.

In this connection, I call your attention to sub-section 11 of section 1599a, Va. Code 1904, as amended, vol. 3, p. 242, which, so far as applicable, reads as follows:

"Any person who shall have in his possession any domestic animal infected with any contagious or infectious disease, or fever ticks, knowing such animal to be infected, who shall permit such animal to run at large or who shall keep such animal where other domestic animals not infected by or previously exposed to such disease may be exposed to its infection or contagion * * * shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be fined in any sum not less than ten nor more than one hundred dollars, for each of such exposed or diseased domestic animals which he shall permit to run at large * * * in violation of the provisions of this act."

The 12th sub-section of the same section provides that the Live Stock Sanitary Board shall have the power to call upon the sheriff, deputy sheriff or constable to execute their orders and such officers shall obey the orders of the board.

I am, therefore, of the opinion that, under section 1599a of the Code, the State Live Stock Sanitary Board have ample powers to remedy the situation complained of.

Very truly yours,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

APPROPRIATIONS—*Commissioner of Labor and Statistics—Expenditures of mining inspector. Va. Code 1904, Sec. 1790c; Acts 1914, ch. 199.*

The inspection of mines so far falls within the meaning of the term "purpose of" the "office" of Commissioner of Labor and Industrial Statistics, under the appropriation act, that the traveling expenses of a mine inspector may be paid out of the funds of that office.

RICHMOND, VA., December 4, 1914.

HON. JAS. B. DOHERTY,
Commissioner of Labor,
Richmond, Va.

DEAR SIR:

Yours of December 2nd received. The appropriation act, chapter 199, Acts 1914, under the head of Commissioner of Labor, contains the following items:

"And for the purpose of his office.....	\$7,600.00
And the further sum of.....	2,300.00
To establish the position of mine inspector of the State—	
Salary of inspector.....	\$1,400.00
Traveling expenses.....	600.00"

I am informed that, in pursuance of law, you appointed a mine inspector at the salary provided by the act, to wit, \$1,400.00, and that said inspector has entered upon the performance of his duties, and that the sum of \$600.00, appropriated for his traveling expenses, has been exhausted, and that unless money can be used out of the sum of \$7,600.00, appropriated for the purposes of your office, it will be impossible for the inspector to do the traveling which is necessary in the performance of his duties. I am also informed that before the creation of the office of mine inspector, and the appropriation for his salary, you had from time to time sent agents to inspect mines and paid their expenses out of the sum appropriated for the "purpose" of your office, and that that fact was well known to the General Assembly. I am also informed that you are fully satisfied that the mine inspector has exercised economy in the matter of traveling expenses. You are now confronted with the problem of either discontinuing the work of the mine inspector or paying his traveling expenses out of the sum of \$7,600.00 above referred to.

Under these circumstances, I am of the opinion that you would be fully justified in using any part of the last mentioned sum for the traveling expenses of the mine inspector, in order that he may continue to do his work as contemplated by law. Any other course on your part would defeat the purpose of the General Assembly in creating the office.

There can be no doubt that the inspection of mines falls within the meaning of the term "purpose of" your "office," as used in the appropriation act. This fact is apparent from sub-section 4 of section 1790c of the Code of Virginia, as amended which embodies the act creating your office.

Very truly yours,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

APPROPRIATIONS—*Sufficiency of title of act—Northwestern Turnpike Co. Va. Constitution, Secs. 52 and 186, Acts 1914, ch. 182.*

Under a statute providing that the State Corporation Commission shall cause tolls collected by a turnpike company to be faithfully collected within the limits

prescribed by law and regularly applied to maintenance and improvement of a road equal to the amount of tolls annually collected; and which is entitled an act to transfer to the county of Frederick the State's interest in so much of the Turnpike Company as lies in Frederick county and to authorize the board of supervisors to transfer the said interest to the State Corporation Commission, no money may be paid out of the State treasury because the object, namely, an appropriation, is not stated sufficiently in the title and because the amount sought to be appropriated is not definitely fixed.

RICHMOND, VA., August 26, 1915.

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

DEAR SIR:

You ask my opinion as to your duty under the following state of facts:

The General Assembly, at its session of 1914, passed an act entitled "an act to repeal an act entitled an act to transfer to the county of Frederick the State's interest in so much of the Northwestern Turnpike Company as lies within the county of Frederick, approved February 26, 1884, and to authorize the board of supervisors of the county of Frederick to transfer the said interest to the State Corporation Commission." (Acts 1914, chapter 182, p. 292). Section 2 of said act provides, among other things, that the State Corporation Commission "shall cause the tolls (on said company turnpike) to be faithfully collected within the limits prescribed by law and regularly applied to the maintenance and improvement of said road, and a sum is hereby appropriated out of the public treasury for the maintenance and improvement of said road equal to the amount of tolls annually collected." In pursuance of said act tolls amounting to \$3,486.31 have been collected for the year ending June 20, 1915, and this sum has not been paid into the public treasury, but has been or is to be used in the maintenance of said road by the agents of the State Corporation Commission appointed in pursuance of said act. The State Corporation Commission has now called upon you to have paid out of the State treasury an amount equal to the said sum collected for tolls, to wit, \$3,486.31, to be used in the maintenance and improvement of said turnpike.

Under this state of facts, I am of the opinion that the said sum cannot lawfully be paid out of the State treasury for two reasons:

First. The title of said act above quoted contains no expression which would suggest that the act contained an appropriation out of the public treasury. It is, therefore, in contravention of section 52 of the Constitution, which provides:

"No law shall embrace more than one object, which shall be expressed in the title." * * *

Second. The provision of the act above quoted, purporting to appropriate out of the public treasury a sum equal to the amount of tolls annually collected, is not an appropriation within the meaning of the provision of section 186 of the Constitution, which provides that:

"No money shall be paid out of the State treasury except in pursuance of appropriations made by law."

It will be noted that the act does not undertake to fix definitely the sum to be paid out of the public treasury, nor even to fix a maximum amount to be so paid. According to the terms of the act, the sum paid out must be equal to the tolls col-

lected, whether such sum be \$5,000.00 or \$500,000.00. The word "appropriation" as used in the constitutional provision just quoted means an appropriation of a sum certain, or a sum not greater than the maximum fixed in the appropriation act itself. This constitutional provision appears in the fundamental law of many States; and the courts have declared that the word "appropriation" necessarily carries with it the idea of a sum limited in amount. The reason of the rule is founded upon a sound financial policy which requires that the aggregate amounts necessary to meet all appropriations should be ascertainable from the face of the appropriation acts so that the demands upon the public treasury may, as far as possible, be foreseen. Any other rule would result in the State's incurring obligations the extent of which it would be impossible to foretell. The authorities on this question, and the observations of the Attorney General thereon, can be found in his report of 1914, pages 9 to 15, inclusive.

I, therefore, advise you not to draw your order on the treasurer for the amount certified to you by the State Corporation Commission.

Very truly yours,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

BAIL—*Judgment on forfeited bail bond—Interest.* Va. Code 1904, Sec. 4093.

The State is entitled to recover legal interest on the amount of a forfeited bail bond from the date of the rendition of the judgment of forfeiture.

RICHMOND, VA., June 19, 1915.

MR. GEO. P. HAW,
Commonwealth's attorney, Hanover county,
1103 East Main Street, Richmond, Va.

DEAR SIR:

You have referred to this office the question as to whether a judgment upon a recognizance, or bail bond, bears interest.

Under section 4093, Va. Code 1904, recognizances in criminal cases are payable to the Commonwealth of Virginia, and in such sum as the court or the officer requiring it may direct. If it be to answer for a misdemeanor, or if required of a witness, it may be with or without security, as the court or officer may direct; but, in all other cases, it is required to be with security deemed sufficient by the court or officer taking it. The condition in a criminal case is that the person giving it shall appear before the court, judge or justice before whom the proceedings on such charge will be, at such time as may be prescribed by the court or officer taking it to answer for the offense with which such person is charged.

A search of the statutes of Virginia fails to disclose that they expressly cover the point as to whether a judgment on recognizances bears interest or not, and I fail to find any case in Virginia which expressly covers the point.

In other states, the question has been specifically passed on, but only a few times. In *State v. Frazer*, 27 So. 799, 52 La. Ann. 1305, it was held that the State is entitled to legal interest on the amount of forfeited bail bonds from the date of the rendition of the judgment of forfeiture, citing and following *State v. Sullivan*, 12 La. Ann. 720.

The same decision has been reached in *Brainerd v. Jones*, 18 N. Y. 35, and in *Kinney v. State*, 14 Ohio Cir. Ct. Rep. 91, 7 O. C. D. 97.

In *Swerdsfeger v. State*, 21 Kansas 346, the same conclusion was reached, but the decision in this case was based upon the express terms of the Kansas statute.

In Michigan, however, the courts have reached an opposite conclusion. In that State, under Howard's Ann. St., sec. 8457, providing that in case of forfeiture of bail the judgment shall be the amount of the penalty of the recognizance, it was held to be error to give judgment for interest from the date of the forfeiture. *People v. Hanaw*, 106 Mich. 421, 64 N. W. 328, citing and following *Fraser v. Little*, 13 Mich. 195. In this latter case there was a strong dissenting opinion, and in the opinion rendered by the court all the cases before that time are carefully examined.

5 Cyc 152 takes the position of the Louisiana court, citing the cases heretofore set out.

In Kentucky, it has been held that upon the breach of the condition of a penal bond, the penalty becomes in law a debt due and the obligors can discharge themselves from liability on the bond by payment of the penalty alone; but if the damages in such a case be not paid on the happening of the breach, it will bear interest until it is paid. *Carter v. Thorn*, 18 B. Mon. (Ky.) 613, citing and following *Hughes v. Wickliffe*, 11 B. Mon. (Ky.) 202.

In *United States v. Arnold*, 1 Gallison's Rep. 348, Mr. Justice Story, Associate Justice of the Supreme Court, holding the Circuit Court of the United States for Rhode Island, held that a judgment on a penal bond should include interest from the time of the breach. According with this decision are *Walcott v. Harris*, 1 R. I. 404; *Harris v. Clapp*, 1 Mass. 307; *Judge of Probate v. Heydock*, 8 N. H. 492; *Moore v. Kipp*, 6 Paige 88.

In *Smedes v. Hooghtaling*, 3 Caine (N. Y.) 48, Chief Justice Kent sustained the principle that, as a matter of law, interest was recoverable beyond the penalty of a bond.

Therefore, in spite of the strong argument in the dissenting opinion in the Michigan case, I am constrained to hold that the State is entitled to legal interest on the amount of a forfeited bail bond from the date of the rendition of the judgment of forfeiture.

Very truly yours,

CHRISTOPHER B. GARNETT,
Assistant Attorney General.

BANKS AND BANKING—*State Institutions—Power to accept drafts. Va. Code 1904, Sec. 1161.*

State banks are authorized to accept drafts drawn upon them by their customers.

RICHMOND, VA., September 9, 1915.

HON. C. C. BARKSDALE, *Chief Examiner,*
State Corporation Commission, Banking Division,
Richmond, Va.

DEAR SIR:

In the absence of the Attorney General I am replying to your letter in which you inquire as to whether or not a State bank has power under the Virginia statutes to accept drafts drawn upon it by its customers?

You are correct in stating that section 1161 of the Code gives State banks "power to exercise, by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating bills of exchange, promissory notes, drafts and other evidences of debt; * * * by guaranteeing the payment of bonds, bills notes, and other obligations; by rediscounting paper;" etc.

I am of the opinion that under the general power conferred upon State banks by said statute, to-wit: "all such incidental powers as shall be necessary to carry on the business of banking," as well as by the express terms of the statute, State banks are authorized in Virginia to accept drafts drawn upon them by their customers.

Very truly yours,

CHRISTOPHER B. GARNETT,
Assistant Attorney General.

CITIES AND TOWNS—*Annexation of territory—Assessment of property in annexed territory. Va. Code 1904, Secs. 491 and 1040a (4).*

Where by the terms of the decree of the court, annexation of territory adjacent to a city becomes effective on April 1st, real estate and personal property in the annexed territory, being assessed as of April 1st should be assessed in the county from which said territory has been annexed.

RICHMOND, VA., April 28, 1915.

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

DEAR SIR:

In the absence of the Attorney General, I am replying to your letter of April 27th, in which you state that by an order of the Supreme Court of Appeals certain territory in the counties of Alexandria and Fairfax was annexed and made a part of the city of Alexandria, which annexation was made effective on April 1, 1915, and you request the Attorney General to inform you whether the real estate and personal property in the annexed territory should be assessed for 1915 in the counties of Alexandria and Fairfax, respectively, or in the city of Alexandria.

This question seems to be settled by section 1014a, clause 4, Va. Code 1904, which reads as follows:

"The county levies imposed on persons and property within such territory for the current fiscal year in which such annexation is made shall be paid to such county. The clerk of the court of such county in whose office the land books are filed, shall forthwith make and certify to the Commissioner of Revenue of such city from such land books a list of all real estate within the annexed territory as it appears on such land books embracing every entry thereon in regard thereto." * * *

If the county levies are required to be paid to the county for the current fiscal year in which the annexation is made, this implies that there shall be a levy upon the property of the county and not as property of the city. In addition, under Section 491, quoted in your letter, the date for the ascertainment of personal property and persons which are subject to taxation in the county, is the first day of February in each year. Therefore, it would seem that the assessment would have to be made in the county for the current fiscal year in which the annexation takes place.

I have had slight opportunity to examine the law, and therefore am submitting this opinion in a tentative way for your consideration. If after further consideration I come to a different conclusion, I shall let you hear from me.

Very truly yours,

CHRISTOPHER B. GARNETT,
Assistant Attorney General.

COURTS—*Contempt proceedings—Judges. Va. Code 1904, Sec. 3049.*

In contempt proceedings for violation of a decree, the Governor may properly appoint to sit in said contempt proceedings either the judge who entered the decree or any other judge.

RICHMOND, VA., May 21, 1915.

To His Excellency, HENRY C. STUART,
Governor of Virginia,
Richmond, Va.

DEAR SIR:

Yours of May 5th received. I understand that you, in pursuance of statute, (Virginia Code, section 3049) designated a certain judge to sit in a suit where the judge of the court in which the suit was pending was so situated as to render it improper, in his judgment, for him to preside at the trial of the cause; that the cause was duly heard by the judge so designated and a decree entered therein by him; that one of the parties to the litigation is now charged with violating the terms of said decree and is before the court for contempt; and that the judge who presides over said court has certified to you that it is improper for him to sit in the contempt proceedings and has again requested you, in pursuance of the statute above mentioned, to designate another judge to sit in his place.

Under this state of facts you ask whether there is any rule of law, or of propriety, (as recognized by bench and bar) which would require you to designate, or to refuse to designate for the trial of the contempt proceedings, the judge whose decree the party is charged with having violated.

In reply thereto I will say that there is no law, and in my opinion, under the circumstances of this case, there is no rule of propriety which could in any way govern the discretion vested in you by the statute. I am of the opinion that the Governor may properly designate to sit in said contempt proceedings, either the judge who entered the decree or any other judge. The offense charged is not one against the judge personally, but against the dignity of the law.

If the judge who entered the decree feels that he is so situated as to render it improper for him to sit in the contempt proceedings, the presumption is, that when designated, he would so inform the Governor. And if, on the other hand, the Governor should see fit to designate some other judge, the judge who entered the decree could not properly take exception because, as above stated, the offense charged is one against the dignity of the law, and it must be presumed that any judge in the Commonwealth would in the proper case mete out just punishment to those found guilty of disobeying a mandate of the law.

Respectfully submitted,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

DAIRY AND FOOD COMMISSIONER—*Food and drink products—Notice as requiring writing. Acts 1908, ch. 188 (6).*

Under a statute requiring that "notice or warning" be given by the Dairy and Food Commissioner, to certain bakers, confectioners and others to put their places in sanitary condition, it is advisable that the notice be in writing.

RICHMOND, VA., July 19, 1915.

HON. BENJ. L. PURCELL, *Commissioner,*
Dairy and Food Division,
Richmond, Va.

DEAR SIR:

In the absence of the Attorney General, I am replying to your favor of July 17th, 1915, asking our construction of section 6 of chapter 188, Acts 1908. So far as necessary for the decision of the question which you put to us, said section reads as follows:

"Whenever it is determined by the dairy and food commissioner, his deputy or assistants, that filthy or unsanitary conditions exist or are permitted to exist in the operation of any bakery, confectionery and ice cream plant, or at any place where any food or drink products are manufactured, stored or deposited, or sold for any purposes whatever, the proprietor or proprietors, owner or owners of such bakery, confectionery or ice cream plant, or any person or persons owning or operating any plant where any food or drink products are manufactured, stored, deposited or sold, shall be first notified and warned by the said commissioner, his deputy or assistants, to place such bakery, confectionery or ice cream plant, or any place where any food or drink products are manufactured, stored, deposited or sold, in a sanitary condition within a reasonable length of time; and any person or persons owning or operating any bakery, confectionery or ice cream plant, or any place where any food or drink products are manufactured, stored, deposited or sold, failing to obey such notice and warning, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than twenty-five dollars," etc.

The specific question which you put is whether the notice and warning required by this section shall be made in writing.

This statute has never been construed by our courts, and consequently our construction thereof will only be persuasive, and not necessarily binding upon any person. In different states the word "notice" has been construed in different ways—sometimes to mean a notice in writing and sometimes to mean merely actual notice, whether by parol or in writing. Whatever may be the correct construction, and whatever the courts may, upon a proper case, decide is meant by the statute here in question, I would advise that in all cases the notice and warning shall be made in writing. There are many reasons why it would be advantageous and the better course to do this. First, by taking a carbon copy of the notice, the carbon copy can be produced in court as evidence. *Taylor's Case*, 10 Va. Appeals, 454, 456; *C. & O. Ry. Co. v. Stock*, 104 Va. 97, where it was held that a carbon copy of a paper made by the same impression of type as the original, and at the same time, may be regarded as a duplicate original and may be introduced in evidence without notice to the opposite party to produce the other. Second, if verbal notice were given, the exact terms of the notice would be a question for dispute between the Commonwealth and the defendant. And, third, if written notice be given, there can be no doubt that it would be sufficient, whereas under some statutes the courts have held that parol notice is not sufficient.

Very truly yours,

CHRISTOPHER B. GARNETT,
Assistant Attorney General.

DAIRY AND FOOD COMMISSIONER—*Millers inspection fee—How computed. Acts 1910, ch. 151 (11).*

Under a statute requiring an inspection fee based on the capacity of the mill per diem in barrels milled, "capacity" means the number of barrels of flour which the mill can produce per day, and not the number actually produced working with half force or on half time, and since no exception is made as to the kind of grinding, a person doing custom grinding is amenable to the statute.

RICHMOND, VA., April 9, 1915.

HON. BENJ. L. PURCELL,
Dairy and Food Commissioner,
Richmond, Va.

DEAR SIR:

Replying to your letter of March 12th, referring to this office the letter of E. W. Newman, Ashland, Va., I beg leave to submit the following:

The first question raised is, if a mill of thirty barrels capacity spends one-third of its time grinding *custom wheat* should this mill pay a tax at thirty barrels capacity, or at the capacity which is left to do merchant grinding. By the expression "grinding custom wheat" the explanation is made that the farmer who raises the grain sends it to the mill and the miller, after deducting one-eighth part of the grain, grinds the remaining seven-eighths and the farmer owning the grain receives the total product of the seven-eighths for his own use.

Chapter 151 of the Acts of 1910, section 11, so far as applicable to this question, provides that:

"Wheat and grain millers * * * exempted from the inspection fee of fifteen cents per ton shall register with the Dairy and Food Commissioner on or before the first day of July in each and every year, and at the time of such registration pay to the Dairy and Food Commissioner a registration or inspection fee as follows, viz: the wheat millers operating with a capacity of over fifteen barrels and not over twenty-five barrels of flour per day, five dollars; over twenty-five barrels and not over fifty barrels per day, ten dollars," etc.

It will be observed that it is provided by the statute that the miller operating with a capacity of over twenty-five and not over fifty barrels per day shall pay \$10.00. No exception is made by the statute where the miller does not operate, but half his time, nor is any exception made in favor of a person doing one kind of grinding as against another doing another kind, and I can see no reason why a person doing custom grinding should be exempted from paying the tax. As stated by you in your letter, the fact that a part of his grinding is custom grinding does not affect the capacity of his mill.

The second question put by Mr. Newman is as to how the mill should be rated. The statute lays down the simple rule that it should be rated according to its capacity. I agree with you that this means the number of barrels of flour which the mill can produce per day, and does not mean the number so produced working with half force or on half time.

Very truly yours,
CHRISTOPHER B. GARNETT,
Assistant Attorney General.

ELECTIONS—*Notice of candidacy—Publicity—Duty of Secretary of the Commonwealth.*
Va. Code 1904, Sec. 122a and 122b.

Notices of candidacy for office filed with the Secretary of the Commonwealth are public documents, open to public inspection at all reasonable times, and it is the duty of the Secretary of the Commonwealth to allow all proper inspection of such notices.

RICHMOND, VA., October 12, 1914.

HON. B. O. JAMES,
Secretary of the Commonwealth,
Richmond, Va.

DEAR SIR:

Yours of October 8th received. Section 122-1, Va. Code 1904, provides, among other things, as follows:

"Any member of the electoral board, the printer who shall print the official ballots provided for by this act, any judge of election, or any person who shall give or sell to any person whomsoever, except where it is distinctly provided for by this act, any official ballot or copy, or any fac simile of the same, or any information about the same, or shall counterfeit, or attempt to counterfeit, the same, shall be deemed guilty of a misdemeanor," etc.

I understand you ask whether this provision prohibits you from disclosing the names of candidates for public office who have filed with you a notice of their intention to become candidates, as provided by section 122a, Va. Code 1904. The purpose of the latter section is to require candidates to file their names in your office in order that you may in turn furnish to those charged with the printing of the ballots the names of the candidates. The same section refers to the filing of such notice with you by the candidate as a method of "announcing his candidacy."

In my opinion, so far from keeping the names of candidates from the public, there is every reason why the widest publicity should be given before election day to the names of candidates in order that the electors may properly consider and choose between them. The provision of section 122-1, above mentioned, is not for the purpose of keeping secret the names of the candidates, but to prevent the printer, the judges of election and other persons handling or having access to the ballots from giving such information as would enable persons to commit election frauds through use of copies, fac similes or counterfeits of ballots. I am of the opinion that notices of candidacy filed with you under section 122a are public documents, open to public inspection at all reasonable times, and that it is your duty to allow all proper inspection of such notices, and that you are at liberty, in your discretion to answer all requests for names of candidates who have filed their notices in your office.

Very truly yours,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

ELECTIONS—*Primary election Law—Summary of opinions by Attorney General on Primary Law. Acts 1912, ch. 507.*

RICHMOND, VA., April 15, 1915.

HON. B. O. JAMES,
Secretary of the Commonwealth,
Richmond, Va.

DEAR SIR:

In response to your request, I am herewith handing you a summary of my

opinions upon chapter 305 of Acts 1914, known as the "Primary Act." The conclusions here set out are taken from the numerous letters written by me in response to inquiries which have come to this office requesting the construction of the Attorney General on various provisions of the act. Many other questions will doubtless arise thereunder. This letter, therefore, is not intended to cover all questions which may arise, but only such as have come to me up to this date.

1. Date of Primary.

The primary for the year 1915 is to be held on Tuesday, August 3rd, and candidates must file their declarations of candidacy and their petitions therefor, together with their receipt for entrance fee, with the chairman or chairmen of the several committees of their respective parties, at least 60 days prior to the primary, that is to say, on or before June 4, 1915. (See sections 3, 9, 10 and 24-a).

But local party committees may call a primary at a date other than August 3rd. (Section 24). But such special primary is governed by the provisions of the primary act, in as much as section 2 provides that "all nominations made by a direct primary shall be in accordance with the provisions of this act."

The term "direct primary" as used in the act, means a primary at which the candidates are voted for directly, as distinguished from a primary at which delegates are elected to a convention to nominate candidates.

2. Candidates May be Nominated by Other Methods.

Party committees may provide for the nomination of their candidates in any way they see fit, and may provide for the nomination of some of the officers by direct primary and some of them by convention, or they may decline to provide for any party nominations. (Section 2).

3. Form of Declaration of Candidacy and Petition Therefor.

The following forms are in compliance with the law (section 9):

"Declaration of Candidacy.

"I, John Doe, of the County of Henrico, Virginia, a member of the Democratic party, declare myself to be a candidate for nomination to the office of member of the House of Delegates of the General Assembly of Virginia from the County of Henrico, to be made at the primary to be held on the 3rd day of August, 1915.

"Given under my hand this 1st day of May, 1915.

"JOHN DOE.

Attested by

"RICHARD ROE,

"EDWARD COE,

"Witnesses."

"State of Virginia,

"County of Henrico, to-wit:

"I, John Smith, a notary public in and for the county aforesaid, in the State of Virginia, do certify that John Doe, whose name is signed to the foregoing writing, bearing date on the 1st day of May, 1915, has acknowledged the same before me in my county aforesaid.

"My commission expires on the 1st day of January, 1917.

"Given under my hand this 1st day of May, 1915.

"JOHN SMITH,
"Notary Public."

*"Petition of Qualified Voters.**(To be Filed With Declaration of Candidacy.)*

"This is to certify that we, the undersigned qualified voters of the county of Henrico, Virginia, hereby petition John Doe, a member of the Democratic party, to become a candidate for nomination to the office of member of the House of Delegates of the General Assembly of Virginia from the county of Henrico, to be made at the primary to be held on the 3rd day of August, 1915; and we further petition that his name as a candidate for said nomination be printed upon the official ballot to be used at said primary.

"Given under our hands."

(Here must follow the signatures of fifty qualified voters of the candidate's county or city.)

"State of Virginia,

"County of Henrico, to-wit:

"I, John Smith, a notary public in and for the county aforesaid in the State of Virginia, do certify that Robert Brown this day appeared before me in my said county and made oath before me that he witnessed the signature of each and every person whose name is signed to the foregoing writing.

"My commission expires on the 1st day of January, 1917.

"Given under my hand this 1st day of May, 1915.

"JOHN SMITH,
"Notary Public."

4. *Declaration of Candidacy Must be Acknowledged or Witnessed.*

The declaration of candidacy must either be acknowledged before some officer who has authority to take acknowledgments to deeds (that is to say, clerks, deputy clerks, commissioners in chancery, notaries public or justices of the peace), Code, section (2501), or must be attested by two persons who can write, signing as witnesses. (Section 9).

5. *Witnesses to Signatures to Petition Must Make Affidavit.*

Each signature to the petition must be witnessed by a person whose affidavit to that effect must be attached to the petition. If one person witnesses the signatures of all fifty of the petitioners, only one affidavit is necessary, but if some of the signatures of the petitioners are witnessed by one person and some by another, affidavits must be made by each of the witnesses. As many copies of the petition may be used as convenient, but the aggregate number of qualified voters on the copies taken together must be fifty or more in case of city and county officers. (Section 9).

Affidavits of witnesses may be taken before a justice of the peace, notary public, commissioner in chancery, clerks of courts, clerks of city councils, boards of aldermen or common councils. (Va. Code, 1904, section 173, as amended). Candidates are advised not to witness signatures to their petitions.

6. *To What Officers Provisions as to Declaration of Candidacy and Petitions Therefor Apply.*

All candidates for public office in the primary must file their declarations under section 9 and pay their entrance fee under section 24-a, but it is doubtful whether *district* officers in counties, such as supervisors, justices of the peace, etc., have to file any petition for their candidacy signed by qualified voters. But, as there is some difference of opinion upon this question, the Attorney General has in all cases advised candidates for district offices, where possible, to file with their declarations of candidacy a petition therefor signed by fifty qualified voters of their *own* districts.

7. *Commissioners of Revenue are County Officers.*

Commissioners of the revenue in some counties have their jurisdiction confined to a particular district, or districts, but they are, in fact, county officers and at the general election in November must be voted for by the voters of the entire county. (See Constitution section 110; Virginia Code 1904, section 92). The names of the candidates for commissioners of revenue must be printed on the primary ballots for the entire county unless the county committee should pass a rule confining the vote to the districts in which the candidate is to serve. Such a party rule would be valid under sections 7 and 8 of the primary act.

8. *Candidates for Senate and House Representing Districts.*

In case of candidates for the Senate or House of Delegates representing districts containing more than one county or city, the 50 qualified voters required on the petition cannot be taken from the several counties or cities, but at least 50 of the petitioners must be qualified voters of the candidate's city or county. The petition may, of course, contain signatures of qualified voters of other counties and cities in the district in addition to the required fifty.

9. *Party Committees May be Elected at Primaries.*

The primary act plainly reserves to party authorities all powers over primary elections not specifically taken away from the party authorities by the act itself. (Section 7). Hence it is competent for the party committees to order printed on the primary ballots the names of candidates for party committees, but the act (which refers only to nominations for *public office*) does not require such candidates to file any declaration or petition or to pay any fee, though party committees may make such or similar requirements.

10. *Can a Qualified Voter Sign the Petitions of More Than One Candidate for the Same Office?*

The validity of a signature on a petition is not affected by the fact that the same signature appears on the petition of another candidate for the same office. Whether a voter may sign two such petitions is a question of propriety and not of law.

11. *Who May Vote at August Primary, 1915.*

All persons qualified to vote at the election for which the primary is held may vote at the primary;

(a). Except no person shall vote for candidates of more than one party; and

(b). Except no person shall vote in the primary of August, 1915, for the candidates of any party unless at the congressional election held in November, 1914, he voted for the nominee of that party, but if he did not vote at the November election, 1914, then he shall be allowed to vote upon his declaration that he will support, at the next November election, the nominees of the party in whose primary he wishes to vote; and

(c). Except those persons who are disqualified by reason of other requirements in the law of the party to which he belongs. Thus the primary law recognizes the right of a party to prescribe any qualifications for voting at primaries, provided such qualifications are not in conflict with the statute, but under section 35 of the Constitution no party regulation nor statute can permit a person to vote at a primary who is not *at the time* registered and qualified to vote at the next succeeding election; and

(d). Except under the plan issued by the State Democratic Committee, February 13, 1913, only white persons are permitted to vote in Democratic primaries.

The test of a man's right under sub-section b of section 8 (exception b above) to vote in the primary of a party, is whether he voted for the party's nominee at the *last preceding general election*. It is, therefore, immaterial at the August primary, 1915, whether the person offering to vote, voted the party ticket in the presidential election of 1912, or in the gubernatorial election of 1913. The only question is how he voted in the congressional election of 1914, *but* if he did not vote at that election, he may vote in the August 1915, primary, upon his declaration as above set out.

To illustrate: If a man voted against the Democratic nominee for Congress in November, 1914, he can under no circumstances, vote in the Democratic primary August, 1915, but if he voted against the Democratic nominee in the presidential election, 1912, or against the Democratic nominee in the gubernatorial election, 1913, but voted for the Democratic nominee in the congressional election of November, 1914, the party law *may* permit him to vote in the Democratic primary of August 3rd, but if he failed to vote in said congressional election, "he *shall* be allowed to vote" at the said primary upon his declaration that he will support the party nominee, etc.

12. *As to Young Men Just Becoming of Age.*

A young man becoming of age after February 1, 1914, and on or before February 1, 1915, must pay his first year's poll tax six months prior to the general election, to-wit: On or before the 1st day of May, 1915. A young man becoming of age at any time after February 1st, this year, and on or before the general election on November 2, 1915, may vote at the primary August 3rd, provided that at any time before, or on the day of the primary election, he pays his first year's poll tax and registers. (See Constitution, sections 18, 20 and 26, Virginia Code, 1904, sections 73 and 491.)

13. *Expenditures of Candidates.*

It is not lawful under the provisions of the primary act for a candidate to pay persons for obtaining signatures to his petition for candidacy, and it is also unlawful for any candidate to hire vehicles to convey voters to the polls on election day. Under section 11 dealing with expenses of candidates, all expenditures are prohibited except those which are expressly permitted.

14. *Entrance Fees of Candidates.*

The entrance fees for the August, 1915, primary required by section 24-a, must be paid to the treasurer of the candidate's county or city, but where the candidate's district is made up of more than one county or city, the fee must be equally divided among the counties or cities in the district and paid to the respective treasurers by the candidate.

It is true that section 24-a requires State officers to pay their entrance fees to the Auditor of Public Accounts, but the term "State officers" as here used was not intended to include Commonwealth's attorneys or members of the House of Delegates or the Senate of Virginia.

15. *Primary Judges.*

The judges to conduct primary elections must be appointed by the electoral

boards of the several counties and cities. Section 4 does not require said boards to appoint judges named by party committees.

16. Crime for Judges and Clerks to Influence Voters.

Any judge or clerk of election who attempts during the progress of the election to influence voters to vote for or against any candidate is guilty of a misdemeanor (section 4) and is subject to punishment by fine or imprisonment, or both. (Va. Code, 1904, section 3902).

Yours truly,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

ELECTIONS—*Vacancy in General Assembly—How filled. Constitution 1902, Sec. 47; Va. Code 1904, Sec. 61.*

In cases of vacancies in the membership of the General Assembly occurring during recess, the duty of the Governor to issue writs of election to fill such vacancies is mandatory and not discretionary.

RICHMOND, VA., *December 24, 1914.*

His Excellency, H. C. STUART,
Governor of Virginia,
Richmond, Va.

DEAR SIR:

Referring to your inquiry as to whether the Governor is vested with any discretion which would enable him to withhold the issuance of writs of election to fill vacancies in the General Assembly occurring during recess, I beg leave to reply as follows:

Section 61 of the Code provides, among other things, that

“When a vacancy occurs during the recess of the General Assembly by the death or resignation of a member thereof * * * a writ of election to fill such vacancy *shall* be issued by the Governor.”

I am of the opinion that, under this provision, the Governor is *required* to issue a writ of election, and that he has no discretion in the premises. The evident purpose of the section is to insure each legislative or senatorial district representation in the deliberations of the General Assembly. So careful has the General Assembly been not to deprive any constituency of a representative that, in the same section, it has provided, even where a member dies *during the recess* of the General Assembly, the Speaker of the House of Delegates or the President of the Senate, as the case may be, *shall* issue writ of election to fill the vacancy.

I am aware of the provisions of section 47 of the Constitution which, in the absence of legislation on the subject, might be construed by some to vest in the Governor a discretion as to whether he will in such cases issue a writ of election. That section provides, among other things, that if vacancies occur during the recess of the General Assembly writs of election “may be issued by the Governor under such regulations as may be prescribed by law,” but I am of the opinion that the purpose and effect of this section is not to vest in the Governor such a discretion as would justify him in refusing to obey the mandate of the legislature requiring him to issue the writ, but rather to permit the General Assembly to pass such regulations as it may see fit governing the time and manner of the issuance of writs of election by the Governor.

My conclusion, therefore, is that, in cases of vacancies in the membership of the General Assembly occurring during recess, the Governor must issue writs of election to fill the vacancies.

Very truly yours,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

ELEEMOSYNARY INSTITUTIONS—*Paupers—Who to dismiss inmates of county poor-house—Children as paupers—Right of the county superintendent to place children in private families—Right of court.* Va. Code 1904, Secs. 868, 876, 881, 2582, 2583, 3795 (a) 5, 3795b.

The discretion as to the dismissal of the inmates of a county poor-house is lodged entirely in the county superintendent of the poor, and therefore the supervisors have no power to insist on detaining the inmates.

A child may be included under the term "pauper."

Where an overseer has an infant put into the county poor-house the county superintendent of the poor, may not put him into a private family, nor has a court any authority to order him to do so.

Courts are not empowered to place delinquent, destitute, and neglected children into private families.

RICHMOND, VA., *September 1, 1915.*

J. T. MASTIN, *Secretary,*

State Board of Charities and Corrections,

Richmond, Va.

DEAR SIR:

In response to your question as to whether the courts have jurisdiction to order children from one to twelve years of age, who are in the alms-houses of the State, and confined there by the supervisors, to be placed in family homes, will say that the correct solution of this question can only be obtained by considering the following questions:

1. May the *supervisors* insist on holding the children in the almshouses?
2. May the *superintendents* of almshouses place these children in family homes without bringing such cases to the attention of the courts?
3. Have the *courts* authority to place delinquent, destitute and neglected children in family homes?

The answer to the first question would seem to be that the *supervisors* have no power to insist on keeping these children.

1904 Va. Code, Sec. 868 provides in part:

"He (the county superintendent of poor) shall receive at such poor-houses (the county poor-house) such paupers as may be sent to him by the overseers of the poor of the several districts of the county and provide and care for said paupers in the manner provided for by law, and shall, when in his opinion it is unnecessary for any pauper to remain longer at the poor-house, discharge him therefrom." It would seem that the term "pauper" includes children.

See *In re Hoffen's Estate* (Wis.) 36 N. W. 407.

Therefore, it would seem that the discretion as to the dismissal of the inmates of a county poor-house is entirely lodged in the county superintendent of the poor, and not in the supervisors.

Nor would there seem to be anything inconsistent with this conclusion to be found in 1904 Va. Code, Secs. 2582 and 2583, since these sections provide as to how minors may be placed by a parent or guardian in "any *incorporated* association, asylum or school" under limitations and how overseers of the poor may place minors in "an incorporated institution."

Thus it is clear that the field as to how overseers of the poor may place minors in county asylums is left uncovered by any specific provision and would therefore seem to be provided for under the section relating to paupers as suggested above.

II. The answer to the second question will be treated under three heads since it appears that only in three ways can an infant get into a county alms-house as an inmate:

a. Where the overseer has the infant put into the alms-house, the superintendent may not, it would seem, under Section 868 (*supra*) put him into a private family since it provides that he shall "when in his opinion it is unnecessary for any pauper to remain longer at the poor-house, discharge him therefrom."

The question then is:

Does authority to "discharge" from a poor-house include the authority to place an infant in a private family?

"Discharge" means to send away, as a creditor, by payment; to set free, release, absolve, or acquit, as of an obligation, claim, accusation, or service due; to exonerate, to relieve." *Rivers v. Bloom*, (Mo.) 63 S. W. 812, 813.

"'Discharge' as used in a statute providing for the payment of fees to United States Marshals in case of the discharge of a person, means an order of discharge which releases the person entirely from custody. It does not apply to the removal of a person from one place to another, or merely bringing the person up to testify or be tried. It means discharge from the custody of the law."

Ex parte Paris, 18 Fed. Cas. 1104, 1105.

Therefore it would seem that construing strictly the powers of this public officer "discharge" cannot be extended and therefore means set free and would confer no power upon a superintendent to place a minor in a private family.

b. The second question which arises is:

May the infant be put in by others than the overseers?

1904 Va. Code, Sec. 2582 provides:

"By the same authority (guardian, or if none by father, or if neither, by mother), and under the same limitations, any minor may be placed for such time as may be agreed on in writing in any incorporated association, asylum or school," etc.

That this section requires the asylum be incorporated which may be doubtful from the above section, is made clear by the section which follows it:

1904 Va. Code, Sec. 2583 provides:

"Any overseer of the poor of a county or corporation, if allowed by an order of the court thereof, may place in *any such incorporated institution* * * * any minor," etc.

Therefore it seems clear that *these* sections confer no authority on anyone to place a minor in a county alms-house.

c. However a third question may arise:

Do secs. 2582 and 2583 by providing these specific methods exclude by implication the commitment of children to county almshouses under Sec. 876-881?

It is clear that they do not since these latter sections provide generally as to the poor, and especially is this true because of the fact that the family is specifically mentioned.

Sec. 877 of 1904, Va. Code provides:

"When on such application the overseer or council refuse provisions or assistance to such person or family the court of the county may direct the same to be furnished."

As more fully discussed later on it seems clear that "direct the same," means to confer on the court the authority possessed by the overseer who refused to do his duty.

Therefore the conclusion is that the superintendents of the county almshouses cannot place a child confined in an almshouse in the home of a private family. Nor has a court any authority to order him to do so.

III. The next question is whether the courts have the power to place delinquent, destitute and neglected children in family homes.

That a court may commit a child to a legally incorporated humane society which in turn may commit the child to a family is clear from 1904 Va. Code, Sec. 3795 (a) Chap. 5, which provides that "a court may order such child to be committed to the custody of any legally incorporated humane society or society for the prevention of cruelty to children, and such society is hereby authorized to receive such child into its custody and provide for its care and education in some suitable family or institution * * *"

But this section refers only to "any child under fourteen years by reason of orphanage or of the neglect, crime, drunkenness, or other vice of parents or other persons having custody of such child is growing up without education or salutary control and in circumstances exposing such child to lead a dissolute and vicious life."

The section which relates to destitute, delinquent, and neglected children is 1904 Va. Code, Sec. 3795b, as amended by 1908 Acts, p. 619.

It provides that,

"Any court of record in this State or the judge thereof in vacation, or any police justice may, on the application of any reputable citizen of the city or town or county wherein such minor may reside or be found, or, on application of any society or association chartered under the laws of this State for benevolent or charitable purposes, or for the care, custody and maintenance of, and the prevention of cruelty to children, commit such minor to care and custody of any society or association incorporated under the laws of this State."

This authority, especially since it must be strictly construed, gives this court discretion to send such child to the custody of such incorporated society, but no authority to send such child to a private family.

But these incorporated societies have the power under clause 4 of the same section to place these children in private families.

In this same connection see also the provision of the charter of the Children's Home Society of Virginia, Acts 1901-2, p. 125.

Although it is true that under 1904 Va. Code, Sec. 877, it is provided that upon the refusal of the overseer to refuse provisions as assistance "the court of the county may direct the *same* to be furnished."

As to what "same" means may be doubtful. It would seem to mean the same sort of assistance as an overseer should furnish which would seem for one in the

county as his last settlement to require his removal to the almshouse under Sec. 881, which provides in part:

“Every person to be provided for by the overseers shall be sent to and kept at the place of general reception of the poor to be supported.”

If there be any doubt as to construction it would seem that one here given is correct under the rule that authority conferred upon public officers is to be strictly construed.

The conclusion then is that courts are not empowered to place delinquent, destitute and neglected children into private families. In this connection, however, it is well to remember the familiar powers of the courts in the appointment of guardians and the adoption of children. Through the exercise of these powers the desired end may sometimes be accomplished.

Yours very truly,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

ELEEMOSYNARY INSTITUTIONS—*Virginia Home and Industrial School for Girls—Annual report. Va. Code 1904, Secs. 221 and 280. Acts 1914, ch. 170.*

It is the duty of the superintendent or executive officer and board of the Virginia Home and Industrial School for Girls to make an annual report to the Governor in writing, in regard to the institution and thereupon it becomes the duty of the superintendent of public printing to print the said report and have it ready for distribution.

RICHMOND, VA., *September 9, 1915.*

MR. ROBERT LECKY, JR., *Chairman,*
Virginia Home and Industrial School for Girls,
Richmond, Va.

DEAR SIR:

I have your letter of September 8, 1915, in which you request me to advise you whether it is your duty to file an annual report of the Virginia Home and Industrial School for Girls with the Governor, and to request the public printer to publish the same at the expense of his office.

This question seems to depend upon whether under the act providing for the conveyance by the Virginia Home and Industrial School for Girls of its real and personal property to the State of Virginia, the said Virginia Home and Industrial School for Girls became a State institution. By reference to said act (Acts 1914, ch. 170, p. 276) it will be observed that the act provided that after the conveyance of said property the State should “operate and maintain the same as a separate State institution, or in connection with some other State institution, or elsewhere.” The State, therefore, is now maintaining said institution as a State institution. Sec. 280, Va. Code 1904, as amended by Acts 1912, p. 535, provides that it shall be the duty of the heads of institutions of the Commonwealth to furnish their annual reports to the officer to whom they are required to be made on or before the twentieth day of October of each year, who shall forthwith deliver them to the superintendent of public printing, whose duty it shall be to have them printed in accordance with section two hundred and thirty-three and ready for distribution on the first Wednesday in January following.

Section 221 Va. Code 1904, requires the superintendents and boards of State institutions to make to the Governor in writing, under oath, reports at such times as may be prescribed by law.

Reading these sections together, therefore, it seems to be the duty of your superintendent or executive officer and board to make an annual report to the Governor, in writing, and thereupon it becomes the duty of the superintendent of public printing to print said report and have it ready for distribution.

A copy of this letter will be forwarded to the Public Printer and also to the Governor.

Yours very truly,

CHRISTOPHER B. GARNETT,
Assistant Attorney General.

ELEEMOSYNARY INSTITUTIONS—*Virginia Home and Industrial School for Girls—Fugitives—Effect of marriage. Acts 1914, ch. 350.*

Delinquent girls who are committed to the Virginia Home and Industrial School for girls in lieu of jail sentence and who escape from the custody of the institution are subject to return to the institution although they marry while fugitives.

RICHMOND, VA., *August 26, 1915.*

MR. ROBT. LECKY, JR., *Chairman,*
Virginia Home and Industrial School for Girls,
Richmond, Va.

DEAR SIR:

I have your letter of August 26th, in which you inform me that Hazel Knight was, on August 26, 1914, committed to your institution by Mr. J. S. Barron, police justice, city of Norfolk; that her age at the time of admission was sixteen years; that she remained at your institution until June 1, 1915, when she escaped; that she has been located in the city of Norfolk, where she has been arrested by the police of that city, and is now held in custody; that she has employed counsel to secure her release through writ of habeas corpus, upon the ground, it is presumed, that she has married since her escape. The legal question which arises is whether a girl who has been regularly committed to your institution, and who has escaped therefrom, can be prevented from returning to the institution by her marriage, under age, and while legally under the care and custody of your institution.

Under chapter 350 of the Acts of 1914, p. 696, the police justices of the cities are empowered and authorized, in their discretion, to commit to the care and custody of the State Board of Charities and Corrections, or of any society, association or reformatory, approved by the said Board of Charities and Corrections and chartered under the laws of this State for the care, custody, maintenance, protection, discipline or betterment of children, any child who shall be proven to be delinquent, dependent or neglected. It is further provided in said statute that all commitments under the act shall be for an indeterminate period, but no child committed thereunder shall be held or detained after such child shall have attained the age of twenty-one years.

The words "delinquent child" are defined in the act to include among others one who is incorrigible, and I learn from the form of warrant of commitment that this girl was committed upon the ground of incorrigibility. I learn from the record of Hazel Knight, kept in the above institution, that the offense for which she was committed was adultery, and that she has been guilty of very vulgar and immoral conduct.

It is clear from the statute above quoted, and also from other provisions of the statute law of Virginia, that the Virginia Home and Industrial School for Girls is entitled to the care and custody and maintenance of this girl until her majority, or until she shall have otherwise been legally released therefrom.

Now, it cannot be claimed that a girl who has escaped from the institution has been legally released from its custody any more than it could be claimed in the case of one who escapes from jail. It must be remembered in this connection that the sentence imposed upon this girl was in lieu of her custody in jail, and that the institution has exactly the same power and rights in regard to her custody that would belong to a jailor to whom she had been regularly committed. I cannot see why the marriage of a girl while a fugitive from the institution would make any difference in her status as a legal inmate thereof. In the first place, there is no statute law for it, and I know of no provision of the common law which would hold that because a girl who had been incarcerated in jail had gotten married, she should be entitled to stay out of it. In the second place, to hold that marriage of escaped inmates from such institutions as this would entitle them to be free from the restraints which the law has imposed upon them would be to defeat the very object of the law. It would encourage inmates of such institutions to get up pretended marriages, or to enter into a marriage for convenience sake, and thus escape from the penalties imposed upon them by the law. I cannot see how any one could justify such a position, and I am forced to hold that her marriage does not affect her status as legally belonging to the care and custody of the institution.

Very truly yours,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

ELEEMOSYNARY INSTITUTIONS—*State Board of Charities and Corrections—Virginia Home and Industrial School for Girls—Power of court to commit children. Acts 1914, ch. 350.*

The judge of a circuit or corporation court is empowered to commit a girl sixteen years old to the State Board of Charities and Corrections if such child is proven delinquent, dependent or neglected; and the board, in turn, has authority to commit such child to the Virginia Home and Industrial School for Girls without the further intervention of the court.

RICHMOND, VA., *July 16, 1915.*

REV. J. J. SCHERER, JR.,
1603 Monument Avenue,
Richmond, Va.

DEAR SIR:

Replying to your letter in which you have sent me commitment papers in the case of Susie Birch, committed by the State Board of Charities and Corrections to the Virginia Home and Industrial School for Girls, and inquiring whether it is legal for you to receive a girl committed by the State Board of Charities and Corrections, or whether she should be recommitted by the court, I beg leave to submit as follows:

The commitment form which you enclose is in the following words and figures:

"State of Virginia, to-wit:

"Whereas, Susie Birch, race white, a delinquent ch'd sixteen years of age, was on the 15th day of December, 1914, committed to the State Board of Charities and Corrections by the judge or justice of Norfolk city court, and

"Whereas, the said State Board of Charities and Corrections believes

that the said Susie Birch is not a suitable child to be placed in a family home, the said Board of Charities and Corrections does hereby commit the said Susie Birch to the Virginia Home and Industrial School for Girls, as provided in chapter 350, page 696, Acts of the Assembly, 1914.

"S. C. HATCHER, *Chairman*,
"J. T. MASTIN, *Secretary*."

The Acts of 1914, ch. 350, p. 696 (Sup. 14, p. 487) provide in part as follows:

"Every court of record of general criminal jurisdiction, or the judge thereof in vacation, and the police and justice courts are hereby authorized and empowered, in their discretion, to commit to the care and custody of the State Board of Charities and Corrections, or of any society, association or reformatory approved by the State Board of Charities and Corrections, and chartered under the laws of this State, for the care, custody, maintenance, protection, discipline or betterment of children, any child who shall be proven to be delinquent, dependent or neglected; provided, however, that all children twelve years old and under declared delinquent by any court or justice in this State and not placed on probation as hereinafter provided, shall be committed to the State Board of Charities and Corrections, and the said Board is hereby authorized, in its discretion, to place such children in homes, institutions or reformatories without further process of law."

There are other provisions of the statute not necessary to quote and not pertinent here. It is clear that under this act, the judge of the Norfolk City court was empowered to commit a child sixteen years old to the Board of Charities and Corrections if such child was proven to be delinquent, dependent or neglected. The question arises whether the State Board of Charities and Corrections has authority to commit such child to the Virginia Home and Industrial School for Girls without further intervention of the court.

As we have seen above, the statute provides that "the said board is hereby authorized, in its discretion, to place such children in homes, institutions or reformatories without further process of law." A hasty reading of the statute would lead one to believe that the language "such children" is confined to children twelve years old and under. After a careful study of the provisions of the act, and of the other statutes which by any possibility might be considered applicable, I am convinced that the object of the statute was to allow the State Board of Charities and Corrections to place in homes, institutions and reformatories, without further process of law, all children who had been theretofore committed to its care and custody by the courts of the Commonwealth. It will be noted, in the first place, that the courts are given power and authority in their discretion to commit either to the care and custody of the State Board of Charities and Corrections or any society, association or reformatory approved by said board, *any child* who shall be proven to be delinquent, etc. Now, there is no provision in the law by which the State Board of Charities and Corrections directly takes control of children committed to its care. The State Board of Charities and Corrections selects the means for the care and maintenance of children committed to its care, and exercises its power and protection over such children either by committing them to private homes approved by them, or to societies, associations or reformatories approved by the said board. In the case of children twelve years old and under, it is mandatory upon the courts that all such children declared delinquent and not placed on probation, shall be committed to the State Board of Charities and Corrections; but, as to all other children, the court may either commit such children to the care and custody of the State Board of Charities and Corrections or may commit such children to the care of any society, asso-

ciation or reformatory approved by said board. The object of the proviso, therefore, in which the language occurs appears to be not to require a recommitment by the State Board of Charities and Corrections of children who have been committed to its care, but to require that, in case of children twelve years of age and under, the court shall not commit such children to institutions, societies or associations, but shall commit such children directly to the State Board of Charities and Corrections, and then the purpose of the act seems to be to allow the State Board of Charities and Corrections to place any children which have been committed to its care in homes or institutions without the intervention of the court.

Therefore, replying directly to the question which you have put, I would say that it is legal for you to receive the girl, Susie Birch, committed by the State Board of Charities and Corrections, without requiring her to be recommitted by the court.

Very truly yours,

CHRISTOPHER B. GARNETT,
Assistant Attorney General.

ELEEMOSYNARY INSTITUTIONS—*Virginia State Epileptic Colony—Power to lease land of institution. Acts 1910, ch. 31.*

The board of the Virginia State Epileptic Colony has no power to lease out any part of its property.

RICHMOND, VA., November 20, 1914.

MR. I. P. WHITEHEAD,
213 Lynch Building,
Lynchburg, Va.

DEAR SIR:

Referring to your inquiry as to the powers of the Board of Directors of the Virginia State Epileptic Colony, will say that I understand the question you propound to be as follows: Has the board the power to lease out a part of the tract of land bought for the purposes of the colony and upon which is situated the buildings used for the purposes of the institution?

You are, of course, well acquainted with the principle that officers and agents of the State have only such powers as are expressly conferred upon them, or are necessarily implied from power expressly conferred. Upon consulting chapter 31 of the Acts of 1910, in which the management of the institution is provided for, I find nothing in that statute, or in the general statute pertaining to conduct of State institutions, which will justify your board in leasing any part of its property.

Unless there is some provision in the deed, conveying the property to the institution, constituting some contract with the grantor to the contrary, the legislature at its next session could, of course, authorize the leasing of any part of the property.

Very truly yours,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

ELEEMOSYNARY INSTITUTIONS—*Virginia Home and Industrial School for Girls—Powers of State Board of Charities and Corrections. Acts 1912, ch. 309 (4).*

The State Board of Charities and Corrections under its power to place dependent wayward or delinquent children in institutions for the care and training of destitute children may commit to the Virginia Home and Industrial School for Girls those girls admissible by the laws of the institution.

RICHMOND, VA., *October 31, 1914.*

REV. J. J. SCHERER,
*1603 Monument Avenue,
Richmond, Va.*

DEAR SIR:

In the absence of the Attorney General, I am writing to you with reference to the letter written by Rev. J. T. Mastin, Secretary, State Board of Charities and Corrections, to you dated October 29, 1914, and by you referred to this office. It appears from the papers submitted that the judge of the circuit court of Accomac county, by an order, committed Daisy Hillman, 17 years of age, to the State Board of Charities, but intended to enter the order committing her to the Virginia Home and Industrial School for Girls; and the question is whether the State Board of Charities has the power to commit this girl to the Virginia Home and Industrial School for Girls without a further order of the circuit court of Accomac county.

Chapter 309, Acts of 1912, Pollard's Code Biennial 1912, p. 358, provides in section 4 thereof as follows:

"Any child adjudged a dependent, a wayward, or a delinquent child by any court in this State may, with the consent of the State Board of Charities and Corrections, be placed by the judge or justice of said court in the custody of the State Board of Charities and Corrections, and the said Board is authorized to place such child in a selected family home or in an institution for the care and training of destitute children, as the said Board may deem best for the interest of said child, until the said child shall arrive at the age of twenty-one years."

The only question to be decided, therefore, is whether, under the above statute, the Virginia Home and Industrial School for Girls may be classified as an "institution for the care and training of destitute children." As the board is given large inquisitorial powers, and must always approve institutions to which wayward and dependent children are committed, it would seem that, under the law, it has the power to commit this girl to the above institution, if the facts within the knowledge of the board would seem to justify such commitment.

Very truly yours,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

ENTOMOLOGY—*State Entomologist—Cedar Rust Law—Payment of court costs and counsel fees. Acts 1914, ch. 36.*

Where the order of the State Entomologist under the Cedar Rust Law is appealed from, court costs and counsel fees are not a part of the costs to be levied on an apple orchard owner.

RICHMOND, VA., *May 7, 1915.*

MR. W. J. SCHOENE,
*State Entomologist,
Blacksburg, Va.*

DEAR SIR:

In the absence of the Attorney General, on official business, I am endeavoring to close up some matters which I find on his desk. Among others, I find the query sent by you as to whether, under the Cedar Rust Law, Acts 1914, ch. 36, section 5, the expenses of the court costs and counsel fees are to be paid by the apple orchard

owners; or, in other words, whether they are to be included in determining the amount to be assessed against the apple orchard owners under the law.

That law confers upon the State Entomologist certain powers as to cutting down cedar trees to prevent the spread of cedar rust.

Clause 5 provides as follows:

"Whenever the owner or owners of said cedar tree or trees refuse or neglect to cut down or destroy the same within the time specified in the notice given by the State entomologist as prescribed by section two of this act, it shall be the duty of the State entomologist to cause said trees to be at once cut down or destroyed and the necessary expense thereof shall be paid by his warrant on the county treasurer to be paid out of the general fund of the county and to be reimbursed as provided in section eight of this act."

Clause 7 provides as follows:

"Any owner finding objection to the order of the State entomologist in requiring him to destroy his cedar tree or trees may appeal from said order to the circuit court of the county in which said trees are located, but said appeal must be taken within fifteen days from the date upon which the notice to destroy the same is served upon him. Notice in writing of said appeal must be filed with the clerk of said court, who shall forthwith transmit a copy thereof to the State entomologist. The filing of said notice shall act as a stay of the proceedings of the State entomologist until it is heard and decided. The court, in regular or special session, shall thereupon hear the objections, and is hereby authorized to pass upon all questions involved, and determine the amount of damages, if any, which will be incurred by the owner in case said trees are destroyed, and the costs incurred or to be incurred in cutting down trees under section 2 of this act. If the court should find any damages or such expense sustained, he shall order the amount so ascertained to be paid to the owner by the treasurer of the county out of the general fund of said county, and such order shall be entered by the clerk in the law order book of the said court."

Clause 8 provides in part as follows:

"Whenever the court orders any damages paid out of the general fund of the county under the preceding section or such amount as the county treasurer may have paid out of the general fund of the county under section five of this act, the said county fund shall be reimbursed by a specific levy of not exceeding one dollar per acre on all apple orchards planted ten years or more, and not exceeding fifty cents per acre on all orchards planted more than two years and less than ten years, in each magisterial district in which this law shall have become operative as hereinafter provided. The court awarding damages shall direct the Commissioner of the Revenue for the district or districts in which the law has become operative to report at the next annual assessment the names of all owners of apple orchards over two years old and less than ten years old, and all owners of apple orchards over ten years old in each district or districts, together with the number of acres of orchards owned by each person."

It is perfectly apparent that clause 5 only provides for the necessary expenses incurred in the cutting down and destruction of the trees by the State Entomologist. If the owner appeals, then, under clause 7, the court determines the amount of damages, if any, which will be incurred by the owner in case the trees are destroyed and "the cost incurred or to be incurred in cutting down trees under section two of this act;" and it is further provided that if the court should find any damages or such expenses sustained, the court shall order the amount so ascertained to be paid to the owner by the treasurer of the county out of the general fund of said county.

Clause 8 provides for the assessment of apple orchard owners to pay the damages assessed under clause 7, and no provision is made for paying the costs of any appeal or counsel fees.

The conclusion, therefore, is that court costs and counsel fees in such a case, where the order of the State Entomologist is appealed from, are not a part of the costs to be levied on an apple orchard owner.

Very truly yours,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

FEES—*Clerks of Courts—Transcript of record in Commonwealth's cases. Va. Code 1904, Secs. 3505, 3523, 3524 and 3527.*

A clerk of court is not entitled to a fee for making a transcript of the record in a Commonwealth's case at the request of the Attorney for the Commonwealth.

RICHMOND, VA., July 12. 1915.

MR. W. T. SLEDGE;

Clerk,

Lawrenceville, Va.

DEAR SIR:

Replying to your letter requesting the opinion of this office as to whether clerk of the court is entitled to a fee for making a transcript of the record in Commonwealth cases, to go to the court of appeals, the transcript being ordered by the Attorney for the Commonwealth, I have made a careful study of the statute bearing on this subject and have been forced to the conclusion that there is no provision made in our law for paying the clerk a fee for making a transcript of the record in a Commonwealth's case, the transcript being ordered by the Attorney for the Commonwealth.

It is true that section 3505, as amended by Acts of 1914, p. 691, allows the clerk "for making out a transcript of the record and proceedings in any case in due form so that the same may be used in an appellate court, for every thirty words three cents;" but this section has no application to cases where the clerk has to be paid out of the treasury for the service. Sections 3523 to 3526, Va. Code 1887, provided in what cases officers were to be paid out of the treasury in civil cases, and section 3524 specifically provided, as the law then stood, that the clerk for services rendered the Commonwealth in a civil case would be entitled to such fees as would be charged for like services rendered to an individual; but this section (3524) was repealed by the Acts of 1902-3-4, p. 786. Sections 3527 to 3537 cover those cases where payment is to be made to officers out of the treasury in criminal cases and how their accounts are to be verified and certified. Section 3529, in providing fees to be paid to the clerk of the court out of the treasury in a similar case, simply provides that for each case of felony tried in his court, the clerks to be allowed a fee of \$2.50, to be charged only once; and no further provision seems to be made for payment out of the treasury to the clerk for making a transcript of the record in a Commonwealth's case. Therefore, I am reluctantly forced to the conclusion that there does not seem to exist any provision in the law whereby a clerk is authorized to charge for such services.

Very truly yours,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

FEES—*Commonwealth's Attorneys—Joint prosecution of misdemeanors. Va. Code 1904, Sec. 3528.*

In a case of misdemeanor where there is a joint indictment and a joint trial of two or more parties the Commonwealth's Attorney is entitled to only one fee in each case and not a fee for each person tried.

RICHMOND, VA., May 17, 1915.

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

DEAR SIR:

In the absence of the Attorney General, I am answering your letter of March 17, 1915, in regard to the claim of H. N. Dillard, Commonwealth's Attorney of Franklin county, for an allowance of \$30.00 for his services in three cases of misdemeanor brought against Frank and Robert Simmons. It seems, from the account rendered by Mr. Dillard, that his claim is itemized as follows:

February, 1915, to services in case of *Commonwealth v. Frank and Robt. Simmons*, misdemeanor larceny, \$10.00.

February, 1915, to services in case of *Commonwealth v. Frank and Robt. Simmons*, misdemeanor larceny, \$10.00.

February, 1915, to services in case of *Commonwealth v. Frank and Robt. Simmons*, misdemeanor larceny, \$10.00.

The question, therefore, is whether, under section 3528 of the Code, as amended by the Acts of 1912, p. 658, the Commonwealth's Attorney is to be allowed, in a prosecution for a misdemeanor before a circuit or corporation court of two persons jointly charged with larceny, a fee of \$5.00 for each person tried, or whether he should be allowed only \$5.00 in each case whether there be one or more defendants.

A similar question was referred to Hon. A. J. Montague, then Attorney General, by letter from J. M. Hooker, Commonwealth's Attorney, dated July 20, 1899, and found in the report of the Attorney General for 1899, at p. 24. In that case, the question was what was the proper fee of a Commonwealth's attorney in the case of a joint indictment and joint trial of two or more parties for a felony. At that time section 3528, as amended by the Acts of 1899-1900, p. 41, provided that the fee of the attorneys for the Commonwealth, for every case of felony tried in any circuit, county or corporation court, to be charged only once in each case, should be the sum of \$10.00; and further provided, that for every case of misdemeanor prosecuted in any such court to judgment for the Commonwealth, except for violation of the revenue laws and offenses under sections 3815 and 3833, the fee should be \$5.00. Attorney General Montague, in response to the aforesaid letter of J. M. Hooker, used the following language:

"I would say that I am of the opinion that section 3528 of the Code provides one fee for every case and not a fee for every party defendant in the case. Therefore, in the case mentioned by you only one fee of \$10.00 should be allowed, and not a several fee for each party defendant in the prosecution, in that there was a joint trial."

Subsequent to this opinion, rendered by Attorney General Montague, the law was amended by the Acts of 1912, p. 658, with reference to fees in *felony* cases, but has remained the same in regard to the fees in misdemeanors, still reading "that for every case of misdemeanor tried in said court * * * the sum of five dollars" shall be

paid as a fee. Therefore, as we already have a precedent in the office, construing this law, and as said precedent seems to be clearly based upon reason, it is necessary to conclude that, in a case of misdemeanor where there is a joint indictment and a joint trial of two or more parties for larceny, the Commonwealth's attorney is only to be allowed a fee in each case and not a fee of \$5.00 for each person tried.

I am returning the papers which accompanied your letter.

Very truly yours,

CHRISTOPHER B. GARNETT,
Assistant Attorney General.

FEES—*Sergeant of incorporated town who is special constable. Va Code 1904, Secs. 1034 and 3533*

A sergeant of a town who is also a special constable of a county may receive fees from the Commonwealth for serving a warrant of a justice of the peace not connected with his duties as sergeant.

RICHMOND VA. March 20, 1915.

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

DEAR SIR:

I am returning herein the papers referred to this office with reference to the account of I. H. Fleetwood, Special Constable, amounting to \$21.28. The facts as gathered from the papers sent to this office seems to be as follows:

Mr. Fleetwood is Town Sergeant of Waverly and in that capacity receives from the town of Waverly a salary for his services. He is also special constable for the county of Sussex, and as special constable he has rendered a bill to the Commonwealth for serving warrants from a justice of the peace in Waverly District for offenses against the Commonwealth. The direct question involved therefore, is whether the sergeant of an incorporated town in the State of Virginia, who is also a special constable appointed by the circuit court, is entitled to any fees out of the State treasury for his services in criminal cases. I note that the auditing clerk is of the opinion that section 3533 of the Code as amended by Acts of 1914, p. 572 debars a constable from the collection of fees in criminal cases if such constable receives a salary as sergeant of a town.

An examination of section 3533 as it is contained in the Virginia Code 1904, and as amended by the Acts of 1914, p. 572, set out below, will show that the law has not been changed in respect to this question since it was adopted by the Acts of 1877-78 p. 378. The old statute and the new statute on this subject read as follows:

"No justice, constable, sergeant, captain or sergeant of police who receives a salary or allowance for *general services* out of the treasury of his county, city or corporation shall receive any fees for services in a criminal case from the State, city or county, but all such fees to said officers shall be paid by the party against whom judgment is rendered; but the judge of any city or corporation court may make an allowance not exceeding two hundred dollars a year to each of two constables, sergeants or policemen of such city or corporation, to be paid in lieu of all fees for serving criminal process of any kind; which allowance shall be paid out of the treasury."

The only question to my mind which we have to solve in this case is whether the salary of a town sergeant is paid to him for general services.

Under the provisions of section 1034 of the Code, sergeants of towns have the same powers and discharge the same duties as constables within the corporate limits of said towns and to a distance of one mile beyond the same and presumably the salary of the town sergeant is given him in payment for services under this statute, as well as for his services in connection with the ordinances and by-laws of the town. But, in the case at hand, Mr. Fleetwood is not only the sergeant of the town of Waverly, but he is also constable of the county, and presumably has rendered his services in the cases at hand not as sergeant of the town of Waverly, but as constable of the county. In other words, his duties and services consist of two classes: first, those of a general nature, such as any other constable of the county might render; and those of a local or particular nature, consisting entirely of his services as sergeant of the town. Therefore, I would conclude that he is entitled to render an account to the Commonwealth for his services as special constable.

Of course, it seems clear, also, that in rendering his services as special constable, he would not be allowed to include therein an enumeration of his services which would be required of him as sergeant of the town of Waverly.

Very truly yours,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

FINES AND PENALTIES—*Forfeited recognizance—Appointment of agents to collect. Va. Code 1904, Secs. 703 and 709.*

The auditor of public accounts is authorized to appoint an agent for the collection of the money of a non-resident surety on a forfeited recognizance; and after the debt or a part thereof, has been collected he is authorized to recommend such compensation as to him may seem reasonable on money actually paid into the treasury whereupon the Governor may authorize the payment of so much thereof as to him may seem proper.

RICHMOND, VA., *October 31, 1914.*

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

DEAR SIR:

In the absence of the Attorney General, I am replying to your letter of October 3rd, referring to this office a letter from Hon. W. C. Bibb, Commonwealth's Attorney, Louisa county, in regard to enforcing the collection of the forfeited recognizance of Charlie Jackson, for which Mrs. Zuella Johnson, a non-resident, is surety. You ask to be advised as to what arrangement, if any you are authorized to make with an attorney outside of the State for the collection of this money. Section 703, Virginia Code 1904, provides as follows:

"The Auditor may appoint agents to superintend the collection of debts to or claims of the Commonwealth, and may authorize them to secure payment thereof by instalments or otherwise, and give farther credit, in consideration of additional security or indemnity satisfactory to him."

Section 709 provides as follows:

"For the service rendered by any agent under section 703 * * * the auditor shall recommend such compensation as may seem to him reasonable on money actually paid into the treasury; and the governor shall authorize

the payment of what is so recommended, or of so much thereof as in his judgment may be proper."

Under the above sections you are authorized to appoint an agent for the collection of such a debt, and after the debt has been collected, or part thereof, you are authorized to recommend such compensation as may seem to you reasonable on money actually paid into the treasury; and the Governor may authorize the payment of what you recommend or so much thereof as in his judgment may be proper. These seem to be the only pertinent provisions of the law applicable in such a case as this. I would advise, therefore, that you communicate the contents of these provisions to Mr. Bibb, and inform him of your willingness to make a contract with an agent for the collection of this debt under the terms of these sections.

Very truly yours,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

FINES AND PENALTIES—*Recovery—Procedure—Escheats—Va. Constitution, Sec. 134—Va. Code 1904, Secs. 675-680, 712-745, 1432, 1505, 2392, 2393.*

The only method which obtains for the recovery of fines, except those in the hands of public officers is by presentment, indictment, or information.

Penalties against escheators are not recoverable by the State Board of Education, but other methods are provided.

RICHMOND, VA., *April 16, 1915.*

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

HON. ROSEWELL PAGE,
Second Auditor of Virginia.

HON. R. C. STEARNES,
Superintendent of Public Instruction.

GENTLEMEN:

In the course of investigation of certain questions connected with the recovery of fines, it has become necessary for me to decide what is the present status of the law on the subject of who may institute an action and who may appoint agents for their recovery. The specific question which I shall endeavor to answer is as follows:

Is the State Board of Education authorized to appoint agents for the collection of fines, and may the Second Auditor institute proceedings for the collection of fines under section 1432, Va. Code 1904, as amended by Acts of 1906, p. 432?

Section 1432 of the Code, as amended by Acts of 1906, p. 432, provides that:

"Any money which ought to be paid into the public treasury to the credit of the literary fund shall (unless other provision be made therefor) be recoverable, with interest, by the Board of Education, by motion after fifteen days, notice, or by action in the circuit court of the city of Richmond. The Second Auditor shall institute and prosecute the proceedings, after an order for such motion or action shall have been made by the board. The said board may appoint agents for the collection of its debts or claims, and authorize them to secure payment thereof on such terms as it may approve. When any estate of any person taken under execution, or for sale under any decree or deed of trust, for any such debt or claim, *or for any fine*, will not sell for the amount thereof, such agent may * * * purchase such estate for the board." * * *

The words italicized above, "or for any fine," were first inserted in the statute

under Acts of 1906, not being found in the original statute, nor in any amendments until 1906.

Chapter 31 of the Code provides, according to its title, a mode of recovering fines and enforcing payment into the treasury.

Section 134 of the Constitution provides, that the General Assembly shall set apart as a permanent and perpetual Literary Fund (1) the present Literary Fund of the State; (2) the proceeds of all lands donated by Congress for public free school purposes; (3) of all escheated property; (4) of all waste and unappropriated lands; (5) of all property accruing to the State by forfeiture; (6) all fines collected for offenses committed against the State, and (7) such other sums as the General Assembly may appropriate.

This section of the Constitution is carried into Va. Code 1904 as section 1505. By section 743a, Va. Code 1904, it is provided further that the proceeds of all fines collected for offenses against the State * * * shall be paid and collected only in lawful money of the United States and shall be paid into the treasury to the credit of the Literary Fund and shall be used for no other purpose whatsoever.

According to the express terms of section 1432, quoted above, if other provision for its recovery be made, no money which ought to be paid into the public treasury to the credit of the Literary Fund is recoverable by the State Board of Education. Our inquiry, therefore, presents two questions (1) whether other provisions have been made for the recovery of fines; and (2) if other provisions have been made for the recovery of fines, whether the amendment of section 1432, referred to above, has changed the former status of the law.

It is interesting to note that chapter 31 of the Code was first enacted as chapter 190, Vol. 2, of the Revised Code of 1819, p 58, and was entitled "An Act to reduce into one the Several Acts for Enforcing and the Payment of Fines into the Public Treasury." The provisions in this original act were practically the same as those now contained in the Code, so far as the essential features are concerned.

Section 12 of chapter 190 of the Revised Code of 1819 aforesaid is the antecedent of section 1432, Va. Code 1904, and reads as follows:

"All moneys now due or which may hereafter become due to the Literary Fund on account of collections made by any public officer (except those cases in which it is otherwise provided by law) shall be recoverable in a general court, upon motion in a summary way, by the Auditor of Public Accounts, with interest at the rate of fifteen per cent. per annum from the time when the same ought to have been paid into the public treasury; provided that every officer so delinquent shall have thirty days' previous notice of such motion."

Thus, as section 1432 stood in the Code of 1819, it was included within the chapter on the collection of fines, and as that chapter provided a full and complete method of collecting fines, it seems clear that *at that time* the section did not apply to the collection of fines until such fines came into the hands of a public officer, since the statute was specifically limited to *collections made by a public officer*.

Tracing section 1432 further back in the law, we find that it was originally a part of chapter 90 of an act which was passed by the Legislature on February 20, 1812, and related to the Literary Fund. (See Laws of Virginia, ed. 1812, p. 106.) In this chapter the section is almost identical in terms with chapter 190, Code of 1819, referred to above, and is limited to collections made by any public officer.

An examination of the chapter in Va. Code 1904, concerning the collection of fines discloses the fact that after making provisions for the collection of fines from offenders by presentment, indictment or information, the law goes on to provide

that justices of the peace shall pay fines to clerks of the courts, and that for failure to make such payment when due the justice forfeits \$20.00 which, together with the fine in his hands, may be recovered by motion. (Section 723.) So, also, when a defendant is committed to jail by court or justice for failure to pay a fine, he may pay the same to the clerk. (Section 729.) The clerk is required to return a list of the fines to the Auditor, and for his failure to transmit such list he forfeits \$100.00. (Sections 730 and 734.) Sheriffs and other officers receiving fines are required to pay the same to the clerk of the court, and upon every failure to pay the said fines he forfeits \$20.00. And clerks are required whenever the amount of funds in their hands due the Commonwealth shall amount to five hundred dollars, to remit the same to the Auditor under a penalty of fifty dollars to be recovered by the Auditor.

Now it is clear from the statute and the Constitution providing for the Literary Fund that the forfeitures provided against public officers aforesaid are recoverable in the manner provided by section 1432; and it seems that fines in the hands of public officers which they fail to pay into the treasury are still recoverable in the same manner as formerly, that is, under section 1432; but until the amendment to section 1432 by the Acts of 1906 aforesaid, it is also perfectly clear that another method was provided by law for the recovery of fines from offenders, and that, consequently, no proceeding under section 1432 was necessary or proper for the recovery of fines until said fines had come into the hands of public officers.

Incidentally it may be noticed that the proceeds of the sale and rents and profits arising from escheated property are provided for otherwise than by section 1432 and are not recoverable under that section. (See section 2392 Va. Code 1904.) And under the chapter on escheats the penalties provided thereby are to be recovered by the Auditor of Public Accounts, by action or motion. (Section 2393.) Therefore, the penalties against escheaters are not recoverable under section 1432. So, also, the proceeds of waste and unappropriated lands are required to be paid to the Register of the Land Office, who is required semi-annually to render his account to the Auditor of Public Accounts, and within ten days after rendering such an account to pay into the treasury the balance appearing due thereby. (Sections 675 to 680.)

Therefore, taking the enumeration contained in section 134 of the Constitution of the items making up the Literary Fund, we note that the proceeds of escheated property are not recoverable under section 1432, because there is a specific method provided by statute for recovering the same; (2) that the proceeds of waste and unappropriated lands are not recoverable under section 1432, because there is a specific method provided by statute for recovering the same; (3) that the proceeds of property accruing to the State by forfeiture may be recoverable under section 1432 in a great many cases if no specific method is provided by statute for recovering the same; (4) that fines which have come into the hands of public officers are recoverable under section 1432 since no other method is provided by law for recovering the same from the officers, and from the beginning of the Literary Fund this has been the method of recovering the same; (5) that as to the proceeds of all public lands donated by Congress for public free school purpose, there seems to be no statute on the subject, and presumably this has ceased to be a source or revenue in Virginia; and (6) that as to fines which have not yet come into the hands of public officers, there is a specific method provided by chapter 31 of the Code for the recovery of the same, unless, as said before, the aforesaid amendment to section 1432 is broad enough to change the whole history of the law of the collection of fines in Virginia.

It may be noted that under section 1432 the State Board of Education is given authority to appoint agents for the collection of its *debts* or *claims*, but that the

amendment of 1906 did not insert at this point the word "fines." It is to be noted also that the exception is still included in the statute which has been there since its early history, to-wit, that money due the literary fund for which other provision has been made is still not recoverable under that section. Therefore, in order to hold that fines are recoverable under section 1432, we must necessarily hold that the amendment revokes and annuls chapter 31 of the Code. Said amendment is contained in the third paragraph of section 1432, which will be repeated here, so far as necessary for this purpose, to-wit:

"When an estate of any person taken under execution, or for sale under any decree or deed of trust, for any such debt or claim, *or for any fine*, will not sell for the amount thereof, such agent may (under the direction of the board as to the price) purchase such estate for the board."

It will be noted that this language does not in terms empower the State Board of Education to recover by motion a fine, nor does it in terms provide that the former method of the recovery of fines is annulled, but simply seems to assume that the existing state of the law would allow the State Board of Education to direct the Second Auditor to institute and prosecute in the Circuit Court of the City of Richmond a motion or action for fines due to the Commonwealth.

It is respectfully submitted that no such force and effect can be allowed to the amendment when the statute in which the amendment is inserted specifically provides that that statute shall not apply to the collection of money due the Commonwealth where another method of recovery has been provided, and that the only method which now obtains under the law of Virginia for the recovery of fines, except those in the hands of public officers, is the method marked out by chapter 31 of the Code, which has not been impliedly repealed by the amendment to section 1432 aforesaid. It is pertinent to note that the Auditor is authorized by section 703 to appoint agents to superintend the collection of debts or claims of the Commonwealth.

Very truly yours,

CHRISTOPHER B. GARNETT,
Assistant Attorney General.

FINES AND PENALTIES—*Remission—Powers of Governor. Va. Constitution Sec. 73. Va. Code 1904, Secs. 739, 740, 741 and 743.*

In order to secure the remittance of fines, application therefor must be made to the Governor in strict compliance with the required procedure.

RICHMOND, VA., December 7, 1914.

His Excellency, H. C. STUART,
Governor of Virginia, Richmond.

DEAR SIR:

In response to your request for my opinion as to your authority to grant the petition of Mrs. Ella Atkins and Mrs. W. C. Thompson to remit fines imposed upon them by the Police Justice of the City of Richmond for the crime commonly known as "shop-lifting," I beg leave to reply:

Section 73 of the Constitution provides, among other things, that the Governor "shall have power to remit fines and penalties in such cases and under such rules and regulations as may be prescribed by law."

Section 738 of the Code, as amended by Acts of 1908, p. 126, vol. 3, Code p. 101,

provides that the Governor "shall have power, in his discretion to remit, in whole or in part, fines and penalties, whether heretofore or hereafter imposed, in all cases of felony or misdemeanor after conviction," except in such cases as it is not necessary at this time to note, for the reason that the present cases do not fall within any of the exceptions. The same section provides that in all applications for granting relief such evidence must accompany the application as will in the opinion of the Governor warrant the granting of the relief asked for.

But, before the Governor can remit the fine, the provisions of sections 739, 740, 741 and 743 of the Code must be complied with as a condition precedent. These sections would require these particular applicants to file their petitions in the clerk's office of the Hustings Court of the City of Richmond at least fifteen days before the term of the court at which the matter is to be heard, setting forth the grounds upon which relief is asked. Ten days notice thereof, in writing, must be given to the attorney for the Commonwealth of the City of Richmond. The court must hear the petition and certify the facts proven and file an opinion in writing as to the propriety of granting the relief prayed for. Section 743 of the Code provides that all such applications made to the Governor shall be accompanied by the petition to the court, answer, certificate of facts and opinion of the court and that the application to the Governor for the relief prayed for shall be in writing.

If after receiving the application, accompanied by the papers above referred to, the Governor is of the opinion that the fine should be remitted, he issues his order, in these cases, to the clerk of the hustings court of the city of Richmond.

The same section makes it the duty of the Governor to communicate to the General Assembly at each session the particulars of each case of fine or penalty remitted with his reasons for remitting the same.

I therefore, advise you that the petition of Mrs. Ella Atkins and Mrs. W. C. Thompson cannot be granted in its present form, but that it is necessary for the applicants to follow the procedure above outlined.

I am herewith returning the petition in the above mentioned cases.

Very truly yours,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

FINES AND PENALTIES—*Rights of informer—Peddler's license. Va. Code 1904, Tax Bill, Sec. 50.*

A police officer is not entitled under the peddler's license law to receive money as an informer.

RICHMOND, VA., *September 7, 1915.*

HON. C. LEE MOORE,

Auditor of Public Accounts,

Richmond, Va.

DEAR SIR:

In the absence of the Attorney General, I am replying to your favor of September 2nd, in which you enclosed a letter from R. E. Marable, deputy clerk of the corporation court of the city of Newport News, inquiring whether under that provision of the statute which gives one-half of the fine to the informer, a regular police officer is entitled to be paid one-half of any fine imposed for peddling without license?

Section 50 Va. Tax Bill, as amended by Acts 1915, p. 237, provides in part as follows:

"Any peddler who shall peddle for sale or barter without a license shall pay a fine of not less than \$100 nor more than \$500 for each offense, one-half of which shall go to the informer."

The courts have on several occasions had similar questions before them, but have managed to side step the point. *U. S. v. Funkhouser*, 4 Biss. (Ind.) 176; *Sanner v. State*, 35 Atl. (Md.) 158.

In *U. S. v. Simons* 7 Fed. 709, a federal statute provided for compensation for "any person not an officer of the United States" who served as an informer. The court in its decision held that the person in that case was an officer of the United States and therefore not entitled as informer to the fund provided by the statute. The decision of the court, therefore, is not in point, but the reasoning used by the court is the basis upon which I hold that a police officer is not entitled to receive compensation as informer under the peddler's statute, and therefore, I am quoting from the above case as follows:

"It only remains to consider whether Brukeman is such an officer of the United States as is excepted from the operation of the act of 1874, and is disentitled by reason of his official position to claim a share of the fine. I had supposed that in order to preclude a person from receiving the informer's share he must have been a permanent officer of the government holding his authority by virtue of a commission or appointment by a chief officer of the customs. Such, I am informed, has been the ruling of the treasury department in this particular, but the courts seem to have uniformly taken a different view, and I am not disposed to dissent from their conclusions. Even before this act was passed, and when officers might be considered as informers it was held by Judge Lowell in the *U. S. v. 100 Barrels of Distilled Spirits*, 1 Law 244, that they would only be considered informers when they incidentally and not in the direct prosecution or course of their duty, or of any special retainer for that purpose, made a discovery * * *. The question was directly passed upon in the use of four cutting machines, 3 Ben., 220, in which Judge Blatchford held that a person whose duty it is to disclose information, and who violates such duty if he does not disclose it, cannot be an informer and that the person who imparted the information so as to be an informer must be one who has imposed upon him no official duty to impart the information."

Upon the reasoning of the above case I am constrained to hold that since a police officer's duty is to take cognizance of and disclose every violation of the criminal law of this State that occurs within his jurisdiction, there can be no recovery by him as an informer.

Yours very truly,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

FISH LAWS—*Commission of Fisheries—Power of oyster inspectors to grant licenses.*
Va. Code 1904, Secs. 2086 and 2099. Acts 1914, Ch. 121.

An oyster inspector may grant a license to applicants who are residents of the State to fish for market or profit, other than domestic use, with purse nets in the waters of the Commonwealth for menhaden, but that the applicant may not so fish if his purpose be to manufacture the menhaden into oil, fish, scrap, or manure.

RICHMOND, VA., July 15, 1915.

MR. WALTER H. RYLAND,
Secretary, Commission of Fisheries,
Urbanna, Virginia.

DEAR SIR:

I have your letter, in which you state that application has been made to the Commission of Fisheries for license to take menhaden between the first day of December and the last Monday in May for purpose of sale to fishermen to be used as bait for blue fish, and that the Commission, being in doubt as to their power in the premises to permit the taking of menhaden for any purpose with purse nets between December 1st and the last Monday in May, has instructed you to request an opinion from me on the subject.

Acts of 1914, chapter 121, p. 201 (Sup. 1914, p. 414) provides as follows:

"It shall be unlawful for any person, firm or corporation to take or catch in the waters of the Commonwealth of Virginia, or waters within the jurisdiction of the Commonwealth of Virginia, menhaden fish to be manufactured into oil, fish scrap or manure, between the 1st day of December and the last Monday in May of each year."

From the terms of this statute, it is apparent that no license can be granted to take menhaden fish between the first day of December and the last Monday in May for the purpose of manufacturing same into oil, fish scrap or manure. This section, therefore, is a limitation upon section 2099, Va. Code 1904, as amended by Acts of 1908, p. 310, authorizing the circuit courts of the Commonwealth, upon proper hearing, to grant to bona fide residents of the State of Virginia, and to corporations whose stockholders are bona fide residents of the State of Virginia, license to take or catch fish in the waters of this State to be manufactured into oil, fish scrap or manure.

Under the provisions of section 2086, sub-section 1, residents of this State who desire to fish for market or profit, other than domestic use, with a purse net, pound net, fyke net, gill net, haul seine, sturgeon net, skirt net, weir or other device in any of the waters of this Commonwealth are required to apply to the oyster inspector of the proper district for license. The license granted to such applicant, under proper conditions, is for the season which begins on the first day of February in any year and ends on the thirty-first day of January.

Therefore, it would seem that the commission would have the power to grant license under section 2086 to applicants therefor, and such applicant would probably have the right to take menhaden for market or profit, other than domestic use, but not for the purpose of manufacturing the same into oil, fish scrap or manure.

I can find no specific statute authorizing the commission to grant licenses to fish for menhaden for the purpose stated. The only license which might be applicable seems to be under section 2086. Therefore, my conclusion is that the commission has no power to grant a license in the form requested, but could grant a license under section 2086, and that a person who fished for menhaden for the purpose of profit in selling the same to parties fishing for blue fish would not be violating the law; but that whether he would be violating the law or not would depend upon the purpose of the fisherman.

Very truly yours,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

FISH LAWS—*Oyster inspectors—Liability for licenses, rentals, fines and other sums due within his district—Who to institute proceedings. Va. Code 1904, Sec. 681. Acts 1910, ch. 343.*

Where an oyster inspector has failed to account to the Auditor of Public Accounts for licenses, rentals, fines and other sums due within his district, it is the duty of the Auditor of Public Accounts to institute and prosecute proceedings against him in order to enforce the payment of such money to the Commonwealth.

RICHMOND, VA., May 6, 1915.

HON. JOHN S. PARSONS,
Commissioner of Fisheries,
517 Law Bldg., Norfolk, Va.

DEAR SIR:

In the absence of the Attorney General on official business, I am replying to your letter of May 3rd, 1915. In your letter I note that evidence has been presented to the Commission of Fisheries showing that certain oyster inspectors under the former commission failed to remit to the Auditor of Public Accounts certain funds in the form of oyster ground rentals, license fees, etc., collected by them, and you request the ruling of the Attorney General as to whether it is the duty of the Auditor or the Commission of Fisheries to institute proceedings against such inspectors for the recovery of these funds.

Chapter 343 of Acts 1910, requires every oyster inspector, appointed by the Commission of Fisheries, to qualify before the circuit or corporation court of the county or corporation in which his district may be, or before the clerk in vacation, and to enter into a bond in a penalty not to exceed \$2,000.00, nor to be less than \$500.00, with surety payable on condition as required by law, and it is made the duty of the clerk of the court to transmit a copy of said bond to the Auditor of Public Accounts within thirty days from its execution.

It is further made the duty of the inspector to collect all licenses, rentals and other sums due within his district under the provisions of the act and any fines assessed by him or placed in his hands by the proper officials for violation of the oyster or fish laws in any of the waters of the State and the inspector is given, for the purpose of enabling him to collect the fines and fees, the same powers which are given to a county treasurer for the collection of taxes. It is further made the duty of the inspector by the 10th of every month and at such other time as may be required of him to make a complete report to the Commission of Fisheries of collections during the preceding month from every source under his supervision, and to forward to the Auditor of Public Accounts a duplicate of said report accompanied by all the revenues collected during the preceding calendar month. For failure to comply with the provisions of this section inspectors may be fined not less than \$25.00 nor more than \$100.00.

Section 681 of the Code of Virginia provides that the Auditor of Public Accounts shall institute and prosecute all proceedings to enforce payment of money to the Commonwealth. This latter section is a part of chapter 30, which provides the mode of recovering and enforcing payment into the treasury of all public money collected and debts to the Commonwealth generally.

Under the terms of this section and chapter, I am clearly of the opinion that it is your duty to turn over to the Auditor of Public Accounts the evidence which is in your hands and that it will be his duty to institute proceedings under said chapter.

I understand from your letter that the evidence consists of receipts given by the inspectors for various amounts which were not turned into the Auditor.

Of course prosecutions for failure to comply with the law would have to be instituted in the county in which the dereliction occurred.

A copy of this letter will be forwarded to the Auditor of Public Accounts.

Very truly yours,

CHRISTOPHER B. GARNETT,
Assistant Attorney General.

HEALTH—*Public records—Correspondence between public officers.*

Correspondence between public officers on public business constitutes public records, and, as such, are open to inspection at all reasonable times and in such manner as not to interfere with the orderly conduct of official business, but whether copies of such correspondence are to be furnished is entirely discretionary with the officer in charge.

RICHMOND VA., *December 2, 1914.*

BY

HON. ENNION G. WILLIAMS,
Commissioner of Health,
Richmond, Va.

Yours of even date received. I am of the opinion that in the absence of any statute, or reason of public policy to the contrary, all correspondence between public officers, on public business, constitutes public records and as such are open to inspection at all reasonable times and in such a manner as not to interfere with the orderly conduct of official business. There is no provision in the statutes requiring that such correspondence as that to which you refer shall be kept from the public, nor am I aware of any public policy which might require the information therein contained to be kept secret. There is no law, however, requiring you to furnish copies of correspondence in your office, and whether you shall do so is entirely within your discretion; but, if the person desiring copies of the correspondence should come to your office and ask permission to inspect the same, I am of the opinion that it would be your duty to allow him to do so, at such time and in such a manner as not to interfere with the orderly conduct of the duties of your office.

I am returning you, herewith the letter of Howard W. Smith, enclosed with yours of December 2nd.

Very truly yours,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

HEALTH—*Registration of Deaths—Coroners—Who to serve in their absence. Va. Code 1904, Secs. 891, 3947 and 3948. Acts 1912, Ch. 181 (8).*

In the absence of the coroner who is required to make a report to the State registrar where a death is caused by unlawful or suspicious means, it is the duty of the justice of the peace to serve, and it is the proper course for him to require one or more physicians to attend and assist him in making out the required certificate.

RICHMOND, VA., August 17, 1915.

DR. W. A. PLECKER,
State Registrar, Bureau of Vital Statistics
Richmond, Va.

DEAR SIR:

In the absence of the Attorney General, I am replying to your letter of July 21st, in which you refer to this office a letter from Dr. Robt. A. Martin, Health Officer for Petersburg, asking to be advised how certificates of death in coroner's cases should be made in event of the absence or sickness of the coroner.

Acts 1912 ch 181, p. 440, Supplement 1912, p. 305, an act providing for the registration of births and deaths, after requiring, in clause 8, that where a person dies without medical attendance the person acting as undertaker or the undertaker shall notify the registrar, goes on to require.

"That if the death is caused by unlawful or suspicious means, the registrar shall then refer the case to the coroner for his investigation and certification. And any coroner whose duty it is to hold an inquest on the body of any deceased person and to make the certificate of death required for burial permits shall state in his certificate the name of the disease causing death, or if from external causes, (1) the means of death; (2) whether (probably) accidental, suicidal or homicidal; and shall in either case furnish such information as may be required by the State registrar in order properly to classify the death."

By section 3948 Va. Code 1904, it is provided that in case the coroner fails to perform his duties in regards to inquests, or if there be no coroner authorized to act or none in the neighborhood in which the dead body is found any justice of the county may act as coroner and be entitled to the same fees and be subject to the same penalties. The new statute seems to make it a part of the duty of the coroner to make the certificate required in said statutes; and, necessarily, it follows that when a justice acts as a coroner, it is the duty of the justice to make such certificate. It may be remarked that under Va. Code 1904, sec. 89, as amended by Acts of 1910, p. 344, the judge of the court has authority to appoint additional coroners. It may be, also, noted that under section 3947 of the Code, the coroner or justice acting as such has authority to require one or more physicians to attend the inquest and render services incident to his profession. Therefore, it would seem to be the proper course for the justice of the peace who is acting as coroner to require a physician to attend and assist him in the inquest and also in making out the certificate required by the statute.

Very truly yours,

CHRISTOPHER B. GARNETT,
Assistant Attorney General.

HEALTH—*State Board of Health—Maintenance of closets and privies. Acts 1910, Ch. 179. Regulations of Board of Health—Rules 1 and 2.*

A landlord who refuses to construct a dry closet on his premises is guilty of a misdemeanor and the tenant or occupant of the land who deposits human excrement within one hundred yards of a house except in a receptacle built in accordance with the regulations of the State Board of Health is likewise guilty of a misdemeanor.

RICHMOND, VA., *July 15, 1915.*

DR. EDWIN M. MANN,
Kenbridge, Va.

DEAR SIR:

I have your letter of July 13th, informing me that as Health Officer of the town of Kenbridge, Va., you were requested to inspect the town and found that 75% of the privies were insanitary and not fly proof, and you request me to advise you who is responsible for the condition in case of a tenant occupying and renting a house of another, and what authority has the local Board of Health and the State Board of Health in the matter.

The proper solution of this question involves the construction of chapter 179, Acts 1910 p 269; vol. 3, p. 905. Said statute so far as applicable to this question reads as follows:

"The State Board of Health shall have the power to make, adopt, promulgate and enforce reasonable rules and regulations * * * to regulate the method of disposition of garbage or sewage and any other refuse matter in or near any incorporated town, city or unincorporated town or village of this State; to provide for the thorough investigation and study of the causes of all diseases, epidemics and otherwise in this State, and the means for the prevention of contagious disease; * * * to make separate orders and rules to meet any emergency, not provided for by general rules and regulations, for the purpose of suppressing nuisances dangerous to the public health and communicable, contagious and infectious diseases and other dangers to the public life and health. * * *

"Any person who shall violate, disobey, refuse, omit or neglect to comply with any rule of said State Board of Health, made by it in pursuance of this act, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished in the manner provided by law."

In response, and in accordance with the power thus conferred upon the State Board of Health, that body, on July 13, 1910, adopted regulations effective January 1, 1911, reading as follows:

"Rule 1. Every house used as a human habitation in the State shall be provided with a proper closet for the disposal of human excrement. This closet shall be either a water closet, connected with an approved system of sewerage disposal, or with a public or private sewer, or where such sewer is not available shall be built and maintained in accordance with the regulations governing the construction and maintenance of dry closets, this day adopted."

"Rule 2. No person shall deposit any human excrement within one hundred yards of any house used for human habitation, except into the receptacle of a closet built in accordance with the regulations of the State Board of Health."

The bulletin wherein the above rules were promulgated also contains specifications for dry closets, approved by the State Board of Health. Under the above regulations, or rules, you will note, first, that every house used as a human habitation is required to be provided with a proper closet for the disposal of human excrement. The question arises as to the person upon whom the duty is thus devolved by law of providing the house with the closet. As such a closet is affixed to the freehold, and becomes a part thereof and belongs to the owner of the freehold, I am of the opinion that it is the duty of the landlord primarily to construct the closet.

But, I am further of the opinion that, while the law puts the duty upon the landlord of constructing such a closet, any person who deposits human excrement

within one hundred yards of any house used for human habitation, except into the receptacle of the closet built in accordance with the regulations of the State Board of Health, is guilty of a misdemeanor and may be prosecuted therefor. In other words, under the regulations above, a landlord who refuses to construct a dry closet on his premises is guilty of a misdemeanor; and, on the other hand, the tenant or occupant of the land who deposits human excrement within one hundred yards of a house, except into a receptacle built in accordance with the regulations of the State Board of Health, is likewise guilty of a misdemeanor and may be prosecuted therefor.

Very truly yours,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

HEALTH—*State Board of Health—Towns—Maintenance of Privies.*

Where both State and town regulations require the repair or rebuilding of unsanitary privies, if the structure of the privy is such as to require replacement or repair, the duty devolves upon the landlord; but if the objection is not one of construction but grows out of the careless or improper use by the tenant, the proceeding should be against such tenant.

RICHMOND, VA., *July 15, 1915.*

DR. ENNION C. WILLIAMS,

Commissioner, State Board of Health,

Richmond, Va.

DEAR SIR:

I have yours of July 13th, in which you enclose letter from Dr. E. C. Mann, in which he states that in the town of Kenbridge there are a number of unsanitary privies, and that both the State and the town health regulations are such as to require such privies to be repaired or entirely new privies built. It is also stated that the privies to which objection is made are on premises occupied by tenants. Dr Mann raises the question as to whether the landlord or the tenant shall be required to repair or rebuild, as the case may be.

I am of the opinion that the necessary requirements should be made of the landlord, and not the tenant. In all cases where the structure of the privy is such as to require replacement or repair, the duty devolves upon the landlord. If, on the other hand, the objection to the privy is not one of construction, but grows out of the careless or improper use by the tenant, then the tenant should be the party proceeded against.

Very truly yours,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

INSANITY—*Convicts—When they may be removed from State Hospital to Penitentiary—Va. Code 1804, Secs. 1682 and 1687.*

Convicts from the State penitentiary after being adjudged insane in the circuit court of the city of Richmond and sent to the hospital for the criminal insane at Marion cannot be returned to the State penitentiary until restored to sanity.

RICHMOND, VA., September 23, 1915

His Excellency, H. C. STUART,
Governor of Virginia
Richmond, Va.

DEAR SIR:

Confirming my verbal opinion expressed to you a few days ago, as well as the opinion previously expressed to Dr. J. C. King superintendent of the Southwestern State Hospital at Marion, Virginia will say:

Convicts from the State penitentiary after being adjudged insane in the circuit court of the city of Richmond and sent to the hospital for criminal insane at Marion cannot be returned to the State penitentiary unless and until restored to sanity.

Section 1682 of the Code 1904, as amended 1914, p. 542 provides among other things as follows:

"If any person after conviction of any crime, or while serving sentence in the State penitentiary, or in any other penal institution, or in any reformatory or elsewhere, is declared by a jury to be insane, he shall be committed by the court to the department for the criminal insane at the proper hospital, *and there kept until he is restored to sanity.*"

Section 1687 Va. Code 1904 as amended 1910 p. 494 provides as follows:

"When any person, confined in the department for the criminal insane at the proper hospital and charged with crime, and subject to be tried therefor, or convicted for crime, shall be restored to sanity, the superintendent shall give notice thereof to the clerk of the court by whose order he was confined, and deliver him in obedience to the proper precept; provided, no person who has been convicted for a crime punishable by death shall be so delivered until the said superintendent and the superintendent of one of the other State hospitals for the insane, to be designated by the commissioner of State's hospitals, concur in the opinion that the said person has been restored to sanity. When any person, charged with or indicted for any offense which may be punishable by death, has been adjudged insane, both at the time of the offense and at the time when, but for such insanity, he would have been tried, shall be ordered by the court to be committed to the department for the criminal insane, at the proper hospital, such person shall not be discharged therefrom until the superintendent of that hospital and the superintendent of two of the other hospitals, designated by the commissioner of State hospitals, shall be satisfied, after a thorough examination, that such person has been restored to sanity and may be discharged without danger to others, and provided such discharge is given upon the consent and advice of the commissioner of State hospitals and the special board of directors."

Yours very truly,
JNO. GARLAND POLLARD,
Attorney General of Virginia.

INSURANCE—*Surety Companies—Bonds deposited with the Treasurer of Virginia.*
Acts 1806, Ch. 112.

Under the law of this State bonds deposited by surety companies, insurance companies and like companies with the treasurer of Virginia should be treated as a trust fund for the benefit of the policy holders who are residents of this State in the event of the failure of such companies to pay any debt or money due on its policies, or in the event of the distribution of the assets of said company.

RICHMOND, VA., May 7, 1915.

HON. J. N. BRENAMEAN,
Deputy Commissioner of Insurance,
Richmond.

DEAR SIR:

In the absence of the Attorney General, on official business, I am replying to your letter of May 5, 1915, in which you state that you are in receipt of a letter from Hon. B. R. Newton assistant secretary of the Treasury department, Washington, D. C. in which he uses the following language:

"A question has arisen between this department and the American Surety Company of New York as to whether the deposit which is now being carried by that company with your department in the amount of \$28,000, and required to be made under an existing law of the State of Virginia, is regarded by you and the Attorney General of your State as a special deposit, intended primarily for the benefit and protection of the contract and policy holders of the American Surety Company in the event of the distribution of the assets of said company."

I am informed by your department that the \$28,000 on deposit with your department referred to in the aforesaid letter, is in the shape of bonds.

In chapter 112 Acts 1906, p. 180, it is provided in section 2 of chapter 2 thereof, (Vol. 3 Va. Code 1904 p. 591) that insurance companies, associations, societies, and orders and guaranty, trust, indemnity, fidelity, security, and other like companies, may be incorporated under the provisions of chapter one of the act entitled "an act concerning corporations" and shall be subject to the restrictions and have the powers imposed and conferred upon such corporations by the law of the State; "provided, that no charter shall be granted to any life or fire insurance companies with a capital stock until the incorporators shall present to the State Corporation Commission a certificate of the treasurer of the Commonwealth that bonds to the amount of ten thousand dollars of the description mentioned in section fourteen of this chapter have been deposited with him to be held by him under the provisions and upon the terms and conditions in this chapter hereinafter set forth."

In section 14 of chapter 2 of said act (vol. 3, p. 595) it is provided that:

"Unless otherwise provided in this chapter, every insurance company shall, by an agent employed to superintend or manage the business of such company in this State, or through some authorized officer, deliver under oath to the treasurer of this State a statement of the amount of capital stock of said company, unless it be a mutual company, and deposit with him bonds of the United States, or of the State of Virginia, or of the cities or counties of this State, to an amount equal to five per centum on the said capital stock, or not less than ten thousand nor more than fifty thousand dollars, and the treasurer shall thereupon give the agent a receipt for the same; provided, that the cash value of the securities so deposited need not be more than fifty thousand dollars, nor shall it be less than ten thousand dollars, and no single bond so deposited shall exceed in amount the sum of ten thousand dollars; if a mutual company, it shall make a deposit of not less than ten thousand dollars nor more than fifty thousand dollars, the exact amount to be determined by the State Corporation Commission, as may seem equitable upon comparison with the deposit required by stock companies. And upon the face value of such deposits the treasurer of the Commonwealth shall be authorized to make an annual assessment of one-twentieth of one per cent., to be by him collected of the general agent of such company for the State of Virginia, or if there be no general agent, then of any local agent doing business for said company in this State, to defray the expenses of his office in the safekeeping and handling of such securities. * * * If the bonds so deposited be registered bonds, the company shall at the same time

deliver to the treasurer a power of attorney authorizing him to transfer said bonds, or any part thereof, for the purpose of paying any of the liabilities provided for in this act. * * * The treasurer shall require any such company to make good any depreciation or reduction in value of the said securities. * * * The State shall be responsible for the safekeeping of all bonds or other securities deposited with the treasurer of the State, and in case that said bonds or any part thereof shall be lost, destroyed or misappropriated, the State shall make good such loss to the insurance company making the deposit."

Sections 15, 16, 17 and 18 provide as follows:

"15. The treasurer at the time of receiving said bonds shall give to the company authority to draw the interest thereon as the same may become due and payable, for the use of the company, which authority shall continue in force until the company fails to pay any of its liabilities upon its insurance policies made in favor of any citizen or inhabitant of this State, in which case the party charged with the payment of such interest shall be forthwith notified of such failure, and thereafter such interest shall be payable to the treasurer, to be applied, if necessary, to the payment of such liabilities.

"16. If the said company fail to pay any of its liabilities on said policies, according to the terms of the policies, after the said liabilities shall have been adjusted between the parties in the mode prescribed by the policies, if a mode be prescribed thereby, or after the same shall have been ascertained in any mode agreed upon by the parties, or by judgment, order or decree of a court having jurisdiction of the subject, the treasurer shall, upon the application of the party to whom the debt or money is due, proceed to sell at auction such an amount of the said bonds as, with the interest in his hands, will pay the sum due and expenses of sale, and out of the proceeds of sale pay said sums and expenses; provided, that the party making application shall give to the company, or to the agent of the company in this State, twenty days' notice of his intention to make the same; and provided, further, that such company shall be required forthwith to make good any deficit in the amount of its deposit caused by such sale.

"17. Upon the bonds deposited as aforesaid with the treasurer by any such insurance company, the holders of all policies of said company made with residents of this State shall have a lien for the amounts due them respectively under, or in consequence of, such policies for losses, equitable value, return premiums or otherwise, and shall be entitled to be paid ratably out of the proceeds of said bonds, if such proceeds be not sufficient to pay all of said policyholders; and whenever any such company, depositing bonds as aforesaid, shall have become insolvent or bankrupt, or shall have made an assignment for the benefit of its creditors, any holder of such policy shall have the right to file a bill in the circuit court of the city of Richmond to enforce the said lien for the benefit of all the holders of such policies. The treasurer shall be a party to the suit, and the fund shall be distributed by the court.

"18. Where the principal of any said bonds so deposited is paid to the treasurer, he shall notify the company, or its agent in this State, and pay the money so received to the said company upon receiving other bonds, of the character named in section fourteen of this chapter, to an equal amount; or upon the failure of the company, for thirty days after receiving said notice, to deliver such bonds to an equal amount to the treasurer he may invest the said money in any such bonds, and hold the same as he held those which were paid off."

"In section 19 it is further provided that if such company cease to carry on business in this State, and its liabilities, whether fixed or contingent, upon its policies to persons residing in this State, shall have been satisfied, or shall have terminated, upon satisfactory evidence of the fact to the State Corporation Commission, it may direct the treasurer to deliver to such company the bonds in his possession be'ong-

ing to it or of such of them as remain after paying the liabilities aforesaid; or, if such company shall reduce the amount of its liabilities, both fixed and contingent, upon its policies to persons residing in this State, below the value of the bonds in the possession of the treasurer, he may, on the order of the State Corporation Commission, deliver to such company a part of such bonds, taking care, however, that the bonds in his possession shall always be equal in value to the liability of said company upon its policies to persons residing in this State; or, if such company cease to carry on business in this State, and its fixed liability for losses and for taxes, fees and other charges shall have been satisfied, and the contingent liabilities under its policies have been assumed by another company doing business in this State, in case such reinsuring company, if non-resident, has deposited with the treasurer bonds not less in value than those of the company proposing to retire, the State Corporation Commission, upon being satisfied of these facts shall * * * direct the treasurer to deliver to such company proposing to withdraw the bonds in his possession belonging to it."

I have fully quoted the statutes in order that the honorable assistant secretary of the treasury department may have before him the provisions upon which this opinion is based.

By the very terms of the aforesaid statute, it is clear that the deposit is treated as a trust fund for the benefit of the policy holders who are residents of this State, for it is provided in section 17 of chapter 2 that the holders of all policies of said companies, made with residents of this State, shall have a lien upon the bonds deposited with the treasurer for the amounts due them respectfully, under or in consequence, of such policies for losses, equitable values, return premiums or otherwise, and shall be entitled to be paid ratably out of the proceeds of said bonds if said proceeds be not sufficient to pay off all of said policy holders; and the statute gives the right to a policy holder of an insolvent company to file a bill in the circuit court of the city of Richmond to enforce the lien for the benefit of all the holders of such policies. And it is further provided, in section 16, that the treasurer, upon the application of a party to whom the debt or money is due under the policy, but which the company has failed to pay, shall proceed to sell at auction such an amount of said bonds which, with the interest in his hands, will pay the sum due and the expenses of sale, and out of the proceeds of sale pay said sums and expenses.

From the further provisions quoted above, it is perfectly apparent that the policy holders who are intended to be protected by the act are policy holders who are residents of this State, for we find in section 19, treating of the same subject, that the language is "liabilities * * * upon its policies to persons residing in this State." Lower down in the same section, we find the following language: "If such company shall reduce the amount of its liabilities, both fixed and contingent, upon its policies issued to persons residing in this State," &c.

Therefore, answering specifically the inquiry above set out, I would state that this office regards the deposit of \$28,000.00 in bonds now being carried by the American Surety Company in the insurance department as a special deposit intended primarily for the benefit and protection of the policy holders of the American Surety Company residing in the State of Virginia, in event of the failure of said company to pay any debt or money due on its policies, or in event of the distribution of the assets of said company.

Very truly yours,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

INSURANCE—*Deposit of Bonds with State Treasurer—Attachment thereof. Acts 1906, Ch. 112, Chap. 3 (9).*

Any life insurance company incorporating under the laws of this State as a stock company, is required to deposit with the treasurer of the State not less than \$50,000 of solvent bonds, and when the company complies with this provision of the law such deposit is held as a guarantee of good faith on the part of the company and is subject to attachment by the policy holders in the State of Virginia or elsewhere, such attachment to be brought in accordance with the laws of the State of Virginia.

RICHMOND, VA., May 7, 1915.

HON. J. N. BRENNAMAN,
Deputy Commissioner of Insurance,
Richmond.

DEAR SIR:

In the absence of the Attorney General, I am endeavoring to wind up some matters on his desk, and find your letter of January 12th, in which you state that the Security Life Insurance Company of America has deposited with the treasurer of Virginia \$104,000.00, under the provisions of chapter 3 of the act concerning corporations, found in vol. 3 of the Code, at p. 611.

Section 9 of chapter 3 of said act provides as follows:

"Any company availing itself of the four preceding sections shall deposit with the treasurer of the State not less than fifty thousand dollars of solvent bonds of the character required by this act: provided, companies availing themselves of the provisions of the four preceding sections may deposit solvent bonds to the amount of one hundred thousand dollars."

The question which you ask is whether the sum of \$104,000.00 so deposited with the treasurer, in accordance with said act, is held for the benefit of the Virginia policy holders or whether the same is held in trust for all of the policy holders of the company everywhere.

It is my opinion that this sum is held as a guarantee of good faith on the part of the companies referred to in said chapter, and that said sum is subject to attachment by the policy holders, whether in the State of Virginia or elsewhere, such attachment to be brought in accordance with the laws of the State of Virginia. In other words, I distinguish between the fund provided by section 9, chapter 3, and the fund referred to in chapter 2, which latter is held in trust for the policy holders residing in the State of Virginia.

Very truly yours,

CHRISTOPHER B. GARNETT,
Assistant Attorney General.

INSURANCE—*Underwriters agencies—Forms of fire insurance policies required when issued through underwriters agencies—Bonds to be deposited by underwriters agencies and licenses to be paid for doing business in this State. Va. Code 1904, Tax Bill, Secs. 23 and 26. Acts 1915, Ch. 25.*

In the case of a fire insurance company issuing its policies through an underwriters agency, the name of the former on the filing back should be printed in large letters and the name of the latter in smaller letters.

Forms of certain policies examined, and held not in compliance with the law.

All underwriters agencies doing business in this State must make the additional deposit provided for by law (Acts 1915, Ch. 25) and must pay the specific license, tax of two hundred dollars required by such law and that if an underwriters' agency or insurance company wishes to escape the paying of such tax, then the insurance companies must no longer permit business to be done in this State through underwriters agencies.

RICHMOND, VA., *June 15, 1915.*

HON. JOSEPH BUTTON,
Commissioner of Insurance,
Richmond.

DEAR SIR:

You have referred to this department certain questions concerning the law recently passed, entitled "An Act relating to the issuance of fire insurance policies through an underwriters' agency, and providing a penalty for its violation," found in chapter 25, Acts 1915, p. 49. I shall attempt to answer your questions in the order in which they have been set out in your letter.

"1. Are the forms of underwriters' policies issued by single companies, such as the German-American, American Insurance Company of New Jersey, Royal Exchange Assurance and Camden Fire Insurance Company, prohibited by this act?

With this question you have submitted forms of underwriters' policies issued by the American Insurance Company of Newark, N. J., German-American Insurance Co. of New York, the Royal Exchange Assurance of London, and the Camden Fire Insurance Association of Camden, N. J. The form of these policies, so far as pertinent to this inquiry, and the endorsements on the filing back are as follows:

A

"THE AMERICAN INSURANCE COMPANY
of Newark, New Jersey.

In consideration of the stipulations herein named and of
Dollars premium does insure..... for the term
of.....," etc.

The endorsement on the filing back is as follows:

"THE AMERICAN INSURANCE COMPANY
Newark, N. J.

The Jersey Fire Underwriters Department."

B

The contract of the German-American Insurance Company of New York is as follows:

"GERMAN-AMERICAN INSURANCE COMPANY
of New York.

In consideration of the stipulations herein named and of
dollars premium does insure..... for the term
of.....," &c.

The endorsement on the filing back is as follows:

“VIRGINIA POLICY.

GERMAN-AMERICAN INSURANCE COMPANY
of New York
Issued through the
ROCHESTER GERMAN DEPARTMENT
Rochester, New York.”

C

The Royal Exchange Assurance policy, or contract, is exactly in the same form as the German-American Insurance Company of New York, and the endorsement on the filing back is practically the same, except that it shows that the policy is “Issued through” the Exchange Underwriters Agency, United States branch office, 92 William street, New York.

D

The contract of the Camden Fire Insurance Association is in practically the same form as the last two mentioned, but on the filing back is the following endorsement:

“CAMDEN FIRE INSURANCE ASSOCIATION
of Camden, New Jersey
Issued through
EASTERN UNDERWRITERS AGENCY.”

It is to be observed in this latter case, however, that the name of the Camden Fire Insurance Association is written in small caps; the words “Issued through” are written in still smaller print, whereas the name of the Eastern Underwriters Agency is written in very large caps.

I can find no objection under the act aforesaid to the face of the policy in any of the before mentioned policies; nor so far as the exact wording on the filing back can I find any objection, but in the case of the Camden Fire Insurance Association, the print of the matter on the filing back is objectionable to one provision of the aforesaid act, to-wit:

“There shall not appear * * * on its filing back anything that would indicate that it is an obligation of any other than the company responsible for the payment of losses under the policy.”

In order to carry out the spirit of the aforesaid provision, I would suggest that, in the case of the Camden Fire Insurance Association issuing its policies through the Eastern Underwriters Agency, the name of the Camden Fire Insurance Association on the filing back should be printed in large letters and the name of the Eastern Underwriters Agency should be in smaller letters, for, in the form in which the endorsement is now on the back, an inference might be made that it was an obligation of the Eastern Underwriters Agency rather than of the Camden Fire Insurance Association.

“2. Are the forms submitted for a joint policy of two companies, such as the Continental-Fidelity-Phenix policy, herewith submitted, which form of policy is

entitled 'Fidelity Underwriters Policy' and the 'Insurance Company of North America—Fire Association of Philadelphia,' form entitled, in addition to the name of the companies 'Philadelphia Underwriters Policy' prohibited by the Act?"

You have submitted with this second question the form of a policy which reads as follows:

"FIDELITY UNDERWRITERS POLICY
Separate Insurance by two Companies in one Policy.

THE CONTINENTAL INSURANCE COMPANY OF NEW YORK
(A Stock Corporation)
THE FIDELITY-PHENIX FIRE INSURANCE COMPANY OF NEW YORK
(A Stock Corporation)

In consideration of the stipulations herein named and of.....
dollars premium does insure.....for the term
of.....," &c.

The endorsement on the filing back is as follows:

"FIDELITY UNDERWRITERS POLICY
Underwritten by the
CONTINENTAL INSURANCE CO. OF NEW YORK
and the
FIDELITY-PHENIX FIRE INSURANCE COMPANY OF NEW YORK."

I think that the form of the above policy is on its face contrary to the terms of the aforesaid chapter 25, Acts 1915. The first provision of said act is as follows:

"Every fire insurance company shall conduct its business in this State in the name by which it is incorporated, and the policies issued by it shall be headed or entitled by such name. There shall not appear on the face of the policy or on its filing back anything that would indicate that it is an obligation of any other company responsible for the payment of losses under the policy, and the name or names of any fire insurance companies issuing policies through an underwriters' agency shall be stamped or printed on each policy issued by such underwriters' agency, and shall show on each such policy the name of such company or companies, and, where there is more than one company, their proportion of liability under said policies shall be distinctly stated therein."

Examining the face of the aforesaid policy with reference to this provision, the most noticeable feature on the face of the policy is the following:

"FIDELITY UNDERWRITERS POLICY."

and the next most noticeable feature is the star in the centre of the page on which appears the following:

"FIDELITY UNDERWRITERS OF NEW YORK."

Then, when we come to consider the terms of the contract, although the policy is of two companies, the language is framed in the singular, to-wit, "Does insure." Of course it must be admitted that a close examination of the contract and of the

signatures thereto will show that the contract is a contract of the Continental Insurance Company of New York and of the Fidelity-Phenix Fire Insurance Company of New York; but there certainly appears on the face of the policy some things that would indicate that the policy is an obligation of other than the companies responsible for the payment of the losses under the policy.

When we come to examine the filing back, the same objection is found, not only in the exact terms used on the filing back, but also in the size of the print. I think it would be proper for you to require the form of the policy, as well as the filing back, to be changed so as to omit from the face of the policy any reference to the Fidelity Underwriters of New York, and to require that the policy should show on its filing back clearly that it was an obligation of the two companies, issued through the Fidelity Underwriters, giving prominence rather to the names of the companies than to the name of the Fidelity Underwriters.

With this same question you have submitted form of a policy which reads as follows:

“THE PHILADELPHIA UNDERWRITERS POLICY.

INSURANCE COMPANY OF NORTH AMERICA
Stock Company
FIRE ASSOCIATION OF PHILADELPHIA
Stock Company

In consideration of the stipulations herein named and of
dollars premium does insure.....for the
term of.....," &c.

And on the filing back, we find the following language:

“PHILADELPHIA UNDERWRITERS POLICY
Underwritten by the
INSURANCE COMPANY OF NORTH AMERICA
and the
FIRE ASSOCIATION OF PHILADELPHIA,
Both of the City of Philadelphia, Pa.”

The objections made to the last form of policy examined applies with equal force here, and the same recommendations are made as to changes in the form of policy and on the filing back.

“3. Are the companies using the forms not prohibited and underwriters agencies within the scope of the Act required to make the additional deposits provided for by the Act?”

4. Your fourth question, which will be answered with the third, is in effect as follows:

“Does the aforesaid act permit the collection of the annual specific license tax of \$200.00 from companies operating underwriters agencies when said companies have heretofore paid the license tax on gross premium provided for by chapter 77 of Acts of 1915, p. 106, amending and re-enacting sections 23, 24 and 26 of an Act entitled ‘An Act to raise revenue for the support of the government,’ &c.

Section 23 aforesaid, as amended, provides as follows:

"Every person, partnership, company or corporation which contracts on his, their or its account to issue policies or contracts for or agreements for life, fire * * * and all like insurance shall pay an annual license tax based on the gross premium income derived from business in this State during each year ending the 31st day of December prior to the year for which such license tax is to be paid for the privilege of doing business in this State."

And in section 26, it is further provided as follows:

"The license tax on gross premiums as provided in section twenty-three and the tax on real estate and tangible property herein provided to be paid by every person, partnership, company or corporation doing such an insurance business in this State, shall be in lieu of all other license fees, taxes or levies whatsoever for State, county, municipal or local purposes, which shall be construed to include their agents, except that the certificate fee of one dollar required to be paid by all such agents to the bureau of insurance shall be paid by them as heretofore."

It is to be noted that, by the terms of sections 23, the license fee is only required of persons, partnerships, companies or corporations which contract to issue policies or contracts for or agreements for life, fire and other insurance. Chapter 25 of the Acts of 1915, referred to above, provides as follows:

"Before an underwriters' agency shall deliver, or cause to be delivered, a policy in this State it shall pay an annual specific license tax of two hundred dollars for the privilege of doing business in this State as an underwriters' agency, and shall also deposit with the State treasurer bonds equal in amount to those deposited by the company or companies whose policies they issue, as required by section fourteen, chapter two of 'An act concerning the bureau of insurance,' approved March ninth, nineteen hundred and six, and no company shall be permitted to issue an underwriters' policy, or be a party thereto, which has not complied with all of the laws now in force relative to fire insurance companies. Provided, that nothing herein shall be construed to exempt any fire insurance company from the payment of the license tax on premiums required by the laws of this State."

In defining what is meant by the term "underwriters agency," the following language is used:

"The words 'underwriters' agency,' as used in this act, shall be held to apply to a company or companies who issue policies severally or jointly under a name other than their own corporate name, or under a contract or agreement with any individual, partnership, corporation or association through whom such policies may be issued."

The language of this definition is ambiguous and unfortunate; but in view of the well established practice which I understand existed in this State prior to the passage of this act, the language of the act must be construed with reference to the facts, and also with reference to the obvious intention of the whole act, gathered not only from this definition, but from other provisions thereof.

It is obvious that the act makes a clear distinction between contracts of insurance written directly by a company without the intervention of an underwriters agency and contracts of insurance written or issued through underwriters agencies. It is also perfectly clear that the act makes a distinction between an insurance company and an underwriters agency.

It is also perfectly apparent that fire insurance companies since the passage of

the aforesaid chapter 25 must conduct the business in this State in their own names, and cannot issue policies which purport to be contracts of other corporations, persons or partnerships.

It is also clear from said act that while a company cannot issue a policy under any other name than its own, the law contemplates that the two companies may issue joint policies through an underwriters agency, or that a single corporation may make an agreement with an underwriters agency and issue policies through such agency, but in the name of the insurance company.

It is contended for the Hartford Fire Insurance Company, and in a note submitted to you by Mr. J. H. Doyle for the underwriters, that chapter 25, so far as it requires a deposit with the State treasurer of bonds and the payment of an annual specific license tax of \$200.00 by underwriters agencies is not applicable either to the Hartford Fire Insurance Company or to the other underwriters agencies referred to above, and the chief ground of the contention is the definition given in the act, which it is claimed is not applicable to underwriters agencies now doing business in this State. The purposes of that act (chapter 25) seems to be twofold. First, to prevent deception of the policy holder or mistake by him as to who is the insurer. To this end the form of some policies heretofore used in connection with underwriters agencies is condemned. Second, to require underwriters agencies doing business in this State to pay specific license taxes and deposit bonds with the State treasurer. That the latter provision was not intended to relieve the companies from the payment of license taxes is perfectly apparent from the proviso contained therein "that nothing herein shall be construed to exempt any fire insurance company from the payment of the license tax on premiums required by the laws of this State"; and, conversely, it must be perfectly apparent that the license tax required from fire insurance companies was not intended to exempt underwriters agencies from the tax imposed by chapter 25.

From these considerations, it seems to be arguing in a circle to say that the legislature passed a bill specifically taxing underwriters agencies which were known to exist and do business in this State and to provide that this specific tax should not take the place of license tax of insurance companies, but at the same time so worded its statute as to not make it applicable to any underwriters agency doing business in this State.

I am, therefore, constrained to hold, in answer to your third and fourth questions above set out, that all underwriters agencies doing business in this State must make the additional deposit provided for by chapter 25 aforesaid, and must pay the specific license tax of \$200.00 required by said chapter; and that if an underwriters agency or insurance company wishes to escape the paying of such tax, then the insurance companies must no longer permit business to be done in this State through underwriters agencies.

Respectfully submitted,
CHRISTOPHER B. GARNETT,
Assistant Attorney General.

INTOXICATING LIQUORS—*Sale of intoxicating cider. Acts 1908, Ch. 189 (14).*

A person who neither grows nor buys fruit from which cider is made cannot sell cider which will produce intoxication either in local option territory or in territory in which a license to sell ardent spirits at retail has not been granted.

RICHMOND, VA., *January 11, 1915.*

HON. H. DILLARD,
*Commonwealth's Attorney,
Chatham, Va.*

DEAR SIR:

Your letter of December 31st received. In response to your question as to my interpretation of section 14 of the Byrd Law, being as found in the Acts of 1908, Ch. 189, will say that I agree with you that, under the section referred to, a person who neither grows nor buys fruit from which the cider is made cannot sell cider which will produce intoxication, either in local option territory or in territory in which license to sell ardent spirits at retail has not been granted.

It is true that the language used in this section referred to is much involved and can be understood only after close study, yet after such study is given it, I cannot see that any conclusion can be reached other than that which you have reached and in which I concur.

Very truly yours,
JNO. GARLAND POLLARD,
Attorney General of Virginia.

LABOR LAWS—*Children—Employment in offices of restricted establishments. Acts 1914, ch. 339.*

No child may work in the "office" of any establishment wherein it is prohibited from working by law.

RICHMOND, VA., *July 20, 1915.*

HON. JAMES B. DOHERTY,
*Commissioner of Labor,
Richmond, Va.*

DEAR SIR:

In the absence of the Attorney General, I am replying to your letter of recent date, inquiring whether, under the Child Labor Law, chapter 339, Acts 1914, it is permissible for boys under twelve years of age to be employed in offices.

The title to the aforesaid act is as follows: "An Act to regulate the employment of children in factories, mercantile establishments, workshops and laundries, and as messengers or in selling or distributing newspapers and other periodicals."

Section 1 provides that: "No child under the age of fourteen years shall be employed, permitted or suffered to work in any factory, workshop, mine, mercantile establishment, laundry, bakery, brick or lumber yard."

Section 2 provides that: "No child under the age of sixteen years shall be employed, permitted, or suffered to work in, about or in connection with any establishment or occupation named in section one" during certain hours.

As this statute has not been construed by the courts, and it is the function of the court in a given case to construe such a statute, the opinion of the Attorney General's office can be binding upon no one and would have merely a persuasive effect. In view of the fact that the case may be one for judicial construction, and therefore one in which the courts might construe the opinion of the Attorney General as encroaching upon their prerogatives, I can only call your attention, in a brief manner, to some of the principles by which the courts will be governed in reaching a conclusion.

Unless a child be employed by his parent, it is perfectly clear that no child under

fourteen years of age may be employed, permitted or suffered to work in any factory, workshop, mine, mercantile establishment, laundry, bakery, brick or lumber yard. The implication is clear, therefore, that children under twelve years of age may be employed or suffered to work in other places than factories, workshops, mines, mercantile establishments, laundries, bakeries, brick or lumber yards. But suppose a child is employed in the office of a factory, workshop, mine, mercantile establishment, laundry, bakery, brick or lumber yard, does this violate the statute?

It may be noted that if a child under twelve years of age be employed in the office of a lawyer, doctor, dentist, school or other establishment than those enumerated, then there would be no violation of the law. Therefore, the question which would have to be solved by the court is whether the intention of the statute was to exclude children from employment in heavy manual labor, such as would be required in any of the above establishments, and to allow them to do incidental work connected with offices, or did the statute intend to prohibit children from being employed in any kind of labor in connection with the enumerated establishments.

On the one hand, it is a well known canon of statutory construction that penal statutes should be strictly construed in favor of the accused. *Harris v. Commonwealth*, 81 Va. 240. On the other hand, we have the broad policy of the Child Labor Laws which requires that they should be given a liberal construction. 15 Am. & Eng. Enc. of Law, 2nd ed. 474.

I am inclined to think that it is the general policy of the statute to prevent children under twelve years from being employed in connection with any operations of the establishments mentioned, including the offices, because work in connection with the offices of such establishments requires that the child should go into the factory proper, and the child will be subjected to some of the evils from which the statute evidently intended to guard him.

Very truly yours,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

LABOR LAWS—*Children—Newspaper selling—Punishment of parents.* Va. Code 1904, Sec. 3902. Acts 1914, Ch. 339 (5.)

Any boy under ten years of age and any girl under sixteen years of age who shall in any city in this State of five thousand population or more distribute, sell, expose or offer for sale newspapers, magazines or other periodicals in any street or public place is guilty of a misdemeanor and punishable by fine or imprisonment or both in the discretion of the judge or jury trying the case; but no punishment can be visited therefor upon the parent, guardian or employer of such child.

RICHMOND VA., October 10, 1914

HON. JAS. B. DOHERTY,
Commissioner of Labor,
Richmond.

DEAR SIR:

Yours of October 6th received. Section 5 of chapter 339 of the Acts of 1914 reads as follows:

"No boy under ten years of age and no girl under sixteen years of age shall, in any city in this State of five thousand population or more, distribute, sell, expose, or offer for sale newspapers, magazines or other periodicals in any street or public place."

Section 6 of the same act prescribes the penalties for violations of certain provisions of the act, but prescribes no penalty for violation of section 5, nor is there any other part of the act wherein penalties are prescribed for the violation of said section.

The question, therefore, arises whether any child, or the parent or guardian of any child, can be punished for violation of section 5.

Section 3902, Va. Code 1904, provides as follows:

"A misdemeanor for which no punishment is prescribed by statute shall be punished by fine or confinement in jail, or both, in the discretion of the jury or of the court trying the case without a jury."

The next question, therefore, arises whether the violation of section 5 is a misdemeanor. Section 3879, Va. Code 1904, reads as follows:

"Offences are either felonies or misdemeanors. Such offences as are punishable with death or confinement in the penitentiary are felonies; all other offences are misdemeanors."

I am of the opinion that any act which violates a statute is an offence within the meaning of the section last quoted; and, inasmuch as the offence prescribed is not a felony, it follows as a matter of course that it is a misdemeanor.

The next question, therefore, arises as to whether the penalty prescribed in section 3902, above cited, can be imposed for the violation of the said section 5 of chapter 339, Acts 1914. It will be noted that section 3902 provides that where no penalty is provided by statute for a misdemeanor, a fine or imprisonment, or both, shall be imposed in the discretion of the jury, or of the court trying the case without a jury. You will note that the statute uses the word "court." I think the term as here used is broad enough to include a justice of the peace.

It seems to be the general policy of the laws regulating the employment of children to visit the penalties for violations upon the parent or guardian and employer; but note that section 5 does not prohibit a parent or guardian from allowing a boy under ten or a girl under sixteen to sell newspapers, but it prescribes that no boy * * * or girl * * * shall * * * sell * * * &c. The penalty, therefore, if imposed at all, would have to be imposed on the boy or girl violating the act.

While the foregoing are the conclusions I have reached, I shall have to confess that the question is not free from doubt. I therefore think it not improbable that, upon a test case, the court may reach a conclusion contrary to the one herein expressed.

Very truly yours,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

LABOR LAWS—*Mine Inspectors—Right to carry concealed weapons. Va. Code 1904, Sec. 3780. Acts 1912, Ch. 178.*

Since a mine inspector is a police officer, he is permitted while in the actual discharge of his duties to carry concealed weapons.

RICHMOND, VA., *April 28, 1915.*

HON. JAMES B. COHERTY,
Commissioner of Labor,
Richmond.

DEAR SIR:

In the absence of the Attorney General I am endeavoring to close up some matters which I find upon his desk, and I find your letter in which you request his opinion as to the right of a State mine inspector to carry concealed weapons. The first question to be solved is whether a State mine inspector is a police officer. By Acts 1912, chapter 178, page 419 (Supp. 1912, page 288) the department of mines was created under the control of the Bureau of Labor, having for its purpose the supervision of the execution and enforcement of all laws enacted for the safety of persons employed within or at mines within the limits of the Commonwealth, and the protection of mine property and other property used therewith, the said department to be put in charge of an official known as the State Mine Inspector. It is made the duty of the inspector to visit each mine every six months or oftener, to make a personal examination of the interior and outside of the mine where any danger may exist to the workmen and to see that the provisions of the mining statute are carried out. The said mine inspector is given authority under a proper state of facts, to order a mine which is not safe, or in improper condition, to be closed.

Since the ordering of mines to be closed is done in the furtherance of public health and public safety, it seems clear that the State mine inspector is a police officer. *Roanoke Gas Co. v. Roanoke*, 88 Va. 810; *Ex parte Dickey*, 66 L. R. A., 928, and *Louisville v. Wehmhoff*, 76 S. W., 876, 881.

It is provided by section 3780, Va. Code 1904, page 671, that any police officer, while in the discharge of his official duty, is excepted from the terms of the statute making it a misdemeanor to carry concealed weapons. As, therefore, a State mine inspector seems to be a police officer, and his official duties correspond very closely to the duties of other police officers, I would conclude that probably the courts, if the question ever arose, would decide that such an officer, in the discharge of his official duties, could not be convicted for carrying a concealed weapon. However, as there has been no adjudication of the courts upon this statute, the question is not entirely free from difficulty, and I do not know but that it would be better for the State mine inspector to apply to a court, preferably the hustings court of the city of Richmond, for the privilege. If he were granted the privilege by one court, I am sure that no question would ever be raised thereafter.

Very truly yours,

CHRISTOPHER B. GARNETT,
Assistant Attorney General.

LICENSES—*Automobiles—Printing—Departmental expenditures—By whom paid. Va. Code 1904, Sec. 275. Acts 1910, Ch. 326.*

All expenses incident to the cost of mailing the license number plates to automobile owners are to be paid by the Secretary of the Commonwealth, and such expenses include labels used in mailing; blanks containing information prerequisite to the granting of the licenses and forwarding the plates; and envelopes used in mailing the application blanks; but cards used as evidence of the payment of the required automobile license fees must be paid for by the Superintendent of Public Printing.

RICHMOND, VA., August 25, 1915.

HON. DAVIS BOTTOM,
*Superintendent of Public Printing,
Richmond.*

DEAR SIR:

In response to your inquiry as to what printing should be paid out of the funds appropriated to your department for envelopes, labels, cards, etc., furnished the Secretary of the Commonwealth in the performance of his duties under section 19 of the Automobile Law, Acts 1910, Ch. 326, pp. 305-10, will say that the section referred to, so far as applicable to the question propounded, reads as follows:

"All fees collected by the Secretary of the Commonwealth, under the provisions of this act, after the payment of the necessary expenses incident to the cost of purchasing number plates and paying cost of mailing same, shall be paid into the State treasury," etc.

Your Mr. Atkinson to-day exhibited to me certain printed matter used in this connection, and has requested me to advise you which of this matter, if any, should be paid for by the Secretary of the Commonwealth out of the fees collected under the foregoing provision. This printed matter is as follows:

1. A label marked, "From the Office of the Secretary of the Commonwealth, Richmond, Virginia," &c. This label, I understand, is used in mailing the number plates to automobile owners. It is, therefore, clearly within the language of the act, being incident to the cost of mailing the plates. This item should, therefore, be paid by the Secretary of the Commonwealth out of the fees referred to.

2. You have also submitted printed matter as follows:

"Automobile and Motorcycle Application," form S. C.

"Dealer's Application," form S. C. 223.

"Chauffeur Application," form S. C. 226.

As I understand it, all of these blanks are filled in and sent to the Secretary of the Commonwealth in order that he may have the information prerequisite to the granting of the licenses and forwarding of the plates. These forms are, therefore, in my opinion, within the language of the statute, being incident to the cost of mailing the plates, and should be paid for by the Secretary of the Commonwealth out of the fees collected under the statute quoted. I am aware of the fact that, so far as the chauffeur is concerned, no number plate is furnished him, but in lieu thereof he is furnished a badge under section 3 (c) of the act, which badge bears a number. While these badges do not strictly come within the language of the statute, yet I think it is the evident purpose of the law to allow the Secretary of the Commonwealth to pay out of the fees collected by him the cost of these badges or plates and the cost incident to mailing same.

3. As to the envelope marked "Form S. C. 148," &c., I am informed that these envelopes are used in mailing the blank applications above referred to to automobile owners, dealers and chauffeurs, and, inasmuch as these applications are incident to the mailing of the plates, I am of the opinion that they should also be paid for by the Secretary of the Commonwealth out of the fees aforesaid.

4. In addition to the foregoing, you have exhibited to me three cards, being forms S. C. 223, S. C. 234 and S. C. 224. These cards, as I understand it, are used by automobile owners, chauffeurs and dealers respectively as evidence of the fact that they have paid the license fees required under the Automobile Law. They have no relationship either to the payment of the necessary expenses incident to the

furnishing of number plates nor in paying the cost of mailing same. They cannot, therefore, be paid for by the Secretary of the Commonwealth under the provisions of the act referred to. These forms should be paid for by you under section 275 of the Code, as amended Acts 1914, p. 296, providing as follows:

“He (the Public Printer) shall supply all the officers, departments, boards and institutions located at the seat of government * * * with such printing, stationery, lithographing, ruling and binding as may be required by them in their several departments for the proper conduct of the business of the State.” * * *

Very truly yours,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

LICENSES—Circus—Performances during annual fair time—Meaning of “outside of” fair grounds. *Va. Code 1904, Tax Bill, Sec. 109½.*

Under a statute requiring an additional license fee of a circus showing in the open air or in tents outside of the enclosure of a fair association one week previous to, or during the week, or one week after the time in which the regular annual fair of such association is fixed to be held, a license is required of a circus so held anywhere in the same county in which the fair is held.

RICHMOND, VA., *October 5, 1915.*

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

DEAR SIR:

You have referred to this office letters of Henry E. Coleman, commissioner of the revenue Mecklenburg county, and Mr. C. E. Geoghegan, involving the question as to whether a circus which exhibits in the county of Mecklenburg, at Clarksville, Va., during the week of the county fair of Mecklenburg county at Chase City should be required to pay the additional license fee provided for by Sec. 109½ of the Tax Bill, amended by Acts 1915, p. 258, the said town of Clarksville being twelve miles distant from the town of Chase City, where the agricultural fair will be held.

Sec. 109½ of the Tax Bill, aforesaid, provides as follows:

“That all traveling circuses, carnivals, or shows giving performances in the open air, or tents, outside of the enclosure of any and all agricultural fair associations or corporations for one week previous to, or during the week, or one week after the time in which the regular annual fairs of such associations or corporations are fixed to be held, or are held, shall pay a license tax of two hundred and fifty dollars for each performance, in addition to the taxes now required by law; and the commissioner of the revenue shall so assess them, and require payment thereof to the county or city treasurer before allowing such performance.”

You will note that the effect of the foregoing statute is to require an additional license fee of a circus showing in the open air or in tents *outside of the enclosure of the fair association* one week previous to, or during the week, or one week after the time in which the regular annual fair of such association is fixed to be held.

It is argued that the above language should be construed to mean *immediately* outside of the enclosure of the fair association. That such construction is not correct

is evident from the following considerations: (1) That would be reading in the law language not found therein; (2) if a circus were to show inside of the fair grounds the week before, or during the week, or the week after the fair, it would not be required to take out an additional license; but the law says clearly that if it is not shown inside but outside of the grounds it would be required to take out a license. Now the law does not say at what point outside, nor does it say at what distance outside of the fair grounds, but simply outside of the grounds. If it be construed to mean that if a tent abuts the fair grounds it must pay a license, but if the tent is ten feet away it must not pay a license, then by the theory of the diminishing heap we see the fallacy of this position. (3) It will be noted that the prohibition is not one against showing outside of the fair grounds, but is in prevention of a show being exhibited the week before, the week of or the week after the fair. This provision of the law shows clearly that the intention is to prevent competition with the fair association and this competition is to be prevented not only while the fair is being conducted, but before and after the time of the fair.

It seems clear, therefore, that in the instant case the circus should be required to pay the additional license tax if it shows anywhere in Mecklenburg county the week before, the week of, or the week after the fair.

Yours very truly,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

LICENSES—Cities and towns—Power to require a license where State does not—General power of taxation. Acts 1889-90, ch. 440.

Where the legislature grants to a city or town the general power of taxation, such city or town has authority to require a license on a business conducted in the city or town, if not withheld from taxation by the legislature, although no license was required for such business by the State.

RICHMOND, VA., *September 7, 1915.*

HON. NELSON SALE, *Mayor,*
Bedford City, Va.

DEAR SIR:

In the absence of the Attorney General I am replying to your letter asking the opinion of this office as to whether the town of Bedford City has the power to require a license of an optician who practices his art in that town?

Incidentally, I have examined the correspondence between Hon. C. Lee Moore, Auditor of Public Accounts, and J. H. Burnstine, who represents the Tru-Sight Optical Co., and do not find any letter indorsed by me which is inconsistent with the opinion which I shall express in this letter.

Under the charter of Bedford City, Acts 1889-90, ch. 440, p. 761, the power of taxation granted to the town council is defined as follows:

17. "To meet any expenditures that may be lawfully chargeable to said town for general purposes, and for schools, the council may, at such times as seem best, levy a town levy of so much as in its opinion may be necessary upon all taxable persons and property in said town not exempt from taxation by the laws of this state; * * *

"18. The council may levy a tax on licenses to agents of insurance companies, * * * and to persons engaging in any other business for which a license may be required by the laws of the state." * * *

The power of taxation granted in section 17 above is what is known as the general power of taxation and it has been consistently held in Virginia that where the legislature grants to a town or city the general power of taxation, it grants all the power possessed by itself in respect to the imposition of taxes, and that, therefore, such town or city can impose taxes in its discretion upon all subjects within its jurisdiction not withheld from taxation by the legislature, whether they be taxed by the State or not, and that such town or city has, under the general power, authority to impose a license on a business conducted in the city if not withheld from taxation by the legislature, although no license was required for said business by the State. Accordingly it has been held that, although the State requires no license, a town or city may impose a tax on the business of publishing a newspaper or upon oil companies keeping storage tanks and warehouses within a town or city from which they deliver oil by wagons to their customers. *Norfolk v. Norfolk Landmark Co.*, 96 Va. 564; *Standard Oil Co. v. Fredericksburg*, 105 Va. 82.

Accordingly under the powers of the town of Bedford City, granted by its charter, the town of Bedford City has what is known as the general power of taxation, and may require a license tax even in cases where the State does not impose a tax, and it would be entirely proper for the town of Bedford City to require a license tax of an optician for practicing his art within the town of Bedford City. This is an entirely different proposition from the case which was put to the Auditor by Mr. J. H. Burnstine, as to his power to sell by sample eye glasses, spectacles and optical goods without taking out a license where the sale by sample occurred.

A copy of this letter will be sent to the Auditor of Public Accounts.

Yours very truly,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

LICENSES—Contractors—Basis of computing amount to be paid. *Va. Code 1904, Tax Bill, Secs. 90 and 91.*

In computing the license tax required of contractors the basis of the tax is the acceptance of contracts regardless of the work done under the contracts, or even regardless of whether the work is ever done, and in computing the license to be taken out the contractors must contemplate as best they can the probable amount of contracts into which they will enter during the year for which the license is taken out, but they must at all times have a license sufficient to cover the amount of contracts into which they have entered for that year.

RICHMOND, VA., *September 21, 1915.*

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

DEAR SIR:

You have referred to this office a letter received by you from Mr. Joseph B. Anderson, commissioner of the revenue, Danville, Va., in which is the following statement of facts:

A contractor took out a contractor's license for the year ending April 30, 1915, on orders or contracts exceeding \$150,000, paying therefor a license tax of \$150.00. The contracts accepted during that year amounted to several hundred thousand dollars, and the work under these contracts is now being executed and cannot be

completed for some months to come. The payment of a license tax for the year ending April 30, 1916, has been demanded and is refused upon the ground that no more contracts have been entered into since the above mentioned license was taken out. You desire to know of this office whether a license can be required upon these facts for the year ending April 30, 1916?

Va. Code 1904, Tax Bill section 90, as amended by Acts 1915, page 252, provides, as far as is here material, as follows:

"Any person, firm or corporation accepting orders or contracts for doing any work on or in any building or structure requiring the use of paint, stone, brick, mortar, wood, cement, structural iron or steel, sheet-iron, galvanized iron, metallic piping, tin, lead, electric wiring or other metal, or any other building material; or who shall accept contracts to do any paving or curbing on sidewalks or streets, public or private property, using asphalt, brick, stone, cement, wood or any composition, or who shall accept an order for or contract to excavate earth, rock or other material for foundations or any other purpose, or who shall accept an order or contract to construct any sewer of stone, brick, terra cotta or other material, shall be deemed a contractor. Every contractor shall, on the first day of May in each year procure from the commissioner of the revenue for the city or district in which he has his office a license to carry on the business of a contractor; * * * provided, further, that this section shall not apply to contractors the gross amount of whose orders accepted and executed does not exceed five thousand dollars per annum."

After thus defining contractors, section 91 of the same act provides in part as follows:

"Every such contractor, for the privilege of transacting business in this State, shall pay a license, to be ascertained in the following manner:

"If the gross amount of all orders or contracts accepted aggregate five thousand dollars, he shall pay the sum of five dollars; * * * if the amount of such orders or contracts exceed one hundred thousand dollars, and do not exceed one hundred and fifty thousand dollars, one hundred dollars; and if the amount of such orders or contracts exceed one hundred and fifty thousand dollars, one hundred and fifty dollars; and when any such contractor shall have obtained a license for any year for which he has paid a license tax of less than the maximum above described, he shall not accept any contract or contracts during such year the aggregate amount of which exceeds the maximum amount for which his license was obtained, unless and until he shall have paid such additional sum as will make the total license tax paid by him for that year sufficient to cover the aggregate amount of such contract or contracts as prescribed above; and unless he pay such additional sum he shall be deemed to be acting without a license."

From the above it seems clear that the license demanded is not for the privilege of executing contracts or orders, but is expressly for the privilege of accepting contracts or orders. In other words the entire basis of the contractor's license under these sections is the acceptance of orders or contracts and not the doing of the work under such orders or contracts. In arriving at this conclusion I find that the ordinary understanding of a contractor is rather one that undertakes work than one that does work; for instance—in re Unger, 98 Pac. (Okla.) 999 it was held that the term "contractor" as used under a statute granting cities of the first class power to levy and collect an occupation tax on contractors, is one who contracts or covenants, either with a public body or private parties, to construct works and erect buildings on a large scale at a certain price or rate. The power is not sufficiently generic to cover "persons doing contract work"; and that part of an ordinance seeking to levy such tax on persons doing contract work is illegal and void. To a like effect see

Halstead v. Sahl, 94 N. E. (Ind.) 1056; *Caldwell v. Atlantic, B. & A. R. Co.* 49 So. (Ala.) 674; *Janns Administrators v. McKnight* 78 S. W. (Ky.) 862.

In further substantiation of the above conclusion is the fact that in section 90, above quoted, we find the proviso exempting from the payment of a contractor's license those "whose orders accepted and executed do not exceed five thousand dollar per annum." It is evident from this that the legislature clearly had in mind the execution of contracts in certain cases, but did not intend that that be the basis of the contractor's license, but merely that the acceptance of contracts form such basis.

Concluding that the basis is the acceptance of contracts regardless of the doing of the work, or even regardless of whether the work is ever done, the next question that arises is during what period are the acceptances to be considered in levying this tax?

It will be seen that under section 91 it is based upon the amount of contracts accepted, if this stood alone it would be difficult to solve this question as it would rather seem that accepting would refer to contracts accepted during the last preceding year, but the evident intent of the legislature is made plain by the later provision in section 91 requiring that "when any such contractor shall have obtained a license for any year for which he has paid a license tax of less than the maximum above prescribed, he shall not accept any contract or contracts during such year the aggregate amount of which exceeds the maximum amount for which his license was obtained, unless and until he shall have paid such additional sum as will make the total license tax paid by him for that year sufficient to cover the aggregate amount of such contract or contracts as prescribed above." From this it is clear that contractors must contemplate as best they can the probable amount of contracts into which they will enter during the year for which the license is taken out, and must at all times have a license sufficient to cover the amount of contracts into which they have entered for that year.

It is therefore clear, from the facts as above given, that the contractor's claim is justified and that a license for the year ending April 30, 1916, may not be required.

In rendering this opinion I am cognizant that the statutes are not entirely clear, but however unfortunate may be the result of this opinion, it seems fairly clear that the legislature's intent was as above indicated from the plain words of the statute.

Yours very truly,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

LICENSES—*Engineers—Exemptions.* Va. Code 1904, Tax Bill Sec. 89.

An engineer, whether civil, mechanical, electrical or mining, whose time is entirely employed by a railroad and who does not offer for or receive employment from any one else, must nevertheless take out the license required of an engineer, nor is this changed by the fact that the particular engineer is an assistant to a chief engineer who has a license, nor the fact that he has no office of his own, nor the fact that his entire time is spent in working for cities and counties.

RICHMOND, VA., September 4, 1915.

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

DEAR SIR:

You have referred to this office the letter of J. M. Crute, Farmville, Va., also

of H. C. Love, commissioner of the revenue, Keysville, R. F. D. No. 3, both relating to the following question: Under section 89 of the Tax Bill, as amended by Acts 1915, chapter 148, p. 252, is a civil engineer, whose time is entirely employed by a railroad, and who does not offer for or receive employment from any one else, subject to a license tax, and is such person required to take out a license in Virginia?

Section 89, aforesaid, of the Tax Bill, requires in effect that any person or firm who shall for compensation engage in the business of civil engineering, shall pay a license tax of \$15.00 per year for the privilege of conducting such business, * * * provided, that the license of any engineer who has not practiced his profession for more than five years, or whose income from such business is less than five hundred dollars for the preceding year shall be five dollars; and, provided, further, that on the payment of the license the said engineer shall be entitled to engage in such business in any part of this State.

Under the above section the conclusion is clear that an engineer who is employed by a railroad and who works for no other person, firm or corporation, is required to take out a license just as much as if he were open to general employment. I cannot see how any question could be raised under the statute. It would be just as absurd to say that a lawyer, all of whose time is employed by a corporation, should be excused from paying the license fee of a lawyer as to say that an engineer should be excused from paying a license fee because all of his time is taken by one employment.

Neither can I see that the fact that the chief engineer, under whom his assistants work, takes out a license, would excuse any of his assistants from taking out the license required by statute. The statute is applicable to all civil engineers, whether they set up an office of their own or work under other engineers. The statute is also applicable to county surveyors who engage in no other work than that of surveying for counties and to city engineers who engage in no other work than that of doing work for cities.

It is well to notice in passing that the statute is not only applicable to civil engineers, but is likewise applicable to mining, mechanical and electrical engineers, and that the same doctrine as laid down above as to civil engineers will apply to these engineers.

Yours very truly,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

LICENSES—*Fertilizer Inspection fee—Exemption from dealers' tax. Va. Code 1904, Sec. 1783d; Va. Code 1904, Tax Bill, Secs. 45, 46, 48, 49, 50, 51.*

The payment of the inspection and registration fees required by the Fertilizer Act does not exempt a dealer in said fertilizers from complying with the provisions of the Tax Bill as to licenses which would be applicable to the kind of business engaged in by him, whether he be a merchant, peddler or commission merchant.

RICHMOND, VA., June 9, 1915.

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

DEAR SIR:

Replying to your favor of May 8th asking certain questions relative to the

statute regulating the sale and purity of commercial fertilizers, I beg leave to submit as follows:

The object of the statute as first enacted (Va. Code 1904, Sec. 1783d) was to protect and advance agriculture by regulating the sale and purity of commercial fertilizers, and to guarantee the condition upon which they were to be sold. It is evident that the title indicated no purpose to impose a tax. The present law may be found in chapter 260 of Acts 1914, p. 455 (Pollard's Code Biennial, 1914, p. 183.)

In clause 2 of said act, all manufacturers, dealers or agents desiring to sell or offer for sale in this State any fertilizers, are required annually to register with the Commissioner of Agriculture, upon form furnished by the commissioner, the name of each brand of fertilizer or fertilizer material which they may desire to sell in the State, either by themselves or by their agents, together with the name and address of the manufacturer, the weight of the package, the guaranteed analysis thereof, stating the minimum percentage of certain chemical elements; and all manufacturers, dealers or agents applying for such registration are required to pay the Commissioner of Agriculture the sum of \$5.00 annually for each brand registered

In clause 3, all manufacturers, dealers or agents before selling or offering for sale in this State, commercial fertilizers, are required to brand on or attach to each bag, barrel or package the brand name of the fertilizer, the weight of the package, the name and address of the manufacturer and the guaranteed analysis giving the constituents of the fertilizer and minimum percentage only.

In clause 5, all manufacturers, dealers or agents who have registered their brands as aforesaid, are required to forward to the Commissioner of Agriculture a request for tax tags to be used upon brands of fertilizer or fertilizer material registered as aforesaid, and said request is required to be accompanied with the sum of 15c. per ton "as an inspection fee"; thereupon it is made the duty of the Commissioner to issue tax tags to the parties applying, who are required to attach a tag to each package, bag or barrel thereof. The Commissioner of Agriculture is further empowered to prescribe the form of such tags and the color of said tax tags must be changed each year.

Under clause 6, every person proposing to deal in commercial fertilizers after filing with the commissioner his request for tax tags, and accompanying his request with the sum of 15c. per ton as an inspection fee, receives from the commissioner a certificate to the effect that he has complied with the sections in regard to registration of brands and payment of inspection fees, and this certificate when so furnished authorizes the party receiving the same to manufacture for sale in this State, or to sell in this State directly or through dealers or agents the brands named in the certificate.

Under clause 7, the sale of unregistered and unbranded fertilizers is prohibited.

It is further provided by clause 10, that any manufacturer, dealer or agent who shall sell, or offer for sale in this State any fertilizer which has not been previously registered, or which has not been branded or tagged, shall be guilty of a misdemeanor and subject to a fine or forfeiture of not less than \$25.00 nor more than \$200.00 for each and every offense.

It is evident from the above analysis of the law that it is the purpose of the State to protect the farmers from the sale of fertilizers which have not been inspected and approved as containing the chemical elements claimed for the same, and as the funds derived from the sale of the tags and the registering of brands, do not become a part of the general fund of the Commonwealth, but are used for the purpose of carrying out the provisions of the act, and for carrying on experiments with plants

and fertilizers and publishing and disseminating the results of such experiments, and for conducting other work and disseminating other knowledge and information useful to the farmers, it is clear that the purpose of the act is not to raise revenue but to protect the farmers of the State and to advance agriculture.

If, under the provisions of the act, the manufacturer registers his brands and procures the tags, then he may make arrangements for the sale of his fertilizers with either itinerant vendors, who may deliver as they sell, or with merchants, who have a fixed place of business, or with parties who sell on commissions. Now it is clear that neither the itinerant vendor who peddles the fertilizers, nor the merchant who sells at a fixed place of business, nor the party who sells on commission, is required to register the brand which has already been registered, nor to re-tag the bags or packages which have already been tagged, the object of the law having been accomplished whenever the manufacturer has complied with these provisions. So also where an agent or dealer has complied with the aforesaid provisions his sub-agent or sub-dealer is not required to brand or re-tag the fertilizers.

From these considerations I would conclude that the payment of an inspection fee would not excuse the party paying the same from taking out a merchants license under Tax Bill, Secs. 45 and 46, as amended by Acts 1915, page 232, nor a peddler from taking out a peddler's license under Tax Bill, Secs. 50 and 51, as amended as aforesaid, nor a commission merchant from taking out a commission merchant's license under Secs. 48 and 49 of the Tax Bill, amended as aforesaid. I would further conclude that a merchant who buys fertilizers from a manufacturer and sells it at his place of business would be required to include in his report of purchases, the purchase price of the fertilizers so bought, and that if a party makes the sale of fertilizers on commission he would be required to take out a commission merchant's license. In other words, my opinion is that the payment of an inspection fee and registration fee as required by the Fertilizer Act, does not exempt a dealer in said fertilizers from complying with the provisions of the Tax Bill which would be applicable to the kind of business engaged in by him, whether he be a merchant, a peddler, or a commission merchant.

Yours very truly,

CHRISTOPHER B. GARNETT,
Assistant Attorney General.

LICENSES—*Fertilizer inspection fee—Merchants. Va. Code 1904, Sec. 1783d.*

Where goods are sold by an agent of a manufacturer to a customer before being placed in the car at the factory and are delivered to the former upon arrival at the local station, such agent is not thereby constituted a merchant.

RICHMOND, VA., *September 9, 1915.*

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

DEAR SIR:

You have referred to this office a letter of Mr. Chas. G. Wilson, counsel for Virginia-Carolina Chemical Co., relating to the method of his company in disposing of its fertilizer in this State and the necessity for a customer of said company to take out a license.

In a letter written by the writer on June 9, 1915, addressed to you, I took the

position that section 1783d, Va. Code 1904, as amended by Acts 1914, ch. 260, p. 455, did not exempt a merchant from returning as purchases fertilizer bought by him and resold at his store. It is now argued that under the contract which the Virginia-Carolina Chemical Co. makes with its customers (a copy of which contract was enclosed to you in the letter of Mr. Wilson) a customer of the Virginia-Carolina Chemical Company acts merely as a local agent for the transmission or orders somewhat like a traveling salesman, and that, therefore, the customer, under these conditions, should not be required to take out a merchant's license.

An examination of the contract would indicate that there is a direct sale by the company to the customer, and in event that the goods are stored for sale at a fixed place of business or sold in carload lots from a fixed place, I can see no reason to change the views which were taken by me in the letter aforesaid.

But in Mr. Wilson's letter he states that in the majority of cases the goods are sold by the customer to the farmer before being placed in the car at the factory, and are delivered to the farmer upon arrival at the local station. In such cases I think it is perfectly clear that the local customer is not acting as a merchant and should not be required to return as purchases, goods which are so sold by him.

This is in accord with the holding of your office as shown by letter written by you to Mr. T. Roy Adams, commissioner of the revenue, Charlotte Court House, Va., dated August 9, 1915, in which you use the following language:

"I am frank to say the manner in which fertilizer is bought and sold in this State in my opinion rarely requires State license. The sales are usually upon orders for fertilizer not in the possession of the merchant at the time of the sale, but outside of the county and, in many instances, out of the State. The fertilizer never becomes part and parcel of the merchandise in the merchant's place of business, and should not in my opinion be reported as purchases.

"Merchants and others selling fertilizers upon orders and commissions are acting as agents for the manufacturers and have a right to do this without State license. I would not require a merchant to include in his report of purchases fertilizer which does not become part and parcel of the goods and merchandise in his place of business.

"I think a merchant or any other person can take orders for fertilizer, send the orders to a manufacturer in this State or to a manufacturer out of this State, the fertilizer to be consigned either to the purchaser or to the merchant or other person taking the orders for delivery from cars without State license, or without the merchant having to include in his purchases the purchase price of the fertilizer."

It is also in accord with the holding of your office in a letter written by you to Mr. J. B. Washington, commissioner of the revenue, dated August 25, 1915, in which you used the following language:

"If a merchant buys guano in his own name and it becomes thereby his property, and sells it to others, whether he make the delivery from a car or boat, he should include in his purchases, to procure his license as a merchant, the amount of the purchases of fertilizer; but if a merchant takes orders as an agent or upon commission for a manufacturer of fertilizer, sends those orders to the manufacturer and the fertilizer is later shipped to the merchant for delivery to the purchasers (the merchant not being the purchaser on his own account) from a car or boat, the merchant is not required to report that fertilizer as purchases."

Very truly yours,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

LICENSES—*Mercantile Agencies—What are—Retail Merchants Association. Va. Code 1904, Tax Bill, Sec. 85.*

The Retail Merchants Association of Richmond, a corporation, composed of retail merchants and organized into an association for their common welfare, maintaining a bureau for the dissemination of credit reports among its members exclusively, is not a mercantile agency under the Tax Bill.

RICHMOND, VA., May 24, 1915.

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

DEAR SIR:

In the absence of the Attorney General, I am replying to your letter of May 11th, referring to this office a letter from W. A. Clark, Jr., secretary of the Retail Merchants' Association of Richmond, Va., Inc., and requesting advice of this office as to whether said association, and other like associations, are liable to license tax as required of mercantile agencies by the provisions of sections 85 and 86 of the Tax Bill, as amended by Acts of 1915.

Va. Code 1904, Tax Bill, Sec. 85, as amended by Acts of 1915, p. 232, provides:

"Any person, firm or corporation engaged in reporting the financial standing of merchants and others as a regular business for compensation shall be deemed a mercantile agency."

It is, therefore, apparent that among other things, proof must be made that such organization, since it is a corporation, is:

(a) *A regular business.*

(b) *A business for compensation.*

Although the term "business" is susceptible of varied meanings, one of the commonest definitions is found in *Allen v. Commonwealth*, 74 N. E. (Mass.) 287:

"The word 'business' is of large significance and denotes the employment or occupation in which a person is engaged to procure a living."

To same or similar effect, see *Easterbrook v. Hebrew Ladies Orphan Society*, 82 Atl. (Conn.) 561; *State v. Boston Club*, 12 So. (La.) 895.

In *Cuzner v. California Club*, 100 Pac. (Cal.) 868, 871, it was held that an ordinance imposing a license tax on retail liquor dealers does not apply to a *bona fide* social club which sells liquor to its members and guests. In the course of the opinion, we find:

"The term 'business' as used in a law imposing a license tax on business, trades, professions and callings ordinarily means a business in the trade or commercial sense, one carried on with a view to profit or livelihood. A *bona fide* social club, if permitted by its articles of incorporation or association may, of course, so engage in business either by transactions with its members or members of the public, as, for instance, by letting for a consideration rooms not used for the ordinary purposes of the clubhouse, or by engaging in some outside enterprise for the purpose of realizing profits to be devoted to club purposes; and, so far as it does such things even incidentally for purpose of realizing profit to be devoted to club purposes, it would be engaged in business in the commercial sense as fully as any person could be. But in its transactions with its members in the carrying on of the clubhouse looking simply to the giving to them such privileges in the property devoted to *bona fide* club pur-

poses as they are all in common entitled to under the constitution and rules of the club, it is not engaged in business at all in the commercial or trade sense, as ordinarily understood. Such property is beneficially owned in common by the members in equal shares, and is devoted to their common use. So far as such property can be actually used equally by all the members as in the case of reading rooms, sitting rooms, etc., no special charge is made against any member for such use. All may actually use such things in common. But when in the exercise of the common privileges, one member appropriates to his exclusive use food or drink or a room for sleeping purposes, things that cannot be actually used in common by all the members, he pays therefor simply because it is the only fair and equitable way of appropriating the expense of the club among the members."

Furthermore, it would seem that "business" as above defined must be clearly correct in this case because of its use in connection with the phrase, "for compensation." What is meant by that phrase while not entirely clear seems at least to mean business for profit, or as in the above cases, a business conducted for a livelihood.

In *State v. Shipley*, 57 Atl. (Md.) 12, where a person owned property from which he managed and received the rents, and he also collected rent from property which he owned as a co-tenant with another, receiving a commission from his co-tenant for collecting the latter's share, it was held that he was not engaged in a "regular business." The court said:

"The regular business or habitual association or employment contemplated * * * is a fixed occupation connected with some of the branches of trade, industry or commerce or the continuous pursuit of some calling or profession *such as is ordinarily engaged in* as a means of livelihood or for the purpose of gain or profit."

See also:

Wood v. Moore, 1 Chest. Co. (Pa.) Rep. 265, 266;

Com. v. People's Exp. Co., 88 N. E. (Mass.) 420;

Cromwell v. Willis, 53 Atl. (Md.) 1116.

Nor is there anything to show that by engaging in giving out credit reports the corporation acted beyond its corporate powers.

In the certificate of incorporation of the Retail Merchants Association of Richmond, we find among the purposes:

"To secure and disseminate trade and credit information, to make mercantile reports, to establish a collection bureau for the collection of accounts and claims due its members."

As evidencing just what the legislature intended to reach by "mercantile agency," language from *Eaton v. Avery*, 83 N. Y. 31, 34:

"Their business is to collect information as to the circumstances, standing and pecuniary ability of merchants and dealers throughout the country and keep accounts thereof, so that the subscribers to the agency when applied to by a customer to sell goods to him on credit may by resorting to the agency or the lists which it publishes, ascertain the standing and responsibility of the customer to whom it is proposed to extend credit."

See also, *Brookfield v. Kitchen*, 63 S. W. (Mo.) 825.

It, therefore, seems clear that the Retail Merchants Association is not a "regular business for compensation," within section 85 of the Tax Bill.

Very truly yours,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

LICENSES—*Merchants—Newspapers—Coupons. Va. Code 1904, Sec. 1038a and Tax Bill, Secs. 45 and 46.*

A newspaper which sells articles of merchandise with coupons clipped from the paper if it so engages habitually is required to take out a merchant's license; but such a license cannot be required where such newspaper adopts this device sporadically and not habitually.

RICHMOND, VA., May 3, 1915.

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

DEAR SIR:

I have your letter of April 29th, quoting a letter from A. A. Eskridge, commissioner of the revenue of the city of Staunton, in which he asks your ruling as to whether an advertisement of the Staunton Leader Publishing Co., enclosed in his letter, offering articles for sale with a coupon from the paper, constituted the Staunton Leader Publishing Co. a merchant, and required that a license tax should be charged against said company for carrying on the business of a merchant.

From the advertisement, it appears that the newspaper company is offering for sale certain electric search lights, run by a storage battery, at prices varying from \$1.65 to \$3.45 per light. The following is a part of the advertisement:

"Clip the coupon and bring it to the Leader along with the advertised price of lamp or lantern desired";

and on the coupon is found the following language:

"This coupon together with advertised price of kind of light desired entitles any reader of the Leader to one Eveready Electric Lamp or Lantern. Leader Publishing Company."

Sections 45 and 46 of the Tax Bill, as amended by Acts of 1915, p. 233, provides for the taxation of those engaged in the "business of merchant." No State license tax is required under our laws of a newspaper publisher, and section 1038a, Va. Code 1904, expressly forbids counties, cities or towns from levying such a tax.

In *Brown's Case*, 98 Va. 366, a merchant was defined to be "one whose business is to buy and sell merchandise," and it applies to all persons who habitually trade in merchandise; and then goes further to provide that a merchant's license contemplates that the merchant is to have a fixed place of business within a county or city—a store or shop for the sale of goods. This definition has been approved in *Standard Oil Co. v. Fredericksburg*, 105 Va. 82, and in *Morris & Co. v. Commonwealth*, 9 Va. Appeals, 588.

In construing tax laws our court has recognized and followed the rule that such laws are to be strictly construed, and that all doubts as to the meaning or scope of such laws are resolved against the government and in favor of the citizen. *Brown's Case*, *supra*.

The question in this case seems to be narrowed down to this proposition: whether this company, in advertising these sales, may be said to be "habitually trading in merchandise," or whether this is merely a sporadic device or scheme to enlarge its circulation, and incidental to its business as a newspaper publishing company. If under the guise of being a publishing house, a corporation or firm were to engage habitually and regularly in the sale of articles, then undoubtedly it could not escape

paying a merchant's tax by claiming that it was incidental to its business of publishing a newspaper. On the other hand, it would seem that where a bona fide newspaper publishing company sporadically uses devices of this character for the purpose of enlarging its circulation, it could not be held to be engaged in the business of a merchant and should not be required to take out a license. It has been frequently held that where a person is engaged in one business, he may, under the license of that business, do a thing which if done by itself would require a separate license. The ground upon which this is held is that the latter is an incident of the former business. The trading stamp cases is an illustration of this principle. See *Hewin v. City of Atlanta*, 49 S. E. (Ga.) 765, and cases cited; *Commonwealth v. Gormley*, 173 Pa. 586.

The case, therefore, would be reduced to a question of fact, viz: is this company engaged habitually in the sale of merchandise, or is this a legitimate device or scheme by which the company sporadically, and not habitually, endeavors to enlarge its circulation? The facts submitted to us are not sufficient to determine this question, and, therefore, I am sending you this letter in order that you may be able, upon the facts, to decide the case according to what seems to be the proper reason.

Very truly yours,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

LICENSES—*Merchants—Purchases of goods by stockholders of corporations. Va. Code 1904, Tax Bill, Sec. 45.*

A corporation engaged in business as a merchant must pay a graduated license tax based on its total purchases irrespective of the fact that its sales are made in a large measure to holders of its stock.

RICHMOND, VA., May 5, 1915.

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

DEAR SIR:

In the absence of the Attorney General, I am replying to your favor of May 5th, in which you ask the opinion of this office on the following state of facts: The Workingmen's Mercantile Association, Incorporated, of Covington, Virginia, is strictly a co-operative concern and operates a general merchandise store. The business amounts to about \$6,000.00 a month, \$5,000.00 of which is bought by the members and \$1,000.00 of which is bought by others than the members. The question involved is whether the State license tax should be based upon the purchases sold to others than members of the association, or should it be based upon the total amount of the purchases made?

Section 45 of the Tax Bill, as amended by Acts 1915, page 233, provides as follows:

"Every person, firm, company or corporation engaged in the business of a merchant shall pay a license tax for the privilege of doing business in this State to be graduated by the amount of purchases made by him during the period for which the license is granted. * * * To ascertain the amount of purchases it shall be the duty of such merchant, on the 1st day of April of each year, or within ten days thereafter, to make report in writing, under oath, to the commissioner of the revenue of the district for which he was licensed showing purchases as above defined, and all goods, wares and merchandise manufactured and sold, or offered for sale in this State during the next preceding twelve months." * * *

I am clearly of the opinion that under the above section a corporation such as is mentioned in your letter is to pay a graduated license tax according to the purchases made by it, and the question of the parties to whom its sales are made has nothing to do with the graduated license fee. In every case a corporation is a distinct entity from its members, and as the law particularly provides that a corporation engaged in business as a merchant shall pay a graduated license tax on *its purchases* and makes no reference to the sales of such corporation to determine its license fee, it seems clear that the fact that a part of its sales are made to holders of stock of said corporation has nothing to do with the amount of license fee to be paid as aforesaid.

Very truly yours,

CHRISTOPHER B. GARNETT,
Assistant Attorney General.

LICENSES—*Merchants—Who are Merchant tailors, wholesale dry goods dealers, wholesale grocers, tobacco dealers. Va. Code 1904, Tax Bill, Secs. 45, 46 and 48.*

Merchant tailors, wholesale dry goods merchants, wholesale grocers, and those buying leaf tobacco, in hogsheads or loose, and reselling the same after having reprised that which is loose, are merchants, and must take out merchant's licenses.

RICHMOND, VA., August 25, 1915.

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

DEAR SIR:

You have referred to this office the letter of Jno. B. Minor, chairman Local Board of Review for the city of Richmond, asking to be informed whether or not the following classes of persons should be deemed merchants upon whom merchant's license taxes should be assessed:

- (1) A tailor who buys his own raw materials and manufacturers them in this State into finished articles upon special order.
- (2) A wholesale dry goods merchant or grocery merchant.
- (3) An individual or corporation buying leaf tobacco in hogsheads, or loose, and reselling the same after having reprised that which is loose.

I will answer each of these questions in their order.

Sections 45 and 46 of the Tax Bill, relating to merchant's license tax, were amended by Acts of 1915, ch. 148, p. 233. The provisions of section 45 applicable to these questions, are as follows:

"Every person, firm, company or corporation engaged in the business of a merchant shall pay a license tax for the privilege of doing business in this State, to be graduated by the amount of purchases made by him during the period for which the license is granted; and all goods, wares and merchandise manufactured by such merchant and sold, or offered for sale in this State as merchandise, shall be considered as purchases within the meaning of this section." * * *

In section 46 it is provided that goods, wares and merchandise not belonging to a merchant, which are offered for sale by the merchant or by another person at

the merchant's duly licensed place of business, shall require such merchant to take out a license of a commission merchant; and it is further provided as follows:

"The sums imposed under and by virtue of this section shall be in lieu of all taxes for State purposes on the capital actually employed by said merchant or mercantile firm or corporation in said business, except the registration fee and franchise tax. * * * All other property held by such merchant or firm or corporation engaged in mercantile business not offered for sale as merchandise shall be separately listed and taxed as other property."

Under section 48, as amended by the same act above, it is further provided that:

"Every person, firm or corporation buying or selling for another any kind of merchandise on commission shall be a commission merchant."

The question, therefore, which is to be solved, under the above statutory provisions, is whether a tailor who buys his own raw materials and manufactures them in this State into finished articles upon special orders is a merchant.

It is well to note that under section 46 of the Tax Bill as found in Virginia Code 1904, it is specifically provided that "merchant tailors, lumber merchants, furniture merchants, butchers, green grocers, hucksters, dealers in coal, ice or wood, shall be embraced in this section;" and it is worthy of remark that in the original Tax Bill, Acts 1883-4, ch. 450, p. 561, 577, this explanatory language is found. Indeed, in the Acts of 1874-5, ch. 239, p. 281, 289, may be found the parent statute on the subject of licensing merchants, and we find therein that it is also provided that merchant tailors, lumber merchants, furniture merchants, butchers, green grocers, dealers in coal, ice or wood, shall be embraced in the section on merchants.

By the Acts of 1914, ch. 280, p. 489, section 46 of the Tax Bill was amended, and the above explanatory sentence was left out of the law. The question, therefore, which arises at the threshold is whether the legislature intended to change the law by leaving out the aforesaid provision with reference to merchant tailors, lumber merchants, furniture merchants, butchers and others. It would seem to be clear that with reference to furniture merchants, green grocers, dealers in coal, ice or wood, the omission of the explanatory sentence certainly does not change the law, for they are dealers in goods, wares and merchandise and would be required, under the general provisions of section 45, to take out licenses as merchants.

It is not so clear, however, that we can classify tailors as merchants without the authority of the statute to do so. A merchant has been defined as a dealer in goods, wares and merchandise, who has the same on hand for sale and present delivery. *White's Case*, 78 Va. 484, 485. Says Judge Cardwell, in *Morris & Company v. Commonwealth*, 116 Va. 912, 920: "The legal acceptance of the meaning of the word 'merchant' is one whose business is to buy and sell merchandise, and it is held to apply to persons who habitually trade in merchandise." A merchant's license contemplates that the merchant is to have a fixed place of business within a county or city—a store or shop for the sale of goods. *Brown's Case*, 98 Va. 366, 369; *Standard Oil Co. v. Fredericksburg*, 105 Va. 82, 90.

A merchant tailor certainly comes within a great many requisites of the definition of a merchant as given above. First, he has a store or fixed place of business; and, second, he has on hand goods, wares and merchandise for sale. The only way in which a tailor may differ from merchants generally is that before the delivery of the goods, wares and merchandise which he has on hand for sale, he does work thereon and, in a measure, changes their form before delivery; and the question to

be solved in this case is whether such work is sufficient to affect the character of his transactions so as to make it impossible to classify him with merchants generally.

In *State v. Johnson*, 20 Mont. 367, and in *Murray v. State*, 11 Lea (Tenn.) 219, it was specifically held that a tailor was a merchant and required to take out a license as a merchant; and in the former case, it was also held that a merchant tailor was not a manufacturer within the meaning of the statute which required manufacturers to take out a license, but that he was a merchant within the meaning of the statute requiring merchants to take out licenses.

It is true that in *State v. West*, 34 Mo. 424, the Supreme Court of Missouri held that a merchant tailor was a manufacturer and not a merchant within the meaning of the statutes of that State which defined a merchant to be one "who usually dealt in the selling of goods, wares and merchandise at any store, stand or place kept for that purpose." The court held that the definition implied the presence of stock in trade which, when the party dealing sells, may be presently delivered to the purchaser.

The term "merchant tailor" is commonly distinguished from the manufacturing tailor, the merchant tailor being one who delivers to a customer at retail only goods ordered for personal wear, whereas a manufacturing tailor is one who sells at wholesale suits ordered by a number in quantity. The merchant tailor is in competition with the retail clothing store which is licensed as a merchant, and is not in competition with any manufacturer. If we follow the rule of construction adopted in *State v. Johnson*, that the words must be given their common and ordinary meaning rather than their technical meaning, a merchant tailor would be classed as a merchant and not a manufacturer.

Although the question is not without doubt, I am constrained to believe that the change in the statute in Virginia was not designed to change the law, and that on principle it should be held that a merchant tailor is a merchant and not a manufacturer under the tax laws of Virginia.

The next question which we are to consider is whether a wholesale dry goods merchant, or a grocery merchant should be classified as a merchant under our tax laws. It has been held that a grocer is a merchant. *Cole v. Commonwealth*, 38 Ky. 31, 32; and certainly groceries can be classified as goods, wares or merchandise, whether we take the technical or common view of these terms. The fact that the seller is a wholesale seller does not make any difference under the tax laws of Virginia. The term "dry goods" necessarily must be comprehended under the expression "goods, wares and merchandise"; and, consequently, I would hold that both the wholesale dry goods merchant and a wholesale grocery merchant should be required to take out merchants' licenses under the Virginia statutes.

The next question is whether an individual or corporation buying leaf tobacco in hogsheads, or loose, and reselling the same after reprising that which is loose, should be classified under the statute as a merchant and required to take out a merchants' license. If this were a question of first impression, I would unhesitatingly declare that such a person is a merchant under the definitions given to the term "merchandise" in other States. In *Mitchell's case*, 1st Leigh, 28 Va. 572, the court construed a statute requiring a license of any person selling goods, wares and merchandise; and in that case, it was held that tobacco was not goods, wares and merchandise, and that under the Acts of 1822-3, ch. 3, a commission merchant in Richmond was not obliged to obtain a merchants' license to justify him in selling tobacco. The court reached its opinion after examining the then existing state of the revenue law, and based its opinion, first, upon the interpretation of the words "goods, wares

and merchandise" after comparison of the same with the provisions of other laws on the same subject; second, upon the practical construction given by the fiscal officers; and, third, from the fact that the law defining wholesale and retail merchants declared the former to be those whose only sales should be made *by the bale, piece, package or dozen*—terms wholly inapplicable to grain, wheat and tobacco.

It seems clear that Mitchell's case, *supra*, cannot be held to definitely settle the question here involved, nor to be a precedent to be followed without question. In the first place, we have no statutory definition of wholesale and retail merchants such as was used in that case. Second, the practical construction put upon the law by the fiscal officers has been for years to require a merchants' license of individuals or corporations buying leaf tobacco in hogsheads, or loose, and selling the same after having reprised that which is loose. This information I have derived from your office. Third, the present state of our revenue laws is not the same as it was in the time of Mitchell's case. It is now the policy of our revenue law to protect the sale of agricultural products from taxation so long as such sale is made by the producer and no longer. For instance, in section 6 of the Tax Bill, as amended by Acts of 1910, p. 487, it is provided in clause 22 that grain, tobacco and other agricultural products *in the hands of the producer* of the same are declared exempt from taxation under Schedule B; and in section 68 of the Tax Bill, as amended by Acts of 1915, it is provided that no person *not a producer* shall be allowed to sell at retail, tobacco, snuff or cigars without having obtained a specific license to so do. So, also, it is provided by section 1042a that "it shall be unlawful for any city or town of this State, or for any agent thereof, to impose upon or collect from any person any tax, fine or other penalty for selling farm and domestic products within the limits of any such town or city, and outside of and not within the regular market houses and sheds of such city or town, *provided such products are grown or produced by such person.*" Thus it seems clear that the policy of our law has changed since the opinion in Mitchell's case.

The next pertinent inquiry is whether the phrase "goods, wares and merchandise" is broad enough, under the present state of our law, to include tobacco as aforesaid. In *Commonwealth v. Nax*, 13 Grat. 54 Va. 789, it was held that sheet music was comprehended under the phrase "goods, wares and merchandise" in a statute under which the defendant was indicted for selling unlawfully, goods, wares and merchandise.

Goods, wares and commodities, as used in a statute providing for taxation of merchants, goods, wares and commodities, has been held to include lumber kept for sale in a lumber yard. *Mitchell v. Plover*, 53 Wis. 548, 11 N. W. 27; *Washburne v. Oshkosh*, 19 N. W. 364; also it has been held to include ties, poles and posts kept for sale and pine logs kept for sale. *Torrie v. Shawano*, 79 Wis. 152, 48 N. W. 246; *Town of Eagle River v. Brown*, 85 Wis. 76, 55 N. W. 163.

Merchandise is defined by Webster to be "The objects of commerce; whatever is usually bought and sold in trade or market, or by merchants; wares, goods or commodities."

As it is the policy of our law (Sec. 48 of the Tax Bill, as amended) to require persons or corporations receiving or distributing provisions and merchandise, including flour, hay or grain, to take out a license therefor, I cannot conceive that it would be the policy of our law to hold that one who buys and sells tobacco at a fixed place of business should be excused from taking out a license as a merchant. Therefore, I am constrained to hold that an individual or corporation buying leaf tobacco in hogsheads, or loose, and reselling the same after having reprised that which is

loose, is a merchant, provided such individual or corporation does business at a store or fixed place of business within the city or county where the sales are made.

Very truly yours,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

LICENSES—*Peddlers—Produce. Va. Code 1904, Tax Bill, Sec. 46.*

Persons peddling family supplies of a perishable nature not grown or produced by them, and purchased by them for sale must take out peddlers' licenses.

RICHMOND, VA., *July 14, 1915.*

HON. C. LEE MOORE,

Auditor of Public Accounts,

Richmond.

DEAR SIR:

You have referred to this office, letter of L. L. Willis, commissioner of the revenue, White Shoals district, Lee county, Va., in which he asks to be advised "if parties who buy produce, eggs, fowls, butter and other stuff in produce line, who use wagons and vehicles in gathering up this produce from merchants and farmers, and then convey to produce dealers by such conveyance, wagons and vehicles and sell for profit", are liable for a license tax.

Tax Bill, section 46, as amended by Acts of 1915, p. 233, after requiring a license of merchants, contains the following provision:

"But nothing in this section shall be so construed as to require a license of any person who may canvass any county or corporation to buy lambs, pigs, calves, fowl, eggs, butter and such like small matters of subsistence designed as food for man; but any person who shall keep a place of business for the purpose of selling such articles in or within a half a mile of any city or town in the State shall take out license therefor."

From this proviso in the statute, it seems clear that such parties are not required to take out a merchants' license for the purpose of canvassing to buy lambs, pigs, &c.; but it will be observed that, by the very terms of the statute, it is provided that "any person who shall keep a place of business for the purpose of selling such articles in or within a half mile of any city or town in the State, shall take out license therefor." If, after canvassing for such produce, the party shall carry the same from place to place and offer to sell or barter the same, or actually sell or barter the same, he is to be deemed a peddler, and should be required to take out a license under sections 50 and 51 of the Tax Bill. It is to be observed in connection with these latter sections, that, under the terms of section 50, parties who sell, or offer for sale, in person or by their employes, ice, wood, meat, milk, butter, eggs, poultry, fish, oysters, game, vegetables, fruits or other family supplies of a perishable nature grown or produced by them, and not purchased by them for sale, are excused from taking out a license. But, on the other hand, by the express terms of the statute, it would seem clear that parties peddling family supplies of a perishable nature not grown or produced by them, and purchased by them for sale, would be required to take out a peddlers' license.

Very truly yours,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

LICENSES—*Who are manufacturers—Who merchants—Peanut "factories."* Va. Code 1904, Tax Bill, Secs. 45 and 46.

Although ordinarily, persons, firms and corporations engaged in the business of cleaning, assorting, shelling, and roasting peanuts and selling the same would seem to be merchants and not manufacturers, yet in view of the long established custom of taxing them as manufacturers, they should still be so taxed.

RICHMOND, VA., September 14, 1915.

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

DEAR SIR:

I have your letter of the 11th inst, referring to me the question as to whether persons conducting peanut factories should be classed as manufacturers and assessed upon the capital employed in their business or should be classified as merchants, and required to take out a merchants' license based upon their purchases? You also enclosed with your letter a letter from Hon. J. E. West, of Suffolk, Va., and a letter from C. H. Causey, Jr., also of Suffolk, Va., From these letters it seems that the business of a peanut factory consists in cleaning, assorting, shelling and roasting peanuts which have been purchased from farmers or brokers. It also appears from the records in your office that heretofore persons and corporations conducting such factories have been classified as manufacturers and assessed upon the capital employed in their business. The question to be considered, therefore, is whether the previous custom to this matter is to be overruled and a new system of taxation of these persons and corporations adopted?

If it were an original proposition, and never had been acted on by the tax officers of the State, I am inclined to think I would hold that persons and corporations engaged in the business of cleaning, assorting, shelling and roasting peanuts and selling the same, are merchants and not manufacturers; but in view of the long established custom of treating them as manufacturers, I am constrained to believe that it would be unwise to depart from this custom when there has been no change in the law affecting the question. I, therefore, would advise that until the legislature has enacted some law settling the question beyond doubt, the previous custom should be continued.

Yours very truly,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

MILITIA—*Courts—Martial—Refusal of City Sergeant to arrest upon warrant of court-martial—Punishment therefor.* Va. Code 1904, Secs. 374, 712-745, 900 and 2939.

The failure of a city sergeant to arrest enlisted men upon a warrant issued by a court-martial is punishable either by requiring such officer to forfeit twenty dollars or by his removal from office by the corporation court and for the enforcement of such a forfeiture, the justices' court of the corporation has jurisdiction.

RICHMOND, VA., *September 1, 1915.*

HON. W. W. SALE,
The Adjutant-General,
Richmond.

DEAR SIR:

In response to your question as to what steps may be taken in the matter of the refusal of the sergeant of the city of Norfolk to arrest two enlisted men upon warrant to be tried before the court-martial over which lieutenant S. J. Houghton, Battery C, Virginia Militia, is presiding, will say I understand that the court-martial is sitting and the alleged offenders are to be tried in pursuance of the provisions of section 374 of the Code of Va., as amended, Acts 1912, p. 622. That section provides, among other things, as follows:

"Such courts (that is to say courts-martial and courts of inquiry) shall have power to have the alleged offender and witnesses brought before it by a warrant issued by such court and delivered to any sheriff, sergeant or constable of a city, county or town; and it shall be the duty of said sheriff, sergeant or constable to execute said warrant as other criminal warrants are executed, and he shall be entitled to the same fee for such services, which shall be paid to him in the same manner as are allowed and paid him for executing other criminal warrants."

Section 900 of the Code provides that:

"Every officer to whom any order, warrant or process may be lawfully directed shall make true return thereon of the day and manner of executing the same and subscribe his name to such return. * * * Any officer failing to comply with this section shall forfeit twenty dollars." * * *

Section 821 of the Code provides that the corporation courts of corporations shall have power to remove from office all city officers for malfeasance, misfeasance, incompetency, or gross neglect of official duty.

It will, therefore, be seen that the sergeant of the city of Norfolk can be proceeded against under either or both of the statutes above referred to. Jurisdiction in the matter of the enforcement of the forfeiture would be in the justices' court of the city of Norfolk. Va. Code 1904, Secs. 712-45, 2939.

Very truly yours,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

MILITIA—*De facto officer—Power to court-martial.* Va. Code 1904, Sec. 308.

The authority of a military officer of a company which had never been properly organized since the requisite number of men had not been given the medical examination and had not subscribed to the oath of enlistment is not subject to collateral attack on the part of a private who has been court-martialled for disobedience of orders.

RICHMOND, VA., *November 6, 1914.*

His Excellency, H. C. STUART,
Governor of Virginia,
Richmond, Va.

DEAR SIR:

In response to the letter of Mr. Forward, dated October 23rd, I beg leave to submit the following. It appears that James Leffew refused to obey an order given

him by the captain of the military company to which he belonged; and, upon his court-martial, he stated that the company had never been properly organized, since the requisite number of men had not been given the medical examination and had not subscribed to the oath of enlistment. The captain of his company held a commission signed by the Governor and the Adjutant-General. The question is whether James Leffew could be heard to object to the legality of the court-martial, and incidentally whether the captain of the company was a *de facto* captain and ought to have been obeyed.

Section 308, Va. Code 1904, provides, so far as this question is concerned, as follows:

"And whenever the said officers-elect shall have passed the examinations hereinafter provided for, and have been commissioned by the governor, and the oaths provided in section 310 taken and subscribed, and the company mustered into service, the said organization shall be a legally organized company, subject to the requirements and entitled to the benefits and privileges of this chapter."

Section 310, provides for the taking and subscribing of oaths by privates before entering upon their duties.

It seems clear that one of the pre-requisites to a legally organized company is that there must be a sufficient number of men who take and subscribe to the oath. The question here presented is, may a captain who has been regularly commissioned court-martial a member of his company when the requisite number have not been mustered in?

From an examination of authorities, the question seems to hinge upon whether the captain in this case was a *de facto* officer, for the general rule is that the exercise, by a *de facto* officer, of a power which lawfully pertained to the office of which he had possession is valid and binding where it is for the interest of the public, or of any individual other than the officer himself, to sustain the officer's act. Throop on Public Officers, section 622. The same learned author defines a *de facto* officer as follows:

"A *de facto* officer is the one who exercised the power, being then in possession of the office under color of authority, but without actual right thereto."

Or, stated in another way, the rule is as follows:

"The exercise of a power by a *de facto* officer which lawfully pertained to the office of which he had possession is valid and binding, where it is for the interest of the public, or of any individual, except the officer himself, to sustain the officer's act; but where the officer himself founds a right upon such exercise, either personally or officially, it is not valid in his favor."

Throop on Public Officers, sec. 649;

McCraw v. Williams, 33 Gratt. 510;

Griffin v. Cunningham, 20 Gratt. 31.

In the case of *McCraw v. Williams*, the court lays down the following rule:

"The rule which declares that the acts of an officer *de facto* are as valid and binding as if he were an officer *de jure* is founded on the soundest principles of public policy, and is absolutely essential to the protection of the best interests of society. Indeed the affairs of society could not be conducted on any other principle. To deny validity to the acts of such officers would lead to confusion and insecurity in public as well as private affairs, and thus oppose the true policy of every well regulated State."

The rule is sometimes stated in the following language:

"Where the authority under which the officer acts is regular on its face and emanates from a source which has the legal or constitutional right to bestow it, and it requires a reference to facts not disclosed in the commission or order of appointment to show that the power of appointment has been illegally or irregularly exercised, the appointment is voidable only and the acts of the appointee done in reference to such appointment are valid as to the public and third persons, for the reason that the affairs of society cannot be carried on upon any other principle."

Thompson v. State, 21 Ala. 48, 54, 55;

Throop on Public Officers, sec. 633.

The rules laid down above are taken from cases applicable for the most part to civil officers. For stronger reason it would seem they would be applicable when we come to lay down rules for the government of the militia. Therefore, the conclusion seems to be that the authority of the military officer aforesaid is not subject to collateral attack on the part of a private who has been court martialed for disobedience of orders, whatever may be the consequence in a direct proceeding against the officer based upon the assumption that he has not mustered in to his company the proper number of men.

Very truly yours,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

MILITIA—*Enlisted men—Pay.* Va. Code 1904, Sec. 304.

Artificers, wagoners, farriers, saddlers, mechanics, and cooks, being enlisted men, are entitled to only one dollar per day for their services, but in case of a longer period of service than sixty days at one time, they are entitled to receive for such time in excess of sixty days as they may be retained in the service, the same pay, rations, and allowance as enlisted men of like grade in the United States army or navy; and when rations are issued, the value of the same shall be computed by the Adjutant-General and the money paid to the enlisted men in lieu thereof.

RICHMOND, VA., October 7, 1914.

HON. W. W. SALE,

Adjutant-General,

Richmond, Va.

DEAR SIR:

Yours of October 2nd, enclosing communication of Lieutenant Col. Potts, Quartermaster Corps, Virginia Volunteers, regarding State pay allowed enlisted men, under section 304, received. I judge from Col. Pott's letter that artificers, wagoners, farriers, saddlers, mechanics and cooks are all enlisted men. That being the case, under the section referred to, they are entitled to only \$1.00 per day for their services; but in case of a longer period of service than sixty days at one time, they are entitled to receive, for such time in excess of sixty days as they may be retained in the service, the same pay, rations and allowance as enlisted men of like grade in the United States Army or Navy; and when rations are not issued, the value of the same shall be computed by the Adjutant-General and the money paid to the enlisted men in lieu thereof.

Very truly yours,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

MILITIA—Transfer without loss of grade or continuous service—Requirement of an examination. Va. Code 1904, Secs. 308 and 308a.

An examination as to the qualifications to perform the duties of office is required of an officer who is appointed elected or transferred from one officer or organization in the militia to another without loss of grade or continuous service.

RICHMOND, VA., July 8, 1915.

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

DEAR SIR:

I am in receipt of a letter written for you by Colonel W. A. Dempsey, under date of July 6th, in which you state the following case:

"Major J. Fulmer Bright, Medical Corps Virginia Volunteers, with rank of March 20, 1912, was recently elected by the commissioned officers of the companies of the First Battalion, First Infantry, at Richmond, as major of that battalion. Major Bright desires to be transferred without loss of grade or continuous service from his present position as major Medical Corps to that of position for which he was recently selected."

Upon this state of facts, you desire my opinion as to whether such transfer can be made without examination.

The statute giving transfer without loss of grade is found in section 308a of the Code as it appears Acts of 1912, p. 622. It reads as follows:

"The day of appointment or election of an officer shall be expressed in his commission and shall be considered as the date thereof. When an officer is appointed, elected or transferred from one office or organization to another without loss of grade or continuous service he shall rank in his grade according to the date of his original commission, which shall be stated in his new commission."

The provision of the statute dealing with the question of examination is found in section 308 of the Code which, so far as material, reads as follows:

"Each commissioned officer, whether of the field, line or staff, shall within sixty days after his election or appointment, unless sooner ordered, report to a board of examiners, consisting, etc., * * * for examination as to his qualifications to perform the duties of the office to which he has been elected or appointed."

Although section 308a of the Code was enacted after the provision last above quoted, it does not have the effect of changing the previous statute with reference to examinations, but the two sections must be read together as parts of the same law governing such matters. It, therefore, follows that I am of the opinion that Major Bright must pass the examination provided for under section 308 of the Code.

Very truly yours,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

NOTARY PUBLIC—*Failure to qualify—Disposition of fee.*

A person who has been appointed a notary public, but did not qualify within the time prescribed by law cannot be refunded the fee paid out of the treasury nor can the fee already paid be applied under a commission issued by virtue of a new appointment.

RICHMOND, VA., July 14, 1915.

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

DEAR SIR:

I find on my desk a letter addressed to you by Hon. B. O. James, Secretary of the Commonwealth, with reference to the question as to whether a man who had been appointed a notary public, but did not qualify within the time prescribed by law can receive back his fee for commission; or whether, if another commission be issued to him, the fee already paid might be applied on his new appointment. I have before me also a carbon copy of your letter to Hon. B. O. James on this subject, and agree with you that there is no law which would authorize a refund of this money out of the treasury after it has been covered into the treasury; and I also find no law by which the fee already paid can be applied on account of the new appointment.

Very truly yours,

CHRISTOPHER B. GARNETT,
Assistant Attorney General.

OFFICES—*Compatibility of—Circuit judge and a member of the board of visitors of the University of Virginia. Va. Constitution, Sec. 105. Va. Code 1904, Sec. 3130.*

A circuit judge cannot serve as a member of the board of visitors of the University of Virginia.

RICHMOND, VA., April 3, 1915.

His Excellency, H. C. STUART,
Governor of Virginia,
Richmond, Va.

DEAR SIR:

I have your letter of April 2nd, asking my official opinion on the following question, to-wit:

Can a judge of one of the circuit courts of Virginia serve as a member of the board of visitors of the University of Virginia?

Section 105 of the Constitution provides that "no judge * * * shall hold any other office of public trust during his continuance in office * * *."

Section 3130, Va. Code 1904, provides that "no person holding the office of judge shall hold any other office or public trust during his continuance in office * * *."

If, therefore, a visitor is in the language of the Constitution a holder of an "office of public trust," or is the language of the statute, a holder of an "office or public trust," then a judge is not permitted to serve as a visitor.

The Supreme Court of Appeals of this State, in the case of *Childrey v. Rady*, 77 Va. 518, 530, decided that school trustees are officers. My predecessor Attorney General Williams (Report 1913, p. 92) expressed the opinion that a member of the State Library Board was a holder of a public trust within the meaning of the language

used in section 3130, above quoted, and ruled that a circuit judge could not serve as of that board.

In *People v. Bledsoe*, 68 N. C. 457, it was decided that trustees of the State University were officers.

In *People v. McKee*, 68 N. C. 429, it was held that directors for the institution of the deaf and dumb were officers.

In *People v. Sanderson*, 30 Cal. 150, it was decided that trustees of a state library were public officers.

I am, therefore, of the opinion that a circuit judge cannot serve as a member of the board of visitors of the University of Virginia.

Very truly yours,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

OFFICES—*Compatibility of—County clerk—Escheator.*

There is no law preventing the appointment of a county clerk to the position of escheator for his county.

RICHMOND, VA., *September 27, 1915.*

His Excellency, H. C. STUART,
Governor of Virginia,
Richmond, Va.

DEAR SIR:

Yours of September 25th received. There is no law preventing the appointment of a county clerk to the position of escheator for his county.

I am re-enclosing you the letter of Mr. Frank Stuart.

Yours very truly,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

OFFICES—*Payment out of public funds of expense of in attending conventions—State Highway Commissioner. Acts 1906, ch. 73; Acts 1914, ch. 199.*

In the absence of express legislative enactment, the State departments may not pay the expenses of their officers and employees to conventions which have under consideration matters pertaining to their respective departments.

RICHMOND, VA., *August 27, 1915.*

To His Excellency, HENRY C. STUART,
Governor of Virginia,
Richmond, Va.

DEAR SIR:

I have your request for my written opinion on the following question:

In cases where the Governor appoints officials or employees of State departments as delegates to conventions, having under consideration matters pertaining to said departments, is it lawful for such departments to pay the expenses of said delegates to said conventions out of the funds appropriated for the contingent expenses of said departments?

In the first place it may be well to state that the Governor appoints delegates to such conventions in accordance with a long established custom and not because of any statutory authority. The fact, therefore, that the delegates may be appointed by the Governor has no *legal* bearing upon the question.

In as much as your question affects all of the departments of the State government, and the laws pertaining to the various departments, and the language used in the appropriations thereto, may be so widely different, it is altogether possible that one department may possess such right while another department might have no such right. I have, therefore, with your consent, for the present limited my reply to the department which you now have in mind, to-wit: the department of the State Highway Commission. The immediate question upon which you want my opinion is whether that department can pay out of the funds appropriated to it, the expenses of any of its officers or employees to the Pan-American Roads Congress, Oakland California, September 13-17.

Upon consulting the appropriation bill for the current year, Acts 1914, ch. 199 at p. 346, I find under the head "State Highway Commission" the appropriation for the salaries of the State Highway Commissioner, his assistants and clerks followed by an item appearing in the following language:

"For contingent and other expenses \$19,300.00."

The expenses of said delegates if paid at all, must come out of the funds referred to in this item. It will be noted that the appropriation bill does not undertake to define what may properly be considered the "contingent and other expenses" of the State Highway Commission. On turning to the act creating the said Highway Commission, being chapter 73 of Acts 1906, I find there no provision defining what are proper contingent and other expenses of the department. In fact all of the statutes pertaining to this department are entirely wanting in any provision which would throw any light upon the question as to what the General Assembly meant by the term "contingent and other expenses." In construing this language we are, therefore, left entirely to the guidance of general principles. It is difficult, if not impossible, to state in general terms what might properly be considered "contingent and other expenses" of a department. Each specific case must be taken up on its merits and the nature of the proposed expenditure examined in order to ascertain its relationship to the work of the department. It is doubtless true that officers and employees of this department could gather much valuable information concerning the work committed to their care by attending conventions and conferring with those who are engaged in the same work in this and other States and countries, yet I am constrained to believe that an extremely dangerous precedent would be established if departments should, without express legislative authority, pay the expenses of their officers and employees to such conventions. The benefit to accrue from such attendance is too uncertain and the custom of attending such conventions at public expense (said to prevail in some parts of the country) is too new, and the privilege too liable to abuse, to justify the assumption that the General Assembly meant to include such expenses within the language "contingent and other expenses." While I am well aware that occasion might arise where the State would derive great benefit from the attendance of an official upon such conventions, yet it is a question of legislative policy which should be exercised only by the General Assembly or by some official or board plainly authorized so to do by legislative act.

It follows that I am of the opinion that it would be unlawful to pay the expenses of officers and employees of the State Highway Commission to the Pan-American Roads Congress.

Yours very truly,
JNO. GARLAND POLLARD,
Attorney General of Virginia.

OFFICES—*State Board of Embalming—Effect of failure to qualify. Va. Constitution, Sec. 33; Va. Code 1904, Sec. 1743g.*

The failure of a member of the State Board of Embalming to qualify within the time prescribed by law creates a vacancy which it is the duty of the Governor to fill.

RICHMOND, VA., September 22, 1915.

His Excellency, H. C. STUART,
Governor of Virginia,
Richmond, Va.

DEAR SIR:

In the absence of the Attorney General I am replying to your letter of the 18th instant, in which you enclosed a commission issued to Mr. T. Allen Fox, evidencing appointment to membership on the State Board of Embalming for the term of five years from July 1, 1915. From your letter it appears that although the commission was issued on the 21st day of June, Mr. Fox did not qualify for the position until the 26th of August. It does not appear from your letter when the appointment was made. You desire to know whether Mr. Fox is a member of the State Board of Embalming.

The statute creating the said board of embalming is found in Va. Code 1904, section 1743g. That section provides in clause 2, in part, as follows:

"The first board shall be appointed on or before the first day of June, eighteen hundred and ninety-four, and one member annually thereafter, who shall serve for a term of five years from the first day of July next ensuing; all subsequent appointments on the board, except to fill vacancies, shall be selected from three names sent to the governor by the Virginia Funeral Directors' Association. But if the said nominations are not made to the governor by June 15th of any year, then the governor shall appoint and commission a suitable person to fill the vacancy occasioned by the expiration of the term of the said member on said board."

Clause 4 of the same section provides:

"The governor shall furnish each person appointed to serve on the State Board of Embalmers a certificate of appointment. The appointees shall qualify by taking the usual oath of office before a county or corporation court of the county or corporation in which the said person may reside within ten days after said appointment has been made, and this fact shall be noted on the certificate of appointment and shall be filed with the board of embalmers."

In clause 2 of the act, same section, it is provided in part that "all vacancies occurring on the board shall be filled by the Governor."

From these sections it seems clear that since Mr. Fox did not qualify within ten days after said appointment, he is not a member of the State Board of Embalming under that appointment. See *Childrey v. Rady*, 77 Va. 518.

The question then arises as to whether the failure of Mr. Fox to qualify within the prescribed time creates a vacancy within the meaning of clause 2 of the section quoted. It will be observed that section 33 of the Constitution provides that

"All officers elected or appointed shall continue to discharge the duties of their office after their terms of service have expired until their successors have qualified."

In view of this constitutional provision, can there be said to be a vacancy in the office? That question has been treated in an extensive note in 50 L. R. A.

(N. S.) p. 374, under similar statutory and constitutional provisions. From this note it will be seen that the courts are not entirely in harmony as to whether there may be said to be a vacancy when the incumbent holds over as in the present case, but this question seems to have been decided in this State in the case of *Childrey v. Rady*, above quoted. There it was held that the failure of school trustees to qualify caused a vacancy which was to be filled by appointment, notwithstanding the fact that the incumbent might hold over. See also *Kilpatrick v. Smith*, 77 Va. 347.

It would further seem that the same case in deciding that school trustees are officers within section 33 of the Constitution would make it clear that members of the State Board of Embalming are also clearly officers. Indeed, it has constantly been held that members of State boards are officers. 17 L. R. A. 253; 17 Am. & Eng. Ann Cas. 453.

I, therefore, conclude that the failure of Mr. Fox to qualify within the time prescribed by law creates a vacancy to be filled by you. This conclusion renders unnecessary any consideration as to whether the appointment would have been valid had the appointee qualified as required by law. In either event there is a vacancy, and it seems hardly necessary to say that I have further reached the conclusion that the incumbent under the appointment of July 1, 1910, who seems to be the same person appointed as successor, still holds under his commission of July 1, 1910.

Yours very truly,

CHRISTOPHER B. GARNETT,
Assistant Attorney General.

OFFICES—*Superintendent of Public Printing—Duty to furnish copies of Acts of Assembly to chief of police of city. Va. Code 1904, secs. 265 and 279.*

In those cities where important duties, ordinarily performed by the sheriff, are placed upon the chief of police, the Superintendent of Public Printing will be justified in furnishing the chief of police with copies of the Acts of Assembly as they appear from session to session; but where the Superintendent of Public Printing has delivered all of the Acts of Assembly to the Secretary of Commonwealth, he cannot recall them; nor can the Secretary of Commonwealth part with copies of the acts except upon application by the circuit or corporation court; and upon being satisfied that the chief of police does not possess them.

RICHMOND, VA., September 27, 1915.

His Excellency, H. C. STUART,
Governor of Virginia,
Richmond, Va.

DEAR SIR:

I have yours of September 25th, asking whether the chiefs of police for the cities of the Commonwealth are entitled under the law to receive, free of charge, copies of the Acts of Assembly. The statutory provision dealing with the subject appears as section 279 Va. Code 1904, as amended by Acts 1912, p. 535. That section provides, among other things, that the public printer shall distribute one copy of the acts to

“each mayor, clerk of any court, attorney for the Commonwealth, sheriff, sergeant, treasurer, commissioner of the revenue, justice of the peace, supervisor and division superintendent of schools,” etc.

It will be observed that the chiefs of police of cities are not specifically mentioned. It is true, however, that the charter granted by the General Assembly to the various cities of the Commonwealth places upon the chiefs of police duties which are ordinarily performed by the sheriffs, and in some cases takes away from the sheriff the duties which ordinarily pertained to that office and places them upon the chiefs of police. The purpose of the statute, above quoted, is evidently that the officers charged with the enforcement of the laws of the State in their respective jurisdiction should have furnished them, free of charge, the laws which they are called upon to enforce.

I am, therefore, of the opinion that in those cities where important duties, ordinarily performed by the sheriff, are placed on the chiefs of police, the public printer will be justified under the section above referred to, in furnishing the chiefs of police with copies of the Acts of Assembly as they appear from session to session.

The section above referred to, however, provides that the public printer, after making the distribution required by law, should turn over the remaining copies of the Acts of Assembly to the Secretary of the Commonwealth to constitute a part of the Literary Fund. If, therefore, the public printer has delivered all of the Acts of Assembly to the Secretary of the Commonwealth, he cannot recall the same, nor can the Secretary of the Commonwealth part with said copies of the Acts except in pursuance of section 265 of the Code, which provides that

"Whenever the Secretary of the Commonwealth shall be satisfied that any justice or other county or corporation officer entitled by law to receive the session acts of the Code of Virginia does not possess the same or any of them, and cannot otherwise procure them, he shall, on application of the circuit or corporation court, furnish the same; provided, he does not thereby diminish the supply of the work so issued in his custody below twenty-five copies."

If, therefore, chiefs of police should desire Acts of Assembly heretofore published they should apply to the judge of their circuit or corporation courts as provided in the above statute; and as to Acts to be hereafter issued I shall advise the public printer to send a copy to each chief of police exercising the functions of sheriff in the cities of the Commonwealth.

Yours very truly,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

OFFICES—*Superintendent of Public Printing—Duty where bidders combine. Va. Code 1904, Sec. 273.*

Where the Superintendent of Public Printing is of the opinion that the printers bidding on the State's work have made any agreement, express or implied, which results in bids at figures much in excess of those which the State was accustomed to pay for the same work, and that in fact the bids received are the results of a combination among the bidders to fix prices, it is his duty to reject said bids and advertise for new bids.

RICHMOND, VA., *September 23, 1915.*

HON. DAVIS BOTTOM,

Superintendent of Public Printing,

Richmond, Va.

DEAR SIR:

In response to your request, I am herewith giving you my opinion as to your official duty upon the following state of facts.

In pursuance of section 273 of the Code, as amended by Acts 1912, p. 535, you advertised in the newspapers for bids on public printing, and when said bids were received and tabulated it was found that they were greatly in excess of what the State is accustomed to pay for public printing; that upon a careful analysis and comparison of said bids you became convinced that the bidders on a large part of the work had entered into an agreement or combination fixing the figures at which they should respectively bid, and that said bids further indicate that there was an expressed or implied agreement among the bidders in said combination that certain of their number should be allowed to underbid others on specific work, thus bringing about a condition designed to result in the awarding to and parcelling out among said bidders the several classes of work at figures much in excess of those which the State was accustomed to pay for the same work in previous years.

Section 273 of the Code, above mentioned, provides that you shall give notice of the time and place of letting public printing by advertisements published for two weeks in a newspaper of general circulation published in the city of Richmond, and in not less than two other newspapers of general circulation published in other cities of the Commonwealth, and that you shall reserve the right to reject any and all bids. This provision of the law is evidently intended to bring about the fullest and freest competition among contracting printers, and if you are of the opinion that said printers have made any agreement, express or implied, which would defeat the purpose of the law, and that in fact the bids received by you are the result of a combination to fix prices, it is your duty to reject said bids and advertise for new bids in pursuance of statute.

I understand that the bids of some of the contracting printers on some of the work are reasonable and indicate that the concerns offering said bids were not parties to any combination or agreement. In pursuance of discretion vested in you by the statute you may accept or reject said bids as the public interest may, in your opinion, require.

Very truly yours,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

OFFICES—*Vacancies—Judges—Governor. Va. Constitution, Sec. 73; Va. Code 1904, Secs. 3049 and 3133.*

Where a judge of corporation court fails to qualify within the time prescribed by law, a vacancy exists, which the Governor has authority to fill by a commission expiring at the end of thirty days after the commencement of the next session of the General Assembly.

RICHMOND, VA., *July 15, 1915.*

His Excellency, H. C. STUART,
Governor of Virginia,
Richmond, Va.

DEAR SIR:

Referring to your inquiry concerning the status of the judgeship of the corporation court of the city of Fredericksburg, will say that the facts, as I understand them, are as follows:

The General Assembly of Virginia, at its regular session of 1914, elected John T. Goolrick judge of the corporation court of the city of Fredericksburg, to succeed

himself, his new term to begin on February 1, 1915. Judge Goolrick failed to qualify as provided in section 3133 Va. Code 1904, which reads as follows:

"Any judge of this Commonwealth may qualify at any time after receiving his commission and before the expiration of thirty days after the commencement of his term of office; but if he fail to receive his commission until after the commencement of his term of office he may qualify within thirty days from the date of receiving the same. A failure on the part of any judge to qualify as above provided shall vacate his office."

The clerk of the said court has, in accordance with section 3049, Va. Code 1904, written you a letter, under date of May 17, 1915, in which he notifies you that a vacancy exists in the office of judge of said court "by reason of the fact that Judge Goolrick was prevented by illness from qualifying for his new term of eight years, which began February 1, 1915."

Upon this statement of facts I am of the opinion that a vacancy in the judgeship of the corporation court of the city of Fredericksburg does in fact exist, and that, under section 73 of the Constitution, you have authority to fill the vacancy by a commission expiring at the end of thirty days after the commencement of the next session of the General Assembly.

Very truly yours,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

PARDONS—*Power of Governor to pardon person in custody of Prison Association of Virginia. Va. Constitution, Sec. 73; Va. Code 1904, Sec. 4173d.*

A statute conferring upon the Governor the right and authority to pardon minors committed to the Prison Association of Virginia, provided it appear that the Association has refused to discharge the prisoner or has failed to act upon application for such discharge, etc., is unconstitutional insofar as it attempts to take away from the Governor his absolute right to pardon.

RICHMOND, VA., *October 31, 1915.*

His Excellency, H. C. STUART,
Governor of Virginia,
Richmond, Va.

DEAR SIR:

You ask my opinion on the following state of facts: A minor is convicted of forgery and committed, under section 4173d, Virginia Code 1904, to the custody of the Prison Association of Virginia. Under the rules of the Association, he was examined physically and found to be suffering with an infectious disease, whereupon the Association declined to receive him in custody. Application is now made to the Governor to issue a pardon to the convict. Sub-section 6 of the statute above referred to provides that the Governor shall have the right and authority to pardon minors committed to the Association, provided it appear that the Association has refused to discharge the prisoner or has failed to act upon application for such discharge, etc. In this case the Association refused to act on the ground that the prisoner has never been received. The question raised is whether, under the circumstances above related, the Governor may grant a pardon to the prisoner.

Section 73 of the Constitution, defining the powers and duties of the Governor, provides, among other things, that he (the Governor) shall have the power to remit

finances and penalties in such cases, and under such rules and regulations as may be prescribed by law, and, except when the prosecution has been carried on by the House of Delegates, to grant reprieves and pardons after conviction. * * *

I am of the opinion that the section of the Constitution above quoted vests in you the absolute power of pardon, and any statute having for its purpose the limiting of your power in that respect is null and void. The provisions of section 4173d, Virginia Code 1904, so far as it is attempted to take away from the Governor his right to pardon minors after conviction, until application for discharge is made to the Prison Association, is an unwarranted attempt on the part of the General Assembly to restrict your constitutional power.

It follows, therefore, that I am of the opinion that you have a right to exercise executive clemency in this case.

Very truly yours,
JNO. GARLAND POLLARD,
Attorney General of Virginia.

PENITENTIARY—*Powers of Governor—Relief of family of convict guard.*

No relief is afforded to a widow of a convict guard who, while in the employment of the State, was accidentally shot and killed by a fellow-guardman.

RICHMOND, VA., October 1, 1915.

His Excellency, H. C. STUART,
Governor of Virginia,
Richmond, Va.

DEAR SIR:

I have your letter of September 30th inquiring whether existing laws afford any relief for the widow of a convict guard who, while in the employment of the State, was accidentally shot and killed by a fellow-guardman. The circumstances of the particular case to which your inquiry is directed are such as to excite the deepest sympathy and raise the question as to whether justice would not require that the State should make some provision for relief in such cases. I am sorry, however, to have to state that existing laws afford no such relief.

I am returning herewith the correspondence submitted to me.

Yours very truly,
JNO. GARLAND POLLARD,
Attorney General of Virginia.

PHARMACY LAWS—*Licenses of Physicians—Compounding Prescriptions. Acts 1908, Ch. 291.*

Before a licensed physician can sell medicines or fill prescriptions he must procure from the Board of Pharmacy an annual permit for such purpose and that if he does not he is guilty of a misdemeanor and may be prosecuted therefor; or if he sells medicines without displaying a certificate conspicuously in the place in which he practices he may be prosecuted therefor.

RICHMOND, VA., March 20, 1915.

MR. H. S. ARRINGTON,
President Board of Pharmacy,
244 Church Street, Norfolk, Va.

DEAR SIR:

In the absence of the Attorney General I am responding to your letter of January

22, 1915, in which you ask whether a physician, in a town having a population of one thousand or less, or in a rural district, who is regularly licensed to practice medicine under the laws of Virginia, is guilty of violating the Pharmacy and Drugs Act (Acts 1908, ch. 291. p. 520) if he keeps open shop for the compounding of physicians' prescriptions and the sale of poisons without having a permit from the Board of Pharmacy.

Chapter 2, section 11, of the aforesaid act, p. 526. provides as follows:

"Except as provided in this act it shall not be lawful for any person to practice as a pharmacist, or assistant pharmacist, or to engage in, conduct, carry on or be employed in the dispensing, compounding or retailing of drugs, medicines or poisons within this State."

Section 12 also provides:

"Every person practicing as a registered pharmacist, or registered assistant pharmacist, or registered apprentice, and every person engaged in selling or compounding medicines under a permit must at all times display his certificate conspicuously in the place in which he practices *under such certificate*."

Section 10 provides, in part, as follows:

"* * * In rural districts and in towns having a population of one thousand or less any physician regularly licensed under the laws of Virginia may be granted by the board of pharmacy an annual permit to compound and sell medicines, fill prescriptions and sell poisons, duly labeling the same as required by this act."

Under section 21, p. 528, it is further provided:

"Any person violating any of the provisions of this chapter shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than twenty dollars or more than one hundred dollars for each offense."

It is further provided in section 3 of the aforesaid act that all permits of the board to sell or dispense medicines shall be renewed annually, and that the Board of Pharmacy shall require as a prerequisite for such renewal the furnishing of evidence satisfactory to the board that the applicant for renewal has complied with the law and the rules and regulations of the board.

From a study and comparison of these provisions, the conclusion seems inevitable that before a licensed physician can sell medicines, fill prescriptions, etc., he must procure from the Board of Pharmacy an annual permit for such purpose; and that if he does do so without a permit, he is guilty of a misdemeanor and may be prosecuted therefor; or if he sells medicines without displaying a certificate conspicuously in the place in which he practices he may be prosecuted for such act.

Very truly yours,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

PHYSICIANS AND SURGEONS—*Chiropractors—Right to Practice—Examinations.*
Acts 1912, Ch. 237 (11).

It is the duty of the State Board of Medical Examiners to gather sufficient evidence that persons commenced the practice of chiropractic in this State prior to January 1, 1913.

RICHMOND, VA., October 3, 1915.

DR. J. N. BARNEY,

*Secretary-Treasurer Virginia State Board of Medical Examiners,
Fredericksburg, Va.*

DEAR SIR:

Applications of Albert and Janet Snape, chiropractors.

Referring to the above cases, the only question to be decided is whether the applicants "commenced the practice of chiropractic in this State prior to January 1, 1913," as required by Acts 1912, ch. 237 (11) as amended by Acts 1914, p. 504. The information which they give you over their signatures and upon their oaths is such as would naturally call, in my opinion, for further investigation, which may disclose the fact that they were not regularly practicing in this State, or may have treated only a few patients. I would, therefore, suggest that the board satisfy itself on the question at issue by writing to the persons named on the applications, inquiring particularly as to whether the applicants maintained an office and whether or not they held themselves out as practitioners and received patrons for treatment. I would write a letter of inquiry to the owner of the building in which the applicants claimed to have conducted their office, asking how long the applicants rented the office and whether they exhibited signs and received patients at the office for treatment. After the board has gotten this information it will be in a better position to judge as to whether the applicants were really practicing chiropractic in this State prior to January 1, 1913.

I am re-enclosing the applications.

Very truly yours,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

PHYSICIANS AND SURGEONS—*Chiropractors—Right to practice—Examinations. Acts 1912, Ch. 237 (11).*

Where a chiropractor commenced the practice of chiropractic in this State prior to January 1, 1913, and practiced his calling prior to that date, the fact that he resides and has his office in another State does not prevent him from taking the examination in this State.

RICHMOND, VA., October 3, 1915.

DR. J. N. BARNEY,

*Secretary-Treasurer Virginia State Board of Medical Examiners,
Fredericksburg, Va.*

DEAR SIR:

Application of A. L. Dykes, chiropractor.

Referring to the above application, will say that the fact that the applicant does not live in the State of Virginia does not deprive him of his rights under the statute (Acts 1912, ch. 237 (11), as amended by Acts 1914, p. 504). The only question to be decided is whether he "commenced the practice of chiropractic in this State prior to January 1, 1913." If he practiced his calling in this State prior to that date, the fact that he resides and has his office just over the line in Tennessee is immaterial. I would suggest that you write to one or more of the gentlemen mentioned in the application in order to ascertain whether the applicant actually practiced chiropractic

in Virginia prior to January 1, 1913; and if you find this to be the fact, I would advise that the applicant is entitled to the examination provided for in the statute.

I am re-enclosing the application.

Very truly yours,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

PHYSICIANS AND SURGEONS—*Osteopathy—Administration of Drugs. Acts 1912, Ch. 237 (11) and (13).*

If an osteopath who has not received a special license to administer drugs, registers under the Harrison Act and dispenses opium or cocaine preparations, he is guilty of a misdemeanor punishable by a fine of not less than fifty nor more than five hundred dollars for each offense and in addition may be imprisoned for a term of not exceeding six months.

RICHMOND, VA., *September 21, 1915.*

DR. J. N. BARNEY,

*Secretary-Treasurer Virginia State Board of Medical Examiners,
Fredericksburg, Va.*

DEAR SIR:

In the absence of the Attorney General, I am replying to your letter of September 1st, requesting him to inform you whether it would be proper for osteopaths practicing in Virginia to be allowed to register under the Harrison Act.

The correct answer to this question depends upon the construction of section 11, ch. 237, Acts of 1912, as amended by Acts of 1914, p. 504 (Supplement 1914, p. 363), and also upon the terms of the Harrison Act. The provision of section 11 aforesaid, so far as applicable, reads as follows:

"It is further provided that graduates of any sectarian school of medicine who profess to practice medicine according to the tenets of said schools shall fulfil all the conditions of the board and of the State Board of Education, save that they may be exempted from taking the examination of the regulars on practice of medicine, materia medica and therapeutics. A license to practice such sectarian school of medicine shall not permit the holder thereof to administer drugs or practice surgery unless he has qualified himself so to do by examination before the board." * * *

It, therefore, appears from the above statute that the license to practice osteopathy does not permit the holder thereof to administer drugs unless he has qualified himself so to do by examination before the board, and it would follow that a mere license to practice osteopathy would not allow the holder thereof to administer drugs, but he must have, in addition to his license for osteopathy, an additional license for the administration of drugs.

The Harrison Act requires every person who produces, imports, manufactures, compounds, deals in, dispenses, sells, distributes or gives away opium or coca leaves or any compound, etc., shall register his name or style, place or places of business; and further provides in effect that no physician, dentist or veterinarian can have in his possession or write a prescription for any opium or cocaine preparation unless he is registered with the Collector of Internal Revenue of the district.

It follows, therefore, from the Harrison Act, and from the Virginia statute, that if an osteopath who has not received a special license to administer drugs, registers under the Harrison Act and dispenses opium or cocaine preparations, he will be guilty

of a violation not necessarily of the Harrison Act, but of the Virginia act regulating the practice of medicine and surgery, ch. 237, Acts 1912, section 13, which provides that any person practicing medicine in this State in violation of the provisions of the act shall, upon conviction thereof, be fined not less than fifty nor more than five hundred dollars for each offence, and in addition may be imprisoned in the jail of the county or corporation of which convicted for a term of not exceeding six months, etc.

Very truly yours,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

PHYSICIANS AND SURGEONS—*Osteopathy—Examination required. Acts 1912, Ch. 237.*

The provision that a license to practice a certain sectarian school of medicine does not permit the holder thereof to administer drugs or practice surgery unless he has qualified himself so to do by examination before the State Board of Medical Examiners, prevents a person so licensed from administering drugs or practicing medicine even though he was by law under his license formerly permitted to do so.

The present statute providing that the State Board of Medical Examiners may exempt members of the sectarian schools from examination on the practice of medicine, materia medica, and therapeutics, vests in the Board discretion as to the said exemptions and does not compel it to exempt members of the sectarian schools from examination on said subjects.

In cases of members of the sectarian schools *now* practicing, no certificate to perform surgical operations with the use of instruments can be granted unless the applicant also satisfies the State Board either that he has had adequate clinical facilities in the college of his graduation, or that he has, by hospital work, enabled himself to perform such operations; and the Board may satisfy itself on these particulars either by an examination of the applicant as to such knowledge as would demonstrate the fact that he had had such adequate clinical facilities or such hospital work; or it could investigate the facts concerning the adequateness of the applicant's clinical facilities at college, or his work in some hospital.

RICHMOND, VA., *June 22, 1915.*

STATE BOARD OF MEDICAL EXAMINERS,
Richmond, Virginia.

GENTLEMEN:

I am asked to advise your honorable body whether it should grant the application of Dr. H. S. Beckler, Osteopath, for the issuance to him of a new certificate permitting him to practice surgery in this State along with osteopathy.

The facts, as I understand them, are that Dr. Beckler holds the certificate issued by you in 1911 permitting him to practice osteopathy only, which it is admitted is a "sectarian school of medicine" within the sense in which the term is used in the act regulating the practice of medicine and surgery, being chapter 237 of Acts of 1912. It appears that the certificate now held by Dr. Beckler was issued to him after he had successfully passed the examination by your Board on all subjects upon which allopathic or "regular" physicians had to stand examination, except the subject of materia medica, from examination upon which Dr. Beckler was exempted by the Board in pursuance of that provision of the then existing statute which authorized your Board to make such exemption in the case of "applicants professing a system of medicine which does not require the use of drugs." (See Vol. III, Code, Sec.

1747, now repealed.) It appears, however, that Dr. Beckler was examined and successfully passed on the subjects of surgery, toxicology and the related subjects of anaesthesia and antisepsis, and for that reason he claims to be entitled to a certificate permitting him to practice surgery, by which I understand he means not only to practice osteopathic manipulations claimed by his school in some cases to accomplish the same results as surgical operations, but also to practice surgery, with the use of instruments, to the full extent permitted to physicians belonging to what is known as the regular school.

The certificate now held by Dr. Beckler was issued before the passage of the said act of 1912, regulating the practice of medicine and surgery, but, inasmuch as his present application for a certificate to practice surgery, is made after the passage of that act, the granting of the application must be governed by the terms of that act which, so far as material to this case, provides as follows:

"A license to practice such sectarian school of medicine shall not permit the holder thereof to administer drugs or practice surgery unless he has qualified himself so to do by examination before the board, nor shall it permit members of such sectarian schools now practicing in this State to perform surgery with the use of instruments, unless they satisfy the board that they have had adequate clinical facilities at their respective colleges of graduation, or by hospital work, to enable them to perform such operations."

The above provision went into effect March 13, 1912 (Acts 1912, p. 252) and remained the same in the amendment effective June 19, 1914 (Acts 1914, p. 504). It is apparent from the foregoing provision that the present certificate held by Dr. Beckler does not now permit him to administer drugs or practice surgery unless and until he has qualified himself so to do by examination before your board; nor does it permit him to perform surgery with the use of instruments until he satisfies the board that he has had adequate clinical facilities at the college of his graduation, or that he has, by hospital work, enabled himself to perform such operations. Dr. Beckler claims that he has already stood his examination on surgery and that if anything further be required of him, it would be unjust discrimination against his school of medicine, because allopathic physicians who passed the examination at the same time are not required to stand any other and further examination. But, the answer to this contention is plain, to-wit: that if there be any discrimination against osteopathy in the above provision, that such discrimination is embodied in an act of the General Assembly which your board has no authority to change. The General Assembly has exempted the members of sectarian schools of medicine from examination on certain subjects and has in turn required of the members of such schools certain prerequisites for the practice of surgery not specifically required of members of the regular schools, and whether such prerequisites are founded on reason is a legislative question and not one which your board can properly consider in the case before it. It is immaterial whether, at the time of the issuance of Dr. Beckler's license to practice osteopathy, such license then entitled him also to practice surgery, for the reason that the subsequent act of 1912, re-enacted in 1914, specifically provided that the holders of such certificates cannot practice surgery except after compliance with the provisions of said act. Therefore, whatever might have been Dr. Beckler's original rights under the certificate now held by him, he could not have lawfully practiced surgery in this State after March 13, 1912, the date upon which the provision above quoted went into effect. If his examination on surgery in 1911, then entitled him to practice surgery, that right ceased by terms of the act of 1912. He now stands before the board as an applicant for a certificate

to practice surgery and before he can be permitted to practice he must, in the language of the statute, "qualify himself to do so by examination before the board," etc. I shall not undertake to say upon what subjects he shall be examined. This is a medical rather than a legal question. The present act provides that the board *may* exempt members of the sectarian schools from examination on the practice of medicine, materia medica and therapeutics. This provision, in my opinion, vests in the board discretion as to said exemptions and does not compel the board to exempt members of the sectarian schools from examination on said subjects; for instance, if the board be of opinion that the protection of the public requires that all persons practicing surgery should have a knowledge of materia medica in order that the practitioner may know what drugs, if any, should be administered before or after surgical operations, then it is within the province of the board to require members of the sectarian schools to stand an examination on materia medica. It will be observed that in addition to the standing of such examinations as may be required in such cases by the board, that in cases of those members of the sectarian schools *now* practicing, no certificate to perform surgical operations with the use of instruments can be granted unless the applicant also satisfy your board either that he has had adequate clinical facilities in the college of his graduation, or that he has, by hospital work, enabled himself to perform such operations. The board may satisfy itself on these particulars, either by an examination of the applicant as to such knowledge as would demonstrate the fact that he had had such clinical facilities or such hospital work; or 't could investigate the facts concerning the adequateness of the applicant's clinical facilities at college, or his work in some hospital.

Very truly yours,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

PHYSICIANS AND SURGEONS—*Who may be admitted to examination to practice medicine—Educational qualifications. Acts 1912, Ch. 237.*

The State Board of Medical Examiners may not admit to examination any person who does not meet the requirements of the Board of Education of the Commonwealth of Virginia, which fact must be evidenced by a certified statement from the Superintendent of Public Instruction.

RICHMOND, VA., *June 22, 1915.*

STATE BOARD OF MEDICAL EXAMINERS,
Richmond, Va.

GENTLEMEN:

I am asked to advise you whether the former students of the North Carolina Medical College, now completing their professional course at the Medical College of Virginia, can, after graduation, be permitted to examination before your board. The facts, as I understand them, are that the two institutions above mentioned were consolidated, and that the candidates for graduation, no matter in which institution they may have begun their course, are required to pass the same examinations, but that some of the students who began their course in the North Carolina Medical College, and who are now completing their course in the Medical College of Virginia, did not, at the time of their entrance in the North Carolina institution, possess the same academic training which was, at that time, required for entrance in the Medical College of Virginia.

The act regulating the practice of medicine and surgery in this State, being chapter 237 of the Acts of 1912, in the 8th section thereof, dealing with admissions to examination, provides, among other things, that the applicant must have "had prior to beginning his first year of medical study the general education required preliminary to receiving the degree of bachelor or doctor of medicine of this State. This preliminary education shall meet the requirements of the Board of Education of the State of Virginia, and a certified statement from the superintendent of said board shall accompany the candidate's application."

From the above it is plain that you cannot admit to examination any person who does not meet the requirements of the Board of Education of the State of Virginia, which fact must be evidenced by a certified statement from the Superintendent of Public Instruction.

Very truly yours,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

PHYSICIANS AND SURGEONS—"Exemption" licenses—Issuance of licenses. Acts 1912, Ch. 237 (G).

Practitioners of the school called "regular" who were engaged in practice prior to 1885, and those belonging to the school of osteopathy when practicing prior to 1903 may now have issued to them their certificate or license.

The State Board of Medical Examiners is the proper party to pass upon what verification licenses may be issued; and, when the matter has been passed upon by the board, the certificates should be issued by the president and secretary of the board.

RICHMOND, VA., June 22, 1915.

STATE BOARD OF MEDICAL EXAMINERS,

Richmond, Va.

GENTLEMEN:

In response to the request of your president to advise your honorable body whether you might, under section 6 of the act regulating the practice of medicine and surgery (Acts 1912, ch. 237) issue what is known as an exemption license to those who apply for the same more than one year after the passage of said act, will say that the section referred to, so far as is material to your inquiry, reads as follows:

"It is especially provided that those whose claims to State licenses rest upon having practiced in the State previous to the year eighteen hundred and eighty-five shall present to the board satisfactory evidence of having legally practiced medicine in this State before eighteen hundred and eighty-five, or if an osteopath, before the year nineteen hundred and three."

And the first sentence in the same section provides as follows:

"Within one year after the passage of this act all licensed practitioners of medicine in this State shall, as above provided, register their certificates to practice medicine," etc.

I am of the opinion expressed in another letter addressed to you of even date that the last quoted provision is merely directory, and that practitioners may now have their certificates registered. I am also of the opinion that those practitioners of the school called "regular" who were engaged in practice prior to 1885, and those belonging to the school of osteopathy when practicing prior to 1903, may now have

issued to them their certificate or license, as it is inaptly called in the section referred to.

It may be considered desirable to place a limitation of time within which those who claim exemption from examination may apply for their certificates. If so, the object could be accomplished by an amendment to the law.

I am also asked whether what is termed the certification license in the same section shall be issued by the board or by the secretary thereof. In response to this question, I quote the provision dealing with the same:

"Legal practitioners of medicine practicing under the provisions of previous laws who have not already received a license from a State medical examining board of this State shall present to the board documents sufficient to establish the existence and validity of a diploma granted to each by some bona fide college of medicine, or to establish their exemption existing under any law, and shall receive from said board a verification license, which shall be recorded * * * as provided above for original licenses," etc.

It follows, from the above quoted language, that it is for the board to pass upon what verification licenses may be issued, and when the matter has been passed upon by the board, the certificates should be issued by the president and secretary of the board.

Very truly yours,
JNO. GARLAND POLLARD,
Attorney General of Virginia.

PHYSICIANS AND SURGEONS—"Exemption" licenses—When issuable. Acts 1912, Ch. 237.

A statute providing that within one year all licensed practitioners of medicines shall register their certificates to practice medicine is, as to the time limit of a year, merely directory, so that registrations after the expiration of the year are valid.

RICHMOND, VA., June 22, 1915.

STATE BOARD OF MEDICAL EXAMINERS,
Richmond, Va.

GENTLEMEN:

I am asked to advise your honorable body my construction of that provision of section 6 of the act regulating the practice of medicine and surgery (Acts 1912, ch. 237), which reads as follows:

"Within one year after the passage of this act all licensed practitioners of medicine in this State shall, as above provided, register their certificates to practice medicine in the office of the clerk of the circuit or corporation court of the county or corporation in which they reside."

The act was passed and became effective on March 13, 1912, and in obedience to the above noted provision, all practitioners should have registered their certificates within one year after that date. You inform me that some practitioners failed to register their certificates within the prescribed period, and the question has arisen as to whether they may now register the same.

I am of the opinion that the provision, requiring registration within a specified

time, is merely directory, and physicians may now, and it is still their duty, to have their certificates registered, and that it is the duty of the clerks of courts to register the same.

Very truly yours,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

PHYSICIANS AND SURGEONS—*Right to practice. Acts 1912, Ch. 237 (8).*

Under a statute requiring that any person who shall produce before the State Board of Medical Examiners a certificate from the judge of the circuit court and from the Commonwealth's attorney of the county may, under certain conditions, practice medicine, does not include judges and Commonwealth's attorneys of States other than Virginia.

RICHMOND, VA., *June 22, 1915.*

STATE BOARD OF MEDICAL EXAMINERS,
Richmond, Va.

GENTLEMEN:

I am asked to advise your honorable body as to my construction of that provision of section 8 of the act regulating the practice of medicine and surgery (chapter 237 of the Acts of 1912), which reads as follows:

"Any person who shall produce before said examining board a certificate from the judge of the circuit court and the Commonwealth's attorney of the county in which he resides stating that, in their opinion, from the evidence produced before them, he was a practicing physician prior to the 1st day of January, 1895, then said examining board shall give to said person a certificate allowing said person to practice medicine in Virginia."

Under this clause you inform me that a physician now a resident of North Carolina, but who claims to have practiced medicine a few months in Virginia in 1884 without having previously obtained a license, now claims that he may practice medicine in Virginia upon producing before your board a certificate from the judge of the circuit court and the Commonwealth's attorney of the county in North Carolina in which he now resides, stating that, in their opinion, from the evidence produced before them, he was a practicing physician prior to the 1st day of January, 1895.

I am of the opinion that the provision above quoted does not entitle the applicant to a certificate to practice medicine in Virginia. The provision requiring the said statement from the judge and Commonwealth's attorney refers only to judges and Commonwealth's attorneys of the Commonwealth of Virginia.

Very truly yours,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

PLUMBING—*Sewer work—Licensed plumbers. Va. Code 1904, Sec. 1743d.*

In cities of more than 8,000 persons all house draining and sewer work *within the curb line* must be done by licensed plumbers, but an unlicensed plumber may do sewer work from the curb line to the main sewer.

RICHMOND, VA., November 17, 1914.

MR. W. F. MINTER,
Secretary Plumbers' Union,
500 E. Marshall St., Richmond, Va.

DEAR SIR:

You have requested my opinion on the following questions:

First: Does the law require all house draining within the curb line in cities to be done by licensed plumbers?

Second: Does the law require all house draining from the curb line to the main sewer to be done by licensed plumbers?

Chapter 133 of the Acts of 1914, amending section 1743d of the Code of 1904, provides as follows:

"It shall be unlawful for any person to do any plumbing or house draining in such cities of this State unless he pay license as herein provided."

The same act also provides that the words "house draining" and "plumbing" as used in this act shall be construed to mean all plumbing and house draining, sewers and ventilation of sewers placed in or in connection with any and every building in such cities from the curb line in and beyond and through the roof of said building.

From the above quotations, you will note that my answer to your first question must be that the law does require that all house draining and sewer work *within the curb line* in cities shall be done by licensed plumbers. The act, as you know, applies only to cities of more than 8,000.

In answer to your second question, will say that the definition of house draining as above quoted excludes sewer work from the curb line of the street to the main sewer. Therefore, the act does not make it unlawful for one who is not a licensed plumber to do sewer work from the curb line to the main sewer. All the law has to say upon that subject is as follows:

"All cities shall have the right to employ licensed plumbers to construct sewer connections from its property line to the main sewer." See chapter of acts above referred to.

From this quotation you will see that while the cities have a right to employ licensed plumbers for such work, they are not *compelled* to do so.

Regretting that the law is so drawn as not to carry out the intention of those interested in the act, as explained to me by you, I am,

Very truly yours,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

ROADS—*Bond issues—Magisterial districts—Payment of Board of Supervisors or Advisory Board out of bond issue funds. Acts 1912, Ch. 225.*

No money can be paid out of the proceeds derived from sales of bonds for roads in magisterial districts to any member of the board of supervisors or to the "Advisory Board" for any services in connection with advice and supervision in the construction of roads or in securing rights of way.

RICHMOND, VA., November 18, 1914.

HON. GEO. P. COLEMAN,
State Highway Commissioner,
Richmond, Va.

DEAR SIR:

Yours of November 17th received. As I understand it, one of the magisterial districts of Scott county has issued bonds under chapter 225 of the Acts of 1912, providing for the issuing of bonds for permanent road and bridge improvement in magisterial districts of the counties of the State. You ask whether, under this act, it is proper to pay, out of the proceeds of the bond issue, claims of members of the board of supervisors or of the "advisory board" for any services in connection with advice or supervision of road construction, or for securing rights of way.

The concluding sentence of section 9 of said act reads as follows:

"The board of supervisors or local road authorities shall have no power or authority to expend the money derived from the bonds sales as aforesaid, except to pay for materials furnished and work done under the supervision and contract aforesaid."

It therefore follows that no money can be paid out of the proceeds derived from the bond sales to any member of the board of supervisors or to the "advisory board" for any services in connection with advice and supervision in the construction of roads, or securing rights of way. The money thus derived must be used only to pay for materials furnished and work done under the supervision and contract provided for in the act.

Very truly yours,
JNO. GARLAND POLLARD,
Attorney General of Virginia.

ROADS—Bond issues—Magisterial districts—How and by whom proceeds of bonds to be expended. Va. Code 1904, Sec. 944a; Acts 1908, Ch. 70; Acts 1912, Ch. 225.

Where an election is held for the determination of whether there shall be a bond issue by a magisterial district for building certain enumerated roads in that district, the proceeds from bonds so issued can only be expended on the roads enumerated, although the proceeds may be expended on less than all of those; but in the event that the entire proceeds be not required, the excess bonds should be redeemed, and in all cases the question as to which of the enumerated roads are to be improved is to be determined by the board of supervisors of the county.

RICHMOND, VA., October 20, 1914.

HON. GEO. P. COLEMAN,
State Highway Commissioner,
Richmond, Va.

DEAR SIR:

Although it is quite late to render you an opinion on the subject of your letter of July 21st, I am submitting, for your consideration, the following:

Statement of the Case.

A magisterial district issues bonds for building roads. The order to the circuit court gives particulars as required by statute concerning five roads.

- (1) May a surplus be used on other roads than the five?
- (2) May all the money be expended on less than these five?
- (3) Who is to determine upon which roads the money is to be expended?
- (4) What is to be done with bonds, the proceeds of which are not needed?

Material Statutory Provisions Follow.

1912 Acts, ch. 225 provides for a bond issue for roads in magisterial districts following an election in the county. It provides for an election after proper petition of fifty freeholders or a majority of the board of supervisors to the circuit court.

In this act, section 1 provides, in part:

"The approximate location, length and width of such roads as it is proposed to be macadamized or permanently improved from the proceeds of the bonds sought to be issued thereunder shall be named in the order. The said order shall designate the magisterial district or districts in which said road or roads lie, stating as nearly as practicable what length of each road lies in each district and the *maximum* amount of bonds to be issued for the permanent improvement of the roads in each district." * * *

In section 2 we find:

"* * * and at said election each qualified voter who shall approve such issue of bonds shall deposit a ticket or ballot on which shall be written or printed the words, "For bond issue," and each qualified voter who shall oppose such issue of bonds shall deposit a ticket or ballot whereon shall be written or printed the words, "Against bond issue." * * *

Sub-division 4 provides:

"* * * the circuit court shall * * * enter of record an order requiring the supervisors of the county to proceed at their next meeting to carry out the wishes of the voters as expressed at the said election."

1904 Va. Code, sec. 944a (13), as amended by 1906 Acts, p. 551, 1908 Acts, p. 408, provides:

"The board of supervisors subject to the direction of the State Highway Commissioner, if called upon, shall from time to time prescribe and note upon the records of their proceedings such plans, specifications, restrictions and directions as they may deem best for the working, keeping in order and repairing the roads and bridges in their respective counties, including any special plans, restrictions or directions which they may prescribe for particular roads * * * and they shall from time to time fix the price allowed for the hire of hands and for the use of teams, plows and other implements on the public roads."

Opinion.

The rule of law is well sett'ed that to repeal a statute by implication, there must be such a positive, plain and visible repugnancy between the provisions of the new law and the old, that they cannot stand together or be consistently reconciled.

Christian v. Taylor, 96 Va. 503.

It is submitted that the Acts of 1908, ch. 70, as amended by 1910 Acts, p. 32, is inconsistent with 1912 Acts, ch. 225, as will be shown by a comparison of the two.

That it was the intention of the legislature that the 1912 act be amendatory of the 1908 acts, as amended, cannot be doubted. In House Journal and Documents references are found to this bill. See p. 932 House Journal for 1912:

"An act to amend and re-enact sections 1, 2, 4, 5 and 6 of an act approved February 25, 1908, entitled an act to provide for the issuing of county bonds for

permanent road and bridge improvement in the magisterial districts of the counties of the State, as the same was amended by an act approved February 16, 1910, entitled an act to amend and re-enact sections 6 and 7 of an act entitled an act to provide for the issuing of county bonds for permanent road and bridge improvement in the magisterial districts of the counties of the State, approved February 25, 1908, No. 368."

With such a title the bill was passed. See 1912 House Journal, 921. Yet, apparently this very bill as passed by the House was signed by the speaker under a different title, as seen in 1912 House Journal, p. 948:

"No. 368. Senate bill to provide for the issuing of county bonds for permanent road or bridge improvement in the magisterial districts of the counties of the State."

But, as the act in question is in fact inconsistent with the 1908 act, it seems fair to imply that the change in the title was mere legislative inadvertence. Therefore, the act taken in this opinion is the 1912 act.

As stated in Dillon on Municipal Corporations, sec. 891, as to popular vote in bond issues:

"It is essential that it be submitted in *such manner as to enable the voters intelligently to express their opinion* upon it and for that purpose the proposition should be submitted to them separate and distinct."

But, the present statute would seem not objectionable as being expressive of more than one object or purpose.

People v. Counts, 89 Cal. 15, 26 Pac. 612.

The vote "for bond issue" and "against bond issue" is sufficiently definite.

That effect is to be given to every word phrase and clause in a statute is a well settled rule of interpretation.

Postal Co. v. Farmville Ry., 96 Va. 661.

Hoover v. Saunders, 104 Va. 783.

Such being the case, the statute requiring that the court order contain certain descriptions and that it designate the magisterial districts in which the roads are situated are inserted for a purpose, especially is this true in view of the rule that special powers given to courts must be exercised with strict adherence to the directions of the statutes giving them.

Sutherland-Statutory Construction, sec. 630.

This coupled with the fact that the statute is, on this point, phrased in no uncertain terms, requires the words to be construed as mandatory.

Having established such a fact, the point arises: Upon what is the county electorate voting?

True, it is voting upon a bond issue. but bond issue for what purpose?

A fair interpretation leads to the conclusion that the matter voted upon is that stated in the court order, i. e., these five roads as mentioned.

It follows then that the answer to the first question is apparent, that the proceeds from bonds so issued can, under no circumstances, be used on roads other than the enumerated five.

II. May the money from the bond issue be expended on less than the five roads? 1912 Acts, ch. 225 (1) provides:

"* * * The said order shall designate the magisterial district or districts in which said road or roads and bridges lie, stating as nearly as practical the

what length of each road lies in each district and the maximum amount of bonds to be issued for the permanent improvement of the roads and bridges in *each* district."

Any doubt on this point is settled by the word "each" used in the statute to this extent, viz: That the proceeds of the bonds so issued are to be expended only on the roads in the particular district up to the amount mentioned in the order.

However, this still leaves open the question, viz:

If there be two or more roads in the same district may all of the money voted be expended on less than all?

The answer to this question is doubtful.

It is provided that upon an election voting for a bond issue the supervisors shall proceed to carry out the "wishes of the voters as expressed at such election."

The expressed wish of the voters was simply as to the "maximum" for certain roads in each district.

To hold that something must be expended on each road would present difficulties as to how much is to be expended on each road. In view of the broad powers of the supervisors outlined in 1904 Va. Code 944-a (1) as amended by Acts 1906, p. 551, 574; 1908 Acts, p. 408, such a conclusion would seem not inconsistent with the intention of the legislature.

Furthermore, this is reinforced by the well established rule that in a doubtful case laws are construed so as to produce a practical result and to avoid absurd conclusions as well as those contrary to public policy. *Immigration Society v. Commonwealth*, 103 Va. 46.

The board of supervisors is the proper authority to determine *how much* and *where* the proceeds of these bonds are to be spent where any discretion exists: 1912 Acts, ch. 225 (6).

"The board of supervisors at their meeting, or as soon thereafter as practicable, shall determine what amount of bonds for road improvement in said district or districts, not exceeding the maximum aforesaid, shall presently be issued, and shall enter of record the amount so determined."

From this act it appears that since the board of supervisors within limits determines the amount of bonds so too they would determine the roads to be improved within limits.

Nor is there anything inconsistent with this conclusion in any of the road laws.

In section 9 of the act, we find:

"* * * The board of supervisors or local road authorities shall have no power to expend the money derived from the bond sales as aforesaid, except to pay for materials furnished and work done under supervision and contract as aforesaid."

This, at least, makes it certain that either the board of supervisors or the local road authorities determine the mode of expenditure so far as any discretion is given.

The conclusion, then, is that the discretion is vested either in the board of supervisors or the local road authorities.

Since the "local authorities" referred to appear to be the county superintendents who are elected by the board of supervisors, it would seem that unless there be a county superintendent or other local authorities, the board of supervisors are to act. 1908 Acts, p. 408.

However, since the local authorities are answerable to the board of supervisors, the latter would seem to be the ultimate authority on this question.

In regard to bonds already issued, but not all of the funds therefrom are required, it would seem that these are not different from any other bonds, hence are to be redeemed as provided for in section 7 of the act:

“* * * The board of supervisors is hereby authorized and empowered to apply any part, or all, of the Sinking Fund to the payment or purchase of any of said bonds, at any time, and all bonds so paid off or purchased by said board of supervisors shall be immediately cancelled and shall not be re-issued
* * *”

Since the amount to be issued is entirely discretionary with the board of supervisors, no bonds should be issued after the roads voted upon are sufficiently improved.

Very truly yours,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

ROADS—*Bond issues—Payment of interest out of principal. Acts 1910, Ch. 47; Acts 1912, Ch. 225.*

The interest due on bonds issued by counties or districts for road improvement may not be paid out of the principal.

RICHMOND, VA., August 23, 1915.

HON. C. B. SCOTT,

*Assistant Highway Commissioner,
Richmond.*

DEAR SIR:

In response to your letter of the 19th instant, asking to be advised if it is proper for the local road authorities of any county or district to borrow from a bond issue for road improvement money with which to pay interest on the bond issue, with the expectation of reimbursing the bond issue fund at a later date, I beg to state that, after examination of chapter 47 of the Acts of 1910, and chapter 225 of the Acts of 1912, I am of opinion that the interest due on bonds issued for road improvement may not be paid out of the principal, either in the case of district or county bonds.

Very truly yours,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

ROADS—*State Highway Commissioner—Contractual liability—Individual subscriptions for road building.*

Although the State Highway Commissioner has the power and duty to aid the local road authorities in the construction of roads by contributing funds or convict labor, and when this is done he is also given the power and duty to draw specifications and to superintend the construction of the road and is charged with the obligation of seeing that the funds are properly expended, yet he cannot be successfully sued by the contractor constructing the road.

RICHMOND, VA., August 19, 1915.

HON. G. P. COLEMAN,

*State Highway Commissioner,
Richmond.*

DEAR SIR:

You have referred to this office letter of Mr. Cecil Connor, Commonwealth's

attorney, Leesburg, Va., dated August 13, 1915, with regard to the matter of the contract for the building of a road in Jefferson district, Loudoun county, and the enforcement of the payment of certain contributions promised by citizens for the building of said road.

As to one statement in the letter of Mr. Connor, I am sure there must be some mistake. He states in his letter that the State Highway Commissioner incurred a contractual liability to the contractor. I can find no statute authorizing the State Highway Commissioner to enter into any contract of this character. The statutes confer upon the State Highway Commissioner the power and duty to aid the local road authorities in the construction of roads by contributing funds or convict labor; and when this aid is invoked, the State Highway Commissioner is also given the power and duty to draw specifications and to superintend the construction of the road and is charged with the obligation of seeing that the funds are properly expended. In addition, I am assured by Mr. C. B. Scott, assistant commissioner, that the State Highway Commissioner has entered into no contract with the contractor for the construction of the road referred to.

This being true, there could not possibly be any suit by the contractor against the State Highway Commissioner, and the only person to whom the contractor could look for payment would be the local road authorities.

As to the other matter mentioned in the letter of Mr. Connor, to-wit., the liability of the subscribers promising contributions for the building of the road, that is, in my view, a matter with which neither the State nor the State Highway Commissioner has any concern. It seems to be a matter of concern only to the local road board. However this may be, it would be impossible for this office to express any intelligent opinion in regard to the liability of the subscribers to suit, or as to what method should be pursued to enforce the liability of the subscribers, until the subscription contract could be procured and thoroughly studied.

If, as I have intimated above, the State has no interest in the matter, and it is only a matter between the subscribers and the local road board, it would be improper for the office of the Attorney General to be drawn into the contract. If, however, the State is a party in interest, or if by any chance the State Highway Commissioner has to be made a party to a suit in regard thereto, then we would be glad to advise you, if we can produce a copy of the contract and of the subscription list aforesaid.

Very truly yours,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

SCHOOLS—*Agricultural High Schools—Literary Fund—Dormitories. Acts 1914, Ch. 199; Acts 1906, Ch. 252.*

The requirement as to dormitories for agricultural high schools that the district "raise" a like amount refers to congressional districts, and, therefore, no money may be borrowed from the Literary Fund.

RICHMOND, VA., November 3, 1915.

HON. R. C. STEARNES,

*Superintendent of Public Instruction,
Richmond, Va.*

DEAR SIR:

I am informed by Mr. T. O. Sandy that you request my opinion on the following question. Under the Acts of 1914, p. 339 in the Appropriation Act, we find the

following: "For dormitories to congressional district high schools, two thousand dollars for each school upon condition that the districts shall raise a like amount to each school." Query, Can the districts borrow their part of the money from the Literary Fund?

I am of the opin'on that the word "districts" as used in the above quotation from the Appropriation Act means congressional districts; and, inasmuch as congressional districts cannot borrow money from the Literary Fund, the word "raise" as used in the act contemplates the borrowing of the money by the district in some manner other than borrowing the same from the Literary Fund.

In addition to this, no money can be borrowed from the Literary Fund for dormitories, as the act governing loans from that fund limits the loans "for the purpose of erecting schoolhouses." See section 63 of School Laws, being chapter 252 of the Acts of 1906, Va. Code, Vol. 3, p. 465.

Very truly yours,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

SCHOOLS—*Bonds issued by districts for erecting and furnishing schoolhouses—Form required. Acts 1906, Ch. 255.*

Form of bonds to be issued by school districts for erecting and furnishing schoolhouses considered, and opinion expressed.

Although bonds issued by school districts for erecting and furnishing schoolhouses may be either registered or coupon bonds, yet where the Second Auditor has been directed by the State Board of Education to buy registered bonds, such bonds must be bought.

Bonds issued by school districts for erecting and furnishing schoolhouses may not be made payable to "bearer," nor are they transferable merely by delivery; but are transferable only by entry on the books of the debtor.

Deeds of trust must correspond with the bonds for which they are security.

Bonds issued by school districts for erecting and furnishing schoolhouses are subject to call and redemption only after the lapse of ten years from the date of issue, and such bonds must be dated, as well as being in the form of sealed instruments.

RICHMOND, VA., July 29, 1915.

HON. R. C. STEARNES,
Superintendent of Public Instruction,
Richmond, Va.

DEAR SIR:

The deed of trust between the school board of Blacksburg district No. 3, Montgomery county, Va., and William H. Colhoun and Allen I. Harless, of Christiansburg, Va., trustees, and the form of the school bonds provided for in said deed of trust have been submitted to this office for approval under a resolution of the State Board of Education.

Chapter 255, Acts of 1906, vol. 3, p. 687, prescribes the method by which school boards of the several districts and counties of this State may borrow money and issue bonds for the purpose of erecting and furnishing schoolhouses; and is the act under which the election was held in said district authorizing the bond issue. A study of this statute will show that the following requisites must appear on the face of the bond.

(1) The bonds are to be in such form and denomination as the school board may by resolution prescribe.

(2) The bonds are to be either registered or coupon bonds; but as in this case the Second Auditor has been directed to buy registered bonds, these bonds are required to be registered bonds.

(3) They are to be payable at a period not exceeding thirty years after their date.

(4) They are to be made redeemable at the option of the school board at such time as may be specified in the bonds.

(5) The bonds must bear interest at a rate not exceeding 6 per cent. per annum, payable either annually or semi-annually, as the board may prescribe.

(6) They must be signed by the chairman and attested by the secretary of the board.

(7) The deed of trust shall be a lien on all the school property of the school district issuing and selling the bonds for the payment of principal and interest if it shall be so stated on the face of the bonds.

Examining the aforesaid bonds with reference to these provisions, we note, first, that in the form submitted the bond is made payable to bearer, and this provision not only appears in the form prescribed in the deed of trust, but also in other provisions of the deed of trust. As the bonds in this case must be registered bonds, the word "bearer" in the fourth line from the top should be stricken out, and in lieu thereof should be inserted, "to, the registered holder of this bond." Again, in the eighth line from the top the word "bearer" should be stricken out and in lieu thereof should be inserted, "the registered holder."

Again, the fourth paragraph reading as follows: "This bond shall pass by delivery, and shall continue to be payable to bearer and transferable by delivery merely," should be entirely stricken out of the bond.

A registered bond is a simple certificate of indebtedness in favor of a particular individual, payable at a day named, with interest at days named. The name of the payee is entered on the books of the corporation debtor, municipal or private, as the registered owner. Such bonds are not negotiable and can be transferred only by an entry on the books of the debtor, with a proper endorsement on the bond itself, or by the issue of a new certificate. *Benwell v. City of New York*, 36 Atl. 668, 669, 55 N. J. E. 620.

Of course the form of the bond as prescribed in the deed of trust must be changed accordingly, and the deed of trust, in certain provisions, must be changed accordingly. For instance, on page 13 of the deed of trust, the following paragraph should be eliminated:

"It is further stipulated that the said bonds secured by this deed of trust shall pass by delivery and shall continue to be payable to bearer and transferable by delivery merely, and that neither the said party of the first part nor the said trustee shall be in any way responsible by reason of the fact that the said bonds, or any of them, shall be presented by other than the real owner thereof."

The last two lines of the first paragraph should be changed so as to read as follows:

"But said bonds to be redeemable at the option of said board after ten years."

In the third paragraph, in the sixth line thereof, after the word "subject" insert "ten years after their date", so that the said paragraph should read, in the last three lines thereof, as follows:

"Shall at the option of the said school board of Blacksburg School District No. 3, of Montgomery county, Virginia, be subject after ten years from their date to call and redemption at par together with the accrued interest to the date of the payment thereof."

As the bond is an instrument under seal, the last paragraph should be changed so as to read as follows:

"In witness whereof the said school board of Blacksburg School District No. 3, of Montgomery county, Virginia, has caused these presents to be signed by the chairman of the board and its corporate seal to be hereunto affixed and attested by the secretary thereof, this.....day of 191...."

You will note that no date was formerly put on the bonds, but there should be one.

Very truly yours,
JNO. GARLAND POLLARD,
Attorney General of Virginia.

SCHOOLS—*District School Board—Power to make rules and regulations. Va. Code 1904, Sec. 1466.*

A district school board may adopt rules requiring confinement on Saturday forenoon for study period as a punishment for lack of studiousness or bad conduct on the part of a pupil during the week.

RICHMOND, VA., *October 30, 1914.*

HON. R. C. STEARNES,
Superintendent of Public Instruction,
Richmond.

DEAR SIR:

Replying to your letter of September 26th, requesting a construction of section 47 of the Virginia School Laws on the subject matter of the letter of Superintendent H. J. Watkins, South Boston, Va., enclosed in your letter, I beg leave to submit as follows:

The question put by Superintendent Watkins is whether the district school board has the power to provide for confinement of pupils on Saturday forenoon in the school room, for a study period, as a punishment for lack of studiousness or bad conduct during the week.

The broad powers granted the district school boards, as laid down in section 47, p. 37, Virginia School Laws, section 1466 Va. Code 1904, as amended by Act of 1910. p. 536, would seem to confer this right upon the district school boards. Among the duties and powers conferred upon the said boards is "to make rules for the government of the schools and for regulating the conduct of pupils going to and returning from school." The discretion here given is very broad, and unless the exercise of this power is contrary to some statute or some regulation made in pursuance of statute, it should be upheld so long as the power is reasonably exercised. Therefore, I

would hold that it is legal, and a reasonable exercise of the discretion and power given the school board, for such board to adopt rules requiring a confinement on Saturday forenoon for study period, as a punishment for lack of studiousness or bad conduct during the week.

Yours very truly,
JNO. GARLAND POLLARD,
Attorney General of Virginia.

SCHOOLS—*Industrial training—Appropriations. Va. Constitution, Sec. 141.*

Counties, cities, towns, and districts may make appropriations to a non-sectarian school of manual, industrial or technical training.

RICHMOND, VA., *November 3, 1914.*

HON. R. C. STEARNES,
*Superintendent of Public Instruction,
Richmond.*

DEAR SIR:

Replying to your favor of September 30th, in which you commend the work done in the Blue Ridge Industrial School in Greene county, and refer to me a letter from Rev. Geo. P. Mayo raising the question as to whether local school trustees may pay \$25.00 per month of the salary of one of the teachers of that school, on condition that free instruction be given by the school in all of the branches and to all of the children in the surrounding community, I beg leave to submit as follows:

It appears from the correspondence that the school is non-sectarian. Section 141 of the Constitution of 1902 provides that "no appropriation of public funds shall be made to any school or institution of learning not owned or exclusively controlled by the State or some political sub-division thereof; provided, * * * third, that counties, cities, towns and districts may make appropriations to non-sectarian schools of manual, industrial, or technical training, and also to any school or institution of learning owned or exclusively controlled by such county, city, town, or school district."

Upon the assumption that this school is entirely non-sectarian, it would seem, under the foregoing provision of the Constitution, that counties, cities, towns and districts may make appropriations thereto, provided it is a school of manual, industrial or technical training. Its name, of course, indicates that it is intended to be a school of industrial training.

Very truly yours,
JNO. GARLAND POLLARD,
Attorney General of Virginia.

SCHOOLS—*Libraries—State Board of Education—Meaning of "establishment." Acts 1914, Ch. 82.*

Under an act permitting appropriations by the State Board of Education for the "establishment" of libraries in rural schools, the word "establishment" cannot be limited only to the original purchase of books for the library, but applies to the building up and strengthening of what is already in existence.

RICHMOND, VA., *October 16, 1914.*

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

DEAR SIR:

Yours of October 12th received. I agree with you that chapter 82 of the Acts of 1914, relative to school libraries, does not contemplate that each room in a school building may be considered as a separate school. The act contemplates one library for each school building, although, of course, it would be competent for the school authorities to place portions of the library in each of the rooms of the school building. The point which I passed on in my letter to the Superintendent of Public Instruction, dated October 6, 1914, was that the State Board of Education is permitted, in its discretion, to make successive payments of \$10.00 each to a school library in a rural district, provided all requirements of the act were complied with. In other words, the purpose of the act is to encourage the "establishment" of libraries. The word "establishment" as used in the act cannot, in my opinion, be properly limited only to the original purchase of the books for the library, but the word should be given the more extended meaning recognized by all lexicographers, that is, the building up and strengthening of what is already in existence. If, for instance, the Portsmouth school referred to should receive \$10.00 under the act for the original installation of a library, there is nothing in the act which would prohibit the State board, in its discretion, from allowing successive contributions of \$10.00 for the strengthening and building up of a library already installed.

Very truly yours,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

SCHOOLS—Libraries—State Board of Education—Payments by. *Acts 1914, Ch. 82.*

The State Board of Education is permitted in its discretion to make successive payments of \$10.00 each in the establishment of school libraries in the rural districts, provided that all the requirements of the act are complied with.

RICHMOND, VA., *October 6, 1914.*

HON. R. C. STEARNES,
Superintendent of Public Instruction,
Richmond, Va.

DEAR SIR:

Yours of October 3rd received. I am of the opinion that, under chapter 82 of the Acts of 1914, relating to the establishment of libraries, the State Board of Education is permitted, in its discretion, to make successive payments of \$10.00 each in the establishment of school libraries in the rural districts; provided, that all requirements of the act are complied with. It is, however, the duty of the board, under the terms of the act, to "fix rules and regulations looking to as wide a distribution of the fund as may seem practicable," to the end that all the schools of the State may avail themselves of the aid proffered by the act, and that no schools be allowed to absorb the funds to the exclusion of other schools which may desire to avail themselves of the benefits afforded by the statute.

Very truly yours,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

SCHOOLS—*Powers of Board of Education and General Assembly in selection and distribution of text-books. Va. Constitution, Sec. 132.*

The General Assembly is prohibited from passing any law which would abridge the right of the State Board of Education to select text-books, but since the General Assembly may pass any law regulating the contracts for the purchase of text-books which does not have the effect of interfering with the constitutional power of the board to select the books, the present law limiting the period of contracts for books to seven years is valid.

The General Assembly may prohibit the State Board of Education from entering into a contract for books, except after competitive bids, but it cannot require the board to adopt the cheapest books.

Although in the absence of legislative action the State Board of Education has the right to provide for the distribution of books, yet any plan of distribution adopted by it is subject to revision, amendment or repeal by the General Assembly.

RICHMOND, VA., *February 9, 1915.*

HON. JULIEN GUNN,

*Chairman Joint Committee General Assembly of Virginia appointed to Investigate the Price of Text-Books,
Richmond, Va.*

DEAR SIR:

I am in receipt of your communication of even date herewith, enclosing me the following resolution adopted by your committee:

"Resolved, That the Attorney General be requested to advise the committee as follows:

"Whether the State Board of Education can under the constitution, regardless of any action by the General Assembly—

"1. Adopt text books for use in the public schools at such time and for such period and at such prices as they deem best.

"2. Can they adopt such means of distribution as they may deem best.

"3. Whether such action of the board would be paramount to any action that may be taken by the General Assembly."

In answer to your first question, I beg leave to reply that section 132 of the Constitution provides that the State Board of Education "shall select text-books and educational appliances for use in the schools of the State." * * * I am of the opinion that the effect of this section is to take away from the General Assembly entirely all power over the selection of text-books and to vest the same absolutely in the State Board of Education. By the terms of the Constitution, the State Board of Education is composed of six experienced educators, including the Superintendent of Public Instruction, to which are added the Governor and the Attorney General. It was evidently the purpose of the framers of the Constitution to entrust to the board, so largely made up of educators, the important task of the selection of text-books which so vitally affect the educational interests of the children. This task could be well performed only by those who have technical knowledge and experience. I am of the opinion that the language of the Constitution above quoted has the effect of prohibiting the General Assembly from passing any law which would abridge the right of the State Board of Education to select text-books; but the General Assembly may, in my opinion, pass any law regulating the contracts for the purchase of text-books which does not have the effect of interfering with the constitutional power of the board to select the books. I am inclined to think that the present law, limiting

the period of contracts for books to seven years, is a reasonable regulation, and that the courts would not hold such provision to be an infringement upon the powers of the State board to select books.

I am also of the opinion that it is competent for the General Assembly to prohibit the State Board of Education from entering into a contract for books, except after competitive bids; but the General Assembly could not require the State Board of Education to adopt the cheapest books, because the cheapest books might not be the books which, in the opinion of the State Board of Education, were best suited for use in the schools, and to require the State Board to adopt the cheapest books would be interfering with its power to select books given them by the Constitution.

In reply to your second question, as to whether the State Board of Education can, under the Constitution, regardless of any action of the General Assembly, adopt such means of distribution of books as the Board may deem best, I beg leave to reply that the distribution of books is absolutely under the control of the General Assembly; and while, in the absence of legislative action, the Board would have the right to provide for the distribution of books, under its powers of general supervision granted by the Constitution, yet any plan of distribution which might be adopted by the Board, in pursuance of these general powers, would, under section 132 of the Constitution, sub-section 3, be subject to revision, amendment or repeal by the General Assembly.

To your third question, as to whether the actions of the Board would be paramount to any action taken by the General Assembly, I reply that the action of the State Board of Education is paramount in the selection of books, and that the action of the General Assembly is paramount in all other matters pertaining to this subject which does not interfere with the right of the State Board of Education to select the books.

It is a significant fact that in the section of the Constitution above referred to (132) of all the five powers therein granted to the State Board of Education, the selection of test-books is the only power which is not in some way made subject to the control of the General Assembly or the Senate. These powers are enumerated in five separate and distinct paragraphs. The first paragraph pertains to the dividing of the State into school divisions and the election of school superintendents, which is subject to the confirmation of the Senate. The second pertains to the management and investment of the school funds, but this, by express terms, may be regulated by law. The third pertains to the making of rules and regulations for the management and conduct of the schools, and this too is made subject to the authority of the General Assembly. The fifth relates to the management of the State library, which is also made subject to such rules and regulations as the General Assembly may prescribe, while in the granting of the fourth power, which relates to the selection of text-books, any mention of the power of the General Assembly is conspicuously absent.

Respectfully submitted,
JNO. GARLAND POLLARD,
Attorney General of Virginia.

SCHOOLS—*Public Records—Official correspondence.*

The Superintendent of Public Instruction is not obliged by law to furnish copies of letters containing charges which affect the character of persons employed in the educational department of the State government.

RICHMOND, VA., *December 7, 1914.*

HON. R. C. STEARNES,
Superintendent of Public Instruction,
Richmond.

DEAR SIR:

Yours of December 3rd received. You are not obliged by law to furnish copies of letters containing charges which affect the character of persons employed in the educational department of the State government. In such cases, I would advise refusal even to disclose the contents of such communications until required to do so by some court of competent jurisdiction. It is true that the general rule is that, in the absence of statute or some reason of public policy, papers and documents bearing on public affairs are public records and open to inspection at all reasonable times and in such manner as not to interfere with the orderly conduct of business. But this does not mean that you must *furnish copies* of the correspondence, nor does it mean that you must allow inspection of the same if, in your opinion, sound public policy requires the information to be withheld until disclosed through the courts. I am returning Judge Norton's letter.

Very truly yours,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

SCHOOLS—*Virginia Normal School Board—Power to employ secretary-auditor. Acts 1914, Ch. 322(2), and Ch. 199.*

It is within the power of the Virginia Normal School Board to employ a secretary-auditor and to pay him a reasonable compensation out of the funds appropriated by the State to the various institutions involved.

RICHMOND, VA., *November 25, 1914.*

HON. RICHARD B. DAVIS,
Petersburg, Va.

DEAR SIR:

Referring to our conversation and your letter of November 5th, in which you ask my opinion as to whether your Board is authorized to employ a secretary-auditor, to act as secretary of the Board and to audit the accounts of the institutions managed by your Board, I beg leave to reply:

I am of the opinion that, under section 2 of chapter 322 of the Acts of 1914, it is clearly within the power of the Board to employ a secretary-auditor and to pay him a reasonable compensation out of the funds appropriated by the State to the various institutions involved. Under the section referred to, it is made the duty of your Board to "*safeguard* the funds of said schools and distribute all appropriations by the State in a *careful* and economical manner; and shall appoint * * * such *officers* * * * as it may deem necessary." The appointment of such an "officer" is a very proper step towards "*safeguarding*" the funds of the schools and distributing the appropriations in "*a careful and economical manner.*"

When we come to consider the language used by the General Assembly in making appropriations for these institutions (chapter 199, Acts 1914), nothing is found in the language used inconsistent with the view above expressed.

Very truly yours,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

SCHOOLS—*Virginia Polytechnic Institute—Pay of members of board of visitors. Va. Code 1904, Secs. 1596 and 1637a.*

A member of the board of visitors of the Virginia Polytechnic Institute may not be reimbursed out of the public funds for loss of money on account of personal services, but is only entitled to what he has actually paid out in the way of expenses in attending the meetings of the board.

RICHMOND, VA., *March 12, 1915.*

MR. CHAS. I. WADE,
*Treasurer Virginia Polytechnic Institute,
Christiansburg, Va.*

DEAR SIR:

I have your letter in which my official opinion is asked upon the following question:

C, a member of the board of visitors of the Virginia Polytechnic Institute, is employed by a corporation which makes a deduction from his salary for the time he devotes to his duties as a member of said board. Is it lawful to pay him, as a part of his expenses, out of the funds of the institution, an amount sufficient to reimburse him for the deduction made from his salary by his employer on account of the time he devotes to his duties as a member of said board?

Section 1596, Va. Code 1904, dealing with the duties and expenses of the members of your board of visitors, provides, among other things, as follows:

"Such reasonable expenses as the visitors may incur in the discharge of their duties shall be paid out of the funds of the college."

Section 1637a, dealing with the expenses of visitors of various State institutions, including the Virginia Agricultural and Mechanical College (now the Virginia Polytechnic Institute) provides as follows:

"That the boards of visitors * * * shall receive their actual expenses (itemized) in the discharge of their duties in attending the meetings of said boards."

There is no statute allowing visitors any compensation for their time or services; therefore, no such compensation can be allowed.

It will be noted that the section first above quoted provides for the payment of *reasonable* expenses in the discharge of duties, and that the section last quoted provides for *actual* expenses incurred in the discharge of duties "in attending the meetings of said boards." I am of the opinion that the true intent and meaning of both of these statutes is to provide for the payment of expenses incurred, such as railroad fare and hotel bills, and not to reimburse a visitor for any personal loss he may incur by reason of devoting his time to the affairs of the institution. Members of these boards of visitors in accepting their appointments do so with notice of the fact that they are to receive no compensation for their time, although their time is a thing of value. The acceptance of the appointment involves any personal loss which they may incur by reason of giving their time to public business. Any other construction of the law would lead to results which I am sure the legislature never contemplated. For instance, if a physician accepted appointment as a visitor and could prove that, by reason of a day's absence from his practice, he lost the sum of \$50.00 in attendance upon his duty as a visitor, he would be entitled to reimbursement out of the funds of the college. If a lawyer were a visitor and he attended a meeting of

the board of visitors on a day upon which he could prove that he would have earned a fee of \$50.00, then he, too, would be entitled to reimbursement out of the funds of the college. In short, I am of the opinion that C cannot receive, out of the funds of the college, reimbursement for any sum which he might lose for his personal services by reason of the discharge of his duties on the board. The terms "actual" and "reasonable" expenses, as used in the statute, do not include *reimbursement for loss of money on account of personal services, but only on account of what has actually to be paid out in the way of expenses* in attending the meetings of the board, including going to and returning therefrom.

Very truly yours,
JNO. GARLAND POLLARD,
Attorney General of Virginia.

SCHOOLS—*Virginia Polytechnic Institute—State statutes. Va. Constitution, Sec. 24; Va. Code 1904, Secs. 62, 587, 1511 and 1544; Acts 1906, Ch. 92.*

In order to entitle a person to receive free tuition as a State student at the Virginia Polytechnic Institute, he must first establish a residence in some county, city or election district for the House of Delegates; and, second, he must be selected by the school trustees of such county, city or election district, which county, city or election district is entitled to no more than four times the number of members of the House of Delegates from such county, city or election district, so that a person who has been a resident of a State other than Virginia, and who relies on his sojourn at an institution of learning in Virginia to establish residence, would not receive a State scholarship in the absence of other very strong circumstances to prove his residence in Virginia.

RICHMOND, VA., *October 22, 1914.*

MR. J. F. ARTHUR,
*Room 270, Virginia Polytechnic Institute,
Blacksburg, Va.*

MY DEAR SIR:

In the absence of the Attorney General on official business, I am replying to your favor of October 21st, in which you request the Attorney General to construe the law in regard to State students at the Virginia Polytechnic Institute, so that you may be enabled to get the benefit of free tuition.

Section 587, Va. Code 1904, which provides how State students shall have the privilege of attending the Virginia Polytechnic Institute without charge for tuition, is in the following words:

"A number of students equal to four times the number of members of the House of Delegates, to be apportioned in the same manner, shall have the privilege of attending said college without charge for tuition, use of laboratories, or public buildings, to be selected by the school trustees of the respective counties, cities and election districts for said delegates, with reference to the highest proficiency and good character, from the white male students of the free schools of their respective counties, cities and election districts, or, in their discretion, from others than those attending said free schools."

An analysis of the foregoing statute will show clearly that the students who will receive free tuition must be selected by the school trustees of the respective counties, cities and election districts from persons who are bona fide residents of such county, city or election district; and the preference is given in each case to the students of

the free schools of each respective county, city or election district. That they are required to be bona fide residents is clear when we consider that they are to be apportioned in the same manner as the members of the House of Delegates, and that the persons who are given the preference by the statute are white male students of the free schools of their respective counties, cities and election districts; and while it is true that the statute allows students to be selected in the discretion of the members of the House of Delegates from "other than those attending free schools," it is implied in this privilege, I am sure, that persons so selected for free tuition shall be residents of the election district from which the member of the House of Delegates selects them. An examination of the requirements for the State students at William and Mary, the State Female Normal School, University of Virginia and Virginia Military Institute will show that in every case these State students must be selected from residents of the State of Virginia and of some sub-division thereof. (Acts 1906, p. 95, Va. Code 1904, section 1511, section 1544 and section 1575.)

In order, therefore, for you to receive free tuition as a State student at the Virginia Polytechnic Institute you must, first, establish your residence in some county, city or election district for the House of Delegates in the State of Virginia; and, second, you must be selected by the school trustees of such county, city or election district; and it must be remembered that no county, city or election district is entitled to more than four times the number of the members of the House of Delegates from such county, city or election district.

As you have been a resident of the State of North Carolina, there may be some difficulties in the way of your establishing a residence in the State of Virginia. It has been held that the students at an institution of learning are not domiciled there in the legal sense of the term. *Opinion of Justices*, 5 Met. 587, 589. And even if a student may acquire a domicile in the same town where he is attending school, it would take strong circumstances to prove such domicile. *In re Goodman*, 146 N. Y. 284.

In addition, section 62 Va. Code 1904, which carries into effect the provisions of section 24 of the Constitution of 1902, provides that no student in any institution of learning shall 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.

I have thus written you fully and freely the law on the subject. As to whether you can, under the circumstances, comply with the law and bring yourself under the terms thereof is a question which must be determined by your own actions, intentions and state of mind; and also whether you can procure from the school trustees of some county, city or election district wherein you claim your residence an appointment as a State student at the Virginia Polytechnic Institute.

Very truly yours,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

TAXATION—*Bankruptcy—Assets set aside in homestead deed. Bankruptcy Act, Sec 64a.*

The taxes against a bankrupt's estate should be paid by the trustee in bankruptcy, although some of the assets of the bankrupt have been set aside in the homestead deed and have never come into the hands of the trustee in bankruptcy.

RICHMOND, VA., May 12, 1915.

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

DEAR SIR:

You have referred to this office letter of Thos. J. Coles, treasurer Pittsylvania county; also letter of L. S. Thomas, referee in bankruptcy, Martinsville, Va., to said Thos. J. Coles, involving, as we understand it from the rather indefinite facts stated therein, the question as to whether a bankrupt's estate in the hands of a trustee is liable for State taxes when the bankrupt has claimed his homestead exemption in most of his personal property. Upon the assumption that this is the question (of which I am not sure), I will refer you to authorities which definitely settle the matter.

Section 64 of the act on bankruptcy provides that:

"The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such taxes the same shall be heard and determined by the court."

See Remington on Bankruptcy, Vol. II., section 2141, p. 1319. The taxes are to be paid in full, including any penalties or interest for delinquency to the date of payment, the same as if the property were not in the hands of the court. *Id.* section 2144. And it is also perfectly clear that the taxes must be paid in advance of payments to other creditors whether or not the property on which the taxes were assessed ever came into the hands of the trustee. *Id.* section 2145. And it is equally clear that taxes on exempt property must be paid out of the estate. *Id.* 2146; *In re Tilden*, 91 Fed. 501; *In re Baker*, 1 A. B. R. 526. *In re Tilden*, *supra*, the court said:

"There is no express exclusion of taxes against exempt property. The trustee is to pay 'all taxes legally due and owing by the bankrupt.' The creditors, however, plead what they term the injustice of such a construction. The exempt property may have a large amount of taxes standing against it. The estate receives no benefit whatever from the exempt property."

After using the arguments in favor of the creditors against the construction set out above, the court decides that taxes on exempt property must be paid out of the estate in the hands of the trustee. And so it has also been held that taxes will be ordered to be paid out of the general fund to the State or municipality, although the only one benefited will be a mortgagee or some particular creditor or purchaser of the assets. The tax must be paid, and paid out of the general fund, and be paid before all other claims or creditors regardless of benefit or lack of benefit, lien or lack of lien. Remington on Bankruptcy, Vol. II., section 2147.

From these citations it is perfectly clear that the referee in bankruptcy takes an incorrect view in his letter when he states that, as the personal estate was not administered, nor could be administered, in the bankruptcy court, he does not see how the tax bill against J. C. Parrish, bankrupt, Tunstall district, Pittsylvania county, amounting to \$11.14, can be paid by the trustee; and he is likewise mistaken when he takes the position that because a part of the assets of the bankrupt did not come into the trustee's hands, therefore this bill should be prorated.

Very truly yours,

CHRISTOPHER B. GARNETT,
Assistant Attorney General.

TAXATION—Bank depositors—Powers of Local Boards of Review. *Va. Code 1904 Sec. 489, and Tax Bill, Sec. 8; Acts 1915, Ch. 116(7).*

A local board of review of a county may summons the banks, State and National, of that county, the presidents, cashiers, or employees thereof, and require them, under penalty, to give the names of all persons, firms or corporations having time or savings deposits in said banks, together with the amount to the credit of each depositor.

RICHMOND, VA., *October 21, 1915.*

HON. H. C. STUART,
Chairman State Advisory Board on Taxation,
Richmond, Va.

DEAR SIR:

I have your letter of October 12th, enclosing two orders entered by the Local Board of Review of Wise county on the 24th day of September and 7th day of October, 1915, respectively, raising the question as to the right of the Local Board of Review to compel the banks in Wise county to furnish the Local Board of Review with a list of all their "time and savings deposits." It appears from the orders entered that the banks, being required to appear before the Local Board of Review and furnish a complete list of such deposits, did appear and answered that they were ready and willing to answer any and all proper questions concerning the ownership of time and savings deposits of any individuals, firms or corporations about whom the Local Board of Review, or any member thereof, desired to ask questions; but claimed that the law did not require them to furnish a list of such depositors. And the Local Board of Review, being doubtful as to their authority to compel the banks to furnish such lists, have requested the advice and opinion of the State advisory board and of the Attorney General.

As a preliminary to this question, it is necessary to note that the General Assembly, by act approved January 29, 1914, Acts of 1914, p. 6, passed an act providing for the segregation of money upon deposit or otherwise, and making it liable to taxation by the State alone at the rate of twenty cents on the hundred dollars. This act requires that "money on deposit in any bank, or other corporation, or firm, or person, or in the possession or under the control of the owner, whether such money be actually in or out of this State and belonging to a citizen of this State, is hereby segregated," etc. Thus, it will be seen that it is the policy of the law to reach and tax all money belonging to citizens of this State. Schedule C provides for the classification of intangible property. Section 8 thereof, as amended by act approved March 17, 1915, classifies and defines money as follows:

"Sixth: All money other than money used or employed in any trade or business not otherwise taxed on deposit with any bank or other corporation or firm or persons, or in the possession or under control of the owner, whether such money be actually in or out of this State and belonging to a citizen of this State, which shall include certificates of deposit of any bank, banking association, trust or security company; provided, that money as herein defined shall not be liable to taxation by any of the counties, cities, towns, school districts or other local sub-divisions of this State. All money under the control of a court receiver or commissioner in pursuance of an order, judgment or decree of any court, or in the hands or under the control of an executor, administrator, guardian, trustee, agent, or other fiduciary; and all money deposited to the credit of any suit, and not in the hands of a receiver or other fiduciary."

It was further provided by section 9 of Schedule C, as amended by act approved

March 17, 1915, that on all property embraced in section 6, the tax shall be as provided by law; and it is further provided that "the provisions of this section of this schedule shall apply with equal force to any person or corporation representing in this State business interests that may claim a domicile elsewhere, the intent and purpose being that no non-resident person or corporation, either personally or through any agent, shall transact business here without paying to the State a corresponding tax with that exacted of its own citizens, and all bills receivable, obligations or credits and other intangible assets arising from business done in this State are hereby declared assessable within this State and at the business domicile of said non-resident person or corporation, his or its agent or representative." Thus, it is seen that money arising from business done in this State by non-residents or by the representatives of non-resident persons or corporations is subject to taxation in this State; and, as we have seen above, money of citizens is subject to taxation.

Coming now specifically to the question presented, this question depends for its solution on a proper construction of the provisions of chapter 116, Acts 1915, p. 154, creating a State Advisory Board on Taxation and Local Boards of Review and defining their duties and powers.

Under section 7 of said statute, we find a definition of the duties and powers of local boards of review. These duties and powers, so far as necessary for the correct decision of this question, are as follows:

(1) To direct the commissioner of the revenue to enter in the assessment roll any property, real or personal, which is found to have been omitted.

(2) To hear the complaints of taxpayers, members of boards of supervisors, city and town councils, or the Commonwealth's attorney, as to unequal or unjust valuations.

(3) To review the annual returns of intangible personal property, income and money of all taxpayers, and to this end they are required to call in the examiners of records, and it is made the duty of the examiners of records to examine the returns aforesaid, and the records, both State and Federal, with a view of ascertaining and reporting for taxation the valuations to be extended by the commissioners of the revenue on all intangible personal property, incomes and money liable to taxation under the laws of the State.

(4) "The Local Board of Review shall have authority to summon taxpayers, or their agents, or *any other person* having information on the subject, before them and require them to answer under oath *all questions* touching * * * the ownership of intangible property, income or money held by such person, firm or corporation, and the valuation of said property; * * * and should the person, firm or corporation, agents or witnesses, refuse to furnish the information requested, such person, firm, corporation, agents or witnesses shall be liable to a fine of not less than ten nor more than one hundred dollars." * * *

From the papers submitted it is difficult to ascertain the exact point at issue, but, as I understand it, the banks contend that this last quoted provision, while requiring them to answer questions touching the ownership of time and savings deposits of particular persons, firms or corporations concerning which the bank may be specially asked, yet the law does not require them to respond to a general demand for the names of all time and savings depositors. In other words, the banks seem to admit that the board could take up name by name each listed taxpayer or any other citizens of the county named by the board and require the bank to answer what time and savings deposits stand in said names, but they contend on the other hand that the board cannot require the banks to furnish any information concerning a

depositor unless such depositor be first specifically named by the board. The result of this position would be that the board would be able from information obtained from the banks to test the returns of taxpayers already listed and could ascertain the deposits of others whose names they might be able by some other means to obtain, but that they could not compel the banks to give the names of any other of their depositors whose names the board had not been able to obtain otherwise. We look in vain for a reason why this particular class of depositors should be protected from the inquisition of the statute. On the other hand, we find the law in terms placing upon the local board of review the duty to discover all omitted taxes.

Referring to the mode of discovery prescribed by the statute, we find that the local board of review has authority to summon any person having information on the subject before them and require such person to answer under oath all questions touching "*ownership*" of money "*held*" by such person, firm or corporation and the valuation of said property. The use of these two words "*ownership*" and "*held*" in this close connection shows that it was the purpose of law to provide for the discovery, for taxation, of money "*held*" by one and *owned* by another. Inasmuch, therefore, as a bank is, within the meaning of our revenue laws, a corporation which *holds* money *owned* by another, it follows that it can be compelled to disclose such ownership. (See section 489 of the Code of Va., as amended 1915, p. 224.)

The question next arises as to the manner of such disclosure. It appears from the copies of the orders of the local board furnished me in this case that the board desired a "list" of the time and savings depositors, but it is not clear whether the word "list" is used in the strict sense of a written record, or whether the board simply desired the bank to give verbally the names of all such depositors and the amounts to their credit. But this, I presume, is immaterial so far as the willingness of the banks to make disclosures is concerned. It might become material when an effort is made to inflict the punishment provided by the act for refusing to furnish information. It would then be the question of the enforcement of a penal statute and the rule of strict construction would apply. But I do not think it necessary to the decision of the question here propounded to consider whether the banks may be compelled to furnish written lists, for if the conclusion here reached is sustained by the courts it will, I apprehend, result in the banks furnishing such lists regardless of whether they may be compelled to do so, and if they do not furnish such lists it cannot result in anything more than some degree of inconvenience on the part of the board in having to take down in writing the names of the depositors which the banks are compelled to give.

I, therefore, advise that the Local Board of Review of Wise county may summon the banks of that county, the presidents, cashiers or employees thereof, and require them under penalty of the statute to give the names of all persons, firms or corporations having time or savings deposits in said banks, together with the amount to the credit of each depositor.

It is urged that such a construction of the law makes it highly inquisitorial, disclosing the private affairs of the depositors and furnishing to the banks' competitors information which would be harmful to the banks. This, however, is considered a matter of legislative policy already passed upon by the General Assembly and with which the other departments of the government cannot properly interfere.

The General Assembly itself seemed to have recognized the importance of keeping secret the information furnished under the statute above cited and inserted there-

in a provision guarding against the very objection now urged against the construction here placed upon the statute. The provision is as follows:

"The answers required under oath of the person, firm, corporation, agent or witness shall not be disclosed unless called for by a court of record or the State Advisory Board or any Local Board of Review."

It is also urged that the conclusion here reached will work a great hardship upon depositors in State banks. This objection is based upon the assumption that while the State may compel State banks to disclose the names of their depositors, no such authority can be exercised in case of National banks. But this is an erroneous assumption, as the courts have already decided that a State has a right to require National as well as State banks to disclose the names of their depositors and the amount to the credit of each. See *First National Bank v. Hughes*, 6 Fed. 737; *Guthrie v. Harkness*, 199 U. S. 148; *State v. Clement National Bank*, 84 Vt. 167; affirmed 231 U. S. 120.

Yours truly,
JNO. GARLAND POLLARD,
Attorney General of Virginia.

TAXATION—*Banks—Constitutionality as applied to National banks.*

A levy against State banks of a tax on their deposits to be paid by said banks and not charged to the depositor is constitutional, but such a tax cannot be levied against National banks; but a tax may be constitutionally levied against bank deposits in State banks and the banks required to pay the tax and charge the same against the depositors, and the same result may be accomplished as to deposits in National banks by the adoption of statute similar to that existing in Vermont and upheld in *Clement National Bank v. Vermont*, 231 U. S. 120.

RICHMOND, VA., *January 15, 1915.*

TO THE FINANCE COMMITTEE OF THE HOUSE OF DELEGATES,
Richmond, Va.

GENTLEMEN:

I have your resolution of January 12th, in which you request my opinion as to the "constitutionality of a proposed act requiring the banks to pay the tax on money on deposit in said banks to the credit of various individuals." I have been informed by several members of your committee that it was your purpose in propounding the question to obtain an opinion upon two propositions:

First: Is it constitutional to levy a tax on bank deposits, the tax to be paid by the bank itself and not charged against the depositors?

Second: Is it constitutional to levy a tax on money in bank on deposit and require the banks to pay the tax and charge the same against the depositors?

I am here stating briefly the conclusions I have reached, and am handing you, as a part of my opinion, the decisions upon which such conclusions are founded.

In answer to the first question, I reply that I am of the opinion that it is constitutional to levy against *State* banks a tax on their deposits to be paid by said banks and not charged to the depositor, but that such a tax *cannot* be levied against *National banks*.

In answer to the second question, I reply that I am of the opinion that a tax may be constitutionally levied against bank deposits in *State banks* and the banks

required to pay the tax and charge the same against the depositors, and that the same result may be accomplished as to deposits in National banks by the adoption of a statute similar to that existing in the State of Vermont, and which has recently been upheld by the Supreme Court of the United States in the case of *Clement National Bank v. State of Vermont*, 231 U. S., p. 120.

For your convenience, I am herewith sending you a copy of the Vermont statute dealing with this subject, as also a copy of the statute of the same State imposing a tax on deposits of State banks to be paid by the banks themselves and not charged to the depositors.

Very truly yours,
JNO. GARLAND POLLARD,
Attorney General of Virginia.

P. S.—The citations from the authorities referred to are being copied now and will be sent later, as also the copies of the Vermont statutes referred to.

TAXATION—Banks—Effect of merger. *Va. Code 1904, Sec. 494, and Tax Bill, Sec. 17.*

Where a bank closes its doors on December 31st under a proposition of merger with another bank which is not consummated until February 5th, the former bank is subject to taxation on February 1st just as if there had been no contemplation of merger.

RICHMOND, VA., May 7, 1915.

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

DEAR SIR:

In the absence of the Attorney General, on official business, I am replying to your favor of May 7th, enclosing correspondence between the commissioner of the revenue, Commonwealth's attorney of the city of Roanoke and yourself, in regard to the assessment for 1915 of the shares of stock of the stockholders of the City National Bank of Roanoke. I note that you request this office to advise you what directions to give the Commonwealth's attorney and the commissioner of the revenue. The facts in the case are about as follows. The records in your office disclose that the National Exchange Bank of Roanoke on February 1, 1914, made the following returns of the actual value of shares, estimated upon capital, surplus and undivided profits:

Capital.....	\$300,000 00
Surplus.....	300,000 00
Undivided profits.....	55,715 69
Aggregate.....	\$655,715 69
Deduct assessed value of real estate.....	120,000 00
Divided by number of shares (3,000).....	\$535,715 69—\$ 178 57
Amount of indebtedness of stockholders.....	9,564 30

The records in your office also disclose that the National Exchange Bank of

Roanoke on February 1, 1915, made the following returns of the actual value of shares, estimated upon capital, surplus and undivided profits:

Capital.....	\$300,000 00	
Surplus.....	300,000 00	
Undivided profits.....	61,890 20	
Aggregate.....	\$661,890 20	
Deduct value of real estate.....	110,000 00	
Divided by number of shares (3,000).....	\$551,890 20—	\$ 183 96
Amount of indebtedness of stockholders.....	16,593 48	

The records in your office further disclose that on February 1, 1914, the City National Bank of Roanoke made the following returns of the actual value of shares, estimated upon capital, surplus and undivided profits:

Capital.....	\$200,000 00	
Surplus.....	75,000 00	
Undivided profits.....	23,000 00	
Aggregate.....	\$298,000 00	
Deduct value of real estate.....	2,000 00	
Divided by number of shares (2,000).....	\$296,000 00—	\$ 148 00
No deduction for indebtedness of stockholders.		

On February 1, 1915, the City National Bank made no returns, and has up to this time refused to make any returns of the actual value of shares, estimated upon capital, surplus and undivided profits as of February 1, 1915. When the commissioner of the revenue called upon the former cashier and officers of the City National Bank to make the report to the commissioner of the revenue, as required by section 17 of the Tax Bill, they failed and refused to do so, upon the ground that the City National Bank had consolidated with the National Exchange Bank; that the City National Bank closed its doors on December 31, 1914, and did no further business after December 31, 1914.

It appears from a letter of Hon. Everett Perkins, Commonwealth's attorney of Roanoke, that officers of the City National Bank claim that the National Exchange Bank placed in the hands of N. W. Phelps, as liquidating agent, on the 31st of December, 1914, \$315,000.00 with which to pay for the assets of the City National Bank; but it also appears that there was no actual merger until February 6, 1915. Officers of the said City National Bank claim that the stock was not in existence on the 1st day of February, 1915, and that no tax should be paid thereon, but that the tax should be paid on the \$315,000.00, which represented the assets of the City National Bank, including the stock of said bank, and are willing that the said sum of \$315,000.00 shall be taxed on the basis of money.

The question here involved is whether or not the stock of the City National Bank was in existence on the 1st day of February, 1915, and should be taxed pursuant to section 17 of the Tax Bill.

The correspondence does not disclose the exact nature of the contract between the two banks; but, from the records in your office, there certainly was no merger on February 1, 1915; the City National Bank was not insolvent, or in the hands of a receiver; but, on the contrary, it appears to have been entirely solvent and treating with another bank for a merger, which took place on February 6, 1915. Now, it is

perfectly apparent that in legal contemplation the identity of the City National Bank was not lost or merged until that event; it had a legal entity and corporate existence, stockholders and assets. These assets did not escape into the clouds between December 31st and February 6th; and, so far as the tax on said bank, provided for by section 17 et seq. of the Tax Bill is concerned, I see no reason why these sections do not apply for the fiscal year beginning February 1, 1915, as well as for the fiscal year beginning February 1, 1914.

My opinion, therefore, is in accord with that of Mr. Everett Perkins, the Commonwealth's attorney, to-wit: that under section 494, et seq., of the Code, the commissioner may assess this bank with the stock with which it was assessed for last year, that being the best information procurable, and thereby throwing upon the bank the burden to show that such assessment was erroneous.

While it is true that proceedings might be instituted as suggested in your letter, there would be a great deal more chance of success in the former than in the latter proceedings, and the idea of the State is simply to procure its just revenue.

Very truly yours,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

TAXATION—*Capital—Exemption of "money on hand."* Va. Code 1904, Tax Bill, Sec. 8.

Under a statute exempting from taxation as capital "moneys on hand received from loans made for a period of not more than four months which shall be owing and shall have been actually contracted for the necessary conduct of such business," money received from loans made for a period of not more than four months which shall be owing and which shall have been actually contracted for the necessary conduct of the business, is not "on hand" when it has been utilized in the business and therefore moneys received from such loans and utilized in the business is subject to taxation as capital.

RICHMOND, VA., *September 21, 1915.*

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

DEAR SIR:

You have requested this office to advise you as to the proper construction of the word "capital" under section 8 of the Tax Bill, as amended by the Acts of 1915, p. 98, and specifically as to whether, under the present state of the law, capital includes money which may have been invested in business.

Section 8 of the Tax Bill, as amended by Acts of 1915, p. 98, provides for the taxation of:

"All capital of individuals invested, used or employed in any trade or business not otherwise taxed. Moneys and credits actively used and employed in carrying on the trade or business, materials, goods, wares and merchandise on hand, and all solvent bonds, notes, demands or claims made or contracted in the course of business during the preceding year (but not including any moneys on hand received from loans made for a period of not more than four months, which shall be owing and shall have been actually contracted for the necessary conduct of such business) shall be held to be capital in such trade or business, and shall not be taxed otherwise than as such capital; but real estate shall not be listed as such capital, but shall be listed and taxed as real estate; provided, however, that nothing herein shall prevent cities and towns of this Common-

wealth from imposing a license tax on merchants, mercantile firms or corporations, based on their purchases or otherwise, in pursuance of their respective charters or general laws of this State for the government of cities and towns."

It is claimed by some tax-payers that the exemption of *money on hand received from loans made for the period of not more than four months which shall be owing and which have been actually contracted for the necessary conduct of such business* should be construed to exempt not only money on deposit or in the cash drawer, but also money which has been borrowed and invested in the business, although it may not be literally on hand on February 1st. In this connection it seems proper to quote an order entered at the meeting of the State Advisory Board on Taxation, held on September 9, 1915, copies of which were sent to the examiner of records and local board of review for the city of Lynchburg, and which reads as follows:

"The State Advisory Board on Taxation having heard representatives of the manufacturing interests of the city of Lynchburg respecting the taxation of capital for 1915, and having duly considered the question, is of the opinion and advises that there being no change in the present law providing for the taxation of capital from the provisions of the former law providing for the taxation of capital, other than to allow a deduction for 'any moneys on hand received from loans made for a period of not more than four months, which shall be owing and shall have been actually contracted for the necessary conduct of such business,' and the Supreme Court of Appeals of this State having construed the former law, capital for the year 1915 should be assessed in accordance with the opinion of that court as set forth in the case of the *Bridgewater Manufacturing Company v. Funkhouser, Commissioner, and others*, 115 Virginia Reports, subject, however, to the right of the taxpayer to deduct 'any moneys on hand received from loans made for a period of not more than four months, which shall be owing and shall have been actually contracted for the necessary conduct of such business,' as authorized by the amendment above referred to.

"As this board will issue a general circular relating to the assessment at this time of omitted taxes on intangible personal property, money and income, and the merchants' license tax, that matter is not here dealt with specifically with respect to taxpayers of the city of Lynchburg."

After a careful consideration of the question, and also of *Bridgewater Manufacturing Co. v. Funkhouser*, 115 Va. 476, I am unable to agree with the contention of the tax-payers aforesaid, and am forced to conclude that money received from loans made for a period of not more than four months which shall be owing and which shall have been actually contracted for the necessary conduct of the business, is not on hand when it has been utilized in the business, and that, therefore, moneys received from such loans and utilized in the business is subject to taxation as capital.

Very truly yours,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

TAXATION—*Collateral inheritance tax—How computed. Va. Code 1904, Tax Bill, Sec. 44.*

The court or the clerks before whom a will is probated should determine the fair market value of the property subject to a collateral inheritance tax at the time of the decedent's death, and enter an order fixing the amount of the tax accordingly.

RICHMOND, VA., *January 11, 1915.*

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

DEAR SIR:

Referring to your inquiry with reference to the collateral inheritance tax clause of the Tax Bill, being section 44 of the same, as amended March 14, 1910, will say that I understand the facts of the case you have under consideration are as follows:

A man dies leaving his real estate to the woman to whom he was engaged to be married. She takes possession of the property, repairs the same, and then sells it for a price in excess of its assessed value. Upon this state of facts, the question arises as to the valuation upon which the tax should be computed.

Sub-section (a) of section 44 of the Tax Bill provides that in such cases "the estate so passing shall be subject to a tax at the rate of five per cent. on every one hundred dollars value thereof." Assuming that, under the terms of the will, the personal representative was not authorized to sell any real estate or receive the rents and profits thereof, the devisee is required by sub-section (c) to pay the tax, which is made a lien on the real estate, and the treasurer is authorized to rent or levy upon and sell so much of the real estate as may be sufficient to pay the taxes and expenses of the sale. Sub-section (e) provides that the judge of the circuit court, or the clerk thereof, before whom the will is probated "shall determine the collateral tax, if any, to be paid on the estate passing by the will * * * and shall enter of record in the order book of the court or clerk, as the case may be, by whom such tax shall be paid and the amount to be paid. The clerk of the court shall certify a copy of such order to the treasurer of his county * * * and to the Auditor of Public Accounts." It then becomes the duty of the auditor to charge the treasurer with the tax.

From the above quotations, it will be seen that it is the duty of the judge or clerk before whom the will is probated "to determine the tax," and that it is the duty of the clerk to "enter of record the amount to be paid." I am of the opinion that these provisions vest in the court before whom the will is probated, or in the clerk if the will is probated before the clerk, the duty to fix the value upon which the tax is to be computed. Such value is not, in my opinion, fixed either by the State's assessment or by the price at which the property was sold after being repaired; but it is proper for the court or clerk to take into consideration, in fixing the value, not only the assessed value, but the cost of repairs and the probable enhancement of value caused thereby, as well as the price the property actually brought. The effect of the law is that the tax shall be computed on the value of the property as determined by the judge or clerk. Value here means the fair market value, in determining which many facts may be taken into consideration, but concerning which no one fact is absolutely controlling.

Under the facts above stated, the question may arise as to what date that value is to be determined. It has been observed that the tax is levied under sub-section (a) where any estate "shall pass under his will," etc. The valuation, therefore, must be made at the time the estate passes, and, according to the well-known rule of law, the real estate devised under a will passes at the time of the death of the testator. I am aware that under sub-section (f) of section 44, it is provided that such estate "shall be deemed paid over and delivered at the end of a year from the decedent's death, unless and except so far as it may appear that the legatee or distributee has neither received such estate, nor is entitled then to demand it." I am

of the opinion that this provision has reference to personal property only, and does not change the rule of law that real estate passes under a will at the time of the death of the decedent.

To summarize, my conclusion is that if the will was probated before the court, the court should determine the fair market value of the property at the time of the decedent's death and enter an order fixing the amount of the tax accordingly. If the will was probated before the clerk, the same duty devolves upon him.

Very truly yours,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

TAXATION—*Collateral inheritance tax—Who to pay—What subject to—Life estates and remainders—Legacies to churches and seminaries—Administrator. Va. Code 1904, Sec. 2639, and Tax Bill, Sec. 44.*

Any estate passing to the sister of a testatrix is not subject to a collateral inheritance tax.

Personal representatives who are authorized to sell both the real and personal property are required to pay the whole tax.

Personal representatives must pay whatever tax may be due under the statute before the property is delivered over to the legatees.

Where a testatrix directs that a certain sum be left to the nieces of the husband of the testatrix after a life estate, the decree of the court should order the executor before delivering these legacies to pay five per cent. thereof as a collateral inheritance tax, but the legatees are not subject to such taxation until they are entitled to receive the legacies.

Legacies left to a church or theological seminary are not subject to a collateral inheritance tax.

Where certain legacies are left to persons after a life estate in the sister of the testatrix, such legacies are subject to a collateral inheritance tax after the death of the sister.

If an estate is administered by an administrator and not a personal representative, such administrator must pay the collateral inheritance tax.

RICHMOND, VA., *April 17, 1915.*

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

DEAR SIR:

You have referred to this office letter of S. A. Summers, deputy clerk, Abingdon, Va., enclosing copy of the will of Mary C. Page, probated in the circuit court of Washington county, and also a copy of a tentative order, not yet entered, as to the ascertainment of the inheritance tax upon the real and personal property passing under said will, and have requested us to advise you in regard thereto.

From the tentative order, one would gather that the estate was not in the condition in which it was when the testatrix made her will; and, under these circumstances, it would seem to be impossible for us to give an intelligent opinion in regard thereto. There are, however, certain observations which we will make in regard to the application of section 44 of the Tax Bill, as amended by the Acts of 1910.

First: It is clear that as to any estate which passed to the testatrix's sister, such estate is not taxable.

Second: Under the statute, the personal representatives in this case would be required to pay the whole tax since they are authorized to sell both the real and personal property.

Third: The personal representatives must pay whatever tax may be due under the statute before the property is delivered over to the legatees who are entitled to receive the estate.

Fourth: After the termination of the life estate in Elizabeth Crawford, the will directs that the sum of \$6,000.00 be divided equally between Nannie Osborne, Bettie McClelland and Emma Wilson, nieces of testatrix's husband. If the law remains as at present, the decree of the court should, at the death of Elizabeth Crawford, order the executors before delivering the legacies to these three legatees to pay five per cent. thereof as collateral inheritance tax thereon; but these legatees will not be subject to such taxation until the legatees are entitled to receive the same. See sub-section (f) of section 44 aforesaid.

Fifth: Whatever legacies will be due and payable to the trustees of the Sinking Spring Presbyterian Church, or to the trustees of the Union Theological Seminary, or to the trustees of Stonewall Jackson Institute, will not be subject to a collateral inheritance tax, since the law specifically exempts property bequeathed or devised for benevolent, charitable, educational or religious purposes.

Sixth: After the termination of the life estate and the payment of the aforesaid legacies, the will provides for a division of the residuum of the estate as follows:

"To Mrs. Bettie McClelland (niece of my husband) or her heirs, one-fourth of the residuum; to my husband's niece, Margaret, daughter of his brother James, or her heirs, one-fourth of the residuum; to my husband's niece, Mrs. Emma Wilson, or her heirs, one-third of the residuum and to my husband's niece, Nannie Osborne, or her heirs, one-sixth of the residuum."

All of these legacies will be subject to collateral inheritance tax at the time that the legatees therein are entitled to demand delivery of the same; but until such time, no order can be entered for the payment of such taxes.

Seventh: There are certain specific legacies authorized to be made in the codicil of the will, apparently, though as to this point I am not clear, only after the life estate of the testatrix's sister, Elizabeth. Until the death of said sister, those specific legacies are not subject to collateral inheritance tax, but they will be subject thereto at the death of the testatrix's sister, provided that they are of such a character that the testatrix's will may be carried out in regard thereto.

My conclusions above stated may not be correct, since I am not acquainted with the physical property, nor have I had the necessary time in which to give this subject as thorough study as it demands.

In Mr. Summers' letter he also asks this question:

"We would also like to know as to such tax on personal property ascertained and charged to a personal representative, or which shall be ascertained and charged to him; when such representative, or persons interested, refuse to qualify or to have any one qualify as such representative."

The question which seems to be put by this part of Mr. Summers' letter is as to the power of the court to assess a collateral inheritance tax upon property of a decedent when no personal representative has qualified and when the parties interested therein have failed to ask the court to have qualification on such estate.

Section 2639 of the Code provides that if no distributees apply for administration within thirty days from the death of the intestate, the court or clerk may grant

administration to one or more creditors, *or to any other person*. Therefore, in the case cited, the court has authority to appoint an administrator of the estate; and, of course, in such case, the collateral inheritance tax could be paid by the administrator. It is also now provided by law that the clerk likewise has the right to appoint administrators, where formerly this function only belonged to the court.

Very truly yours,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

TAXATION—*Deeds—Bills of sale of personalty—Computation of tax—Mortgages Va. Code 1904, Tax Bill, Sec. 13.*

Waiving any question as to whether bills of sale are “deeds,” they clearly are “contracts” relating to personalty as used in this section under a requirement that a tax on certain instruments recorded be based upon the “consideration or value contracted for,” the latter terms are generally identical in meaning, but the different language was used to cover those cases where it was impossible to ascertain the true consideration in which case it is the duty of the clerk to determine, as far as possible, the actual value of the property contracted for.

Under a statute providing that on deeds of trust or other mortgages the tax shall be upon the amount of bonds or other obligations secured thereby, the tax is based not merely upon the bonds or other obligations issued, but upon the bonds or other obligations which might under the instruments be issued.

The amount of the recordation tax is not affected by reason of the fact that the deed of trust is merely supplemental and secures the same debt secured by the original deed of trust upon which the tax was duly paid; and the tax is upon the amount of bonds or other obligations secured in the original instrument, together with any additional amounts which may have been secured in the supplemental deeds of trust.

RICHMOND, VA., *September 17, 1915.*

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

DEAR SIR:

You have referred to this office letter from Murray, Prentice & Howland, counsellors at law, New York city, enclosing a letter from them to the clerk of the corporation court of the city of Newport News, regarding taxes which should be paid upon the recording of certain bills of sale. The instruments in question relate to a vessel now under construction in the city of Newport News, and are as follows:

- (1) Bill of sale by Newport News Shipbuilding and Dry Dock Co. to Luckenbach Co., Inc.
- (2) Bill of sale by Edgar F. Luckenbach to Luckenbach Co., Inc.
- (3) Bill of sale by Luckenbach Co., Inc., to The Equitable Trust Company of New York.

As the instruments themselves have not been submitted to this office, we can only gather the facts as best we may from the statements in the letters referred to above.

In the letter to D. G. Smith, clerk of the corporation court of the city of Newport News, copy of which was enclosed, we find the following statement:

"We understand that the vessel referred to in the instruments is under construction in the yards of Newport News Shipbuilding and Dry Dock Company, and that its construction was undertaken by this company pursuant to the terms of a contract between the said company and Edgar F. Luckenbach dated December 31, 1914, which provides that the vessel while under construction and all additions made thereto in the process of construction shall be the property of Edgar F. Luckenbach. The said Edgar F. Luckenbach has assigned to Luckenbach Company, Inc., his interest in this contract, including all his right, title and interest in and to the said vessel. Luckenbach Company, Inc., by an indenture dated May 1, 1915, has mortgaged all its interests in the vessel to the Equitable Trust Company of New York."

The first question which arises is whether, under section 13 of the Tax Bill of Virginia, as amended by Acts of 1910, p. 488, the first two instruments referred to, that is, the bill of sale by Newport News Shipbuilding and Dry Dock Company to Luckenbach Company, Inc., and the bill of sale by Edgar F. Luckenbach to Luckenbach Company, Inc., may be regarded as deeds or contracts relating to real or personal property under section 13, as amended. Said section, so far as material to the point here being considered, reads as follows:

"On every deed, except a deed exempt from taxation by law, which is admitted to record the tax shall be fifty cents where the consideration of the deed or the actual value of the property conveyed is \$300 or less; where the consideration of the deed or actual value of the property is over \$300 and does not exceed \$1,000, the tax shall be \$1.00, and where the consideration of the deed or the actual value of the property conveyed exceeds \$1,000, there shall be paid ten cents additional on every \$100 or fraction thereof of such consideration or actual value. On deeds of trust or mortgages the tax shall be upon the amount of bonds or other obligations secured thereby. * * * On every contract relating to real or personal property, except as hereinafter provided, which is admitted to record the tax shall be fifty cents where the consideration or value contracted for is \$300 or less; where the consideration or value contracted for is over \$300 and does not exceed \$1,000, the tax shall be \$1.00, and where the consideration or value contracted for exceeds \$1,000, there shall be paid ten cents additional on every \$100 or fraction thereof of such consideration or value contracted for."

It is hardly necessary to cite authority, for the fact that a bill of sale has often been held to be a contract. *Yeck Sung v. Hines*, 85 Pac. (Cal.) 1089; *DeBarry v. Dunne*, 172 Fed. 940; *Cole v. Laird*, 96 N. W. (Iowa) 744; *Koehler v. St. Mary's Brewing Co.*, 77 Atl. (Penn.) 1016. Waiving the question as to whether these bills of sale may be regarded as deeds, they certainly are contracts relating to personal property as used in the above section.

The next question is whether, under the provisions in the section of the Tax Bill, as amended, requiring that the tax imposed be based upon "the consideration or the value contracted for," the term "consideration or value contracted for" may have a different signification, and if so, how is the amount of the tax to be determined? This question has already been interpreted by this office in letters to you. See letters dated March 6, 1914, April 17, 1914, and March 10, 1915. The purpose of giving the double measure as to what the tax should be, to-wit: upon, first, the consideration, or second, the value contracted for, seems to be to allow the clerk where the actual value is not stated in the instrument, or where the person offering the instrument for record is unwilling to state the true consideration, or where the

instrument is one on a consideration of love and affection, or some similar sentimental consideration, to determine what is the actual value contracted for, and, thereupon, to charge a just sum as a tax. In other words, these terms are generally identical in meaning, but the different language was evidently used to cover those cases where it was impossible to ascertain the true consideration, in which case it is the duty of the clerk to determine, as far as possible, the actual value of the property contracted for. The statute provides that "the tax on every deed, contract, or agreement shall be *determined* and be collected by the clerk in whose office it is first offered for recordation;" and, therefore, if the clerk cannot ascertain the true consideration, he must use his best judgment to determine "the value contracted for."

The third question asked is in regard to the mortgage, in which the information is sought as to whether the tax should be computed on the basis of the amount of bonds outstanding or on the amount of the authorized issue. From the section above quoted, it appears that on deeds of trust or other mortgages the tax shall be upon the amount of bonds or other obligations secured thereby. It would seem that it was the intention of this section to base the tax not merely upon the bonds or other obligations issued, but upon the bonds or other obligations which might under the instruments be issued.

The fourth question upon which a construction is sought as found in the letter is as follows:

"We would like your ruling on the question whether the supplemental mortgage should be taxed on the basis of the entire debt, or only on a proportion thereof based on the ratio which the value of the property covered by such supplemental indenture bears to all of the property mortgaged to secure the debt."

While this question is not entirely clear, it seems to be the same question that was answered in our letter of January 2, 1915, in which the following questions were put to this office:

(1) Is the amount of the tax imposed under the terms of section 13 of the Tax Bill affected by reason of the fact that a part of the land conveyed is not situated in the State of Virginia?

(2) Is the amount of such tax to be paid affected by reason of the fact that the deed of trust is merely supplemental and secures the same debt secured by the original deed of trust upon which the tax was duly paid?

Our answer to the foregoing questions, one of which is not relevant, was as follows:

"Both of these questions must be answered in the negative. The first question is put at rest in the case of *Pocahontas Colliery Co. v. Commonwealth*, 113 Va. 108; and the second question by the case of *Saville, Clerk, v. Virginia Railway & Power Co.*, 114 Va. 444. Under the authority of these cases the clerk is charged with the duty of collecting a tax on the amount of bonds or other obligations secured in the original deed of trust, together with any additional amounts which may have been secured in the first, second and third supplemental deeds of trust."

In an opinion rendered the Hon. Morton Marye, auditor, etc., by Hon. William A. Anderson, Attorney General, on March 28, 1902 (Reports of Attorney General for 1902, p. 70), the following language, which seems to be pertinent here, occurs:

"The last instrument, although it may be a cumulative security upon the same property, is a distinct and substantive conveyance of the property therein

described, and is, in my opinion, subject to the tax imposed by the statute under the recordation of deeds and other instruments.”

As before indicated, this opinion is based not upon an examination of the instruments themselves, but upon the description of them in the correspondence. Therefore, I cannot say that I have correctly decided these questions.

Very truly yours,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

TAXATION—*Deeds—Effect of part of land conveyed being out of State—Supplementary deeds of trust. Va. Code 1904, Tax Bill, Sec. 13.*

The amount of the tax on deeds is unaffected by the fact that part of the land conveyed lies in another State.

On original and supplementary deeds of trust the tax is on the amount of bonds or other obligations secured in the original deed of trust, together with any additional amounts which may have been secured in the supplemental deeds of trust.

RICHMOND, VA., *January 2, 1915.*

HON. C. LEE MOORE,

Auditor of Public Accounts,

Richmond, Va.

DEAR SIR:

Referring to the enclosed inquiry of C. V. Greever, clerk of Tazewell county, as to the tax on the fourth supplemental deed of trust of the Pocahontas Coal and Coke Co., to the Girard Trust Co., trustee, dated December 1, 1913, which deed is offered for recordation in the clerk's office of Tazewell county, will say that the two questions concerning which the clerk is in doubt are evidently as follows:

First: Is the amount of the tax imposed under the terms of section 13 of the Tax Bill affected by reason of the fact that a part of the land conveyed is not situated in the State of Virginia?

Second: Is the amount of such tax to be paid affected by reason of the fact that the deed of trust is merely supplemental and secures the same debt secured by the original deed of trust upon which the tax was duly paid?

Both of these questions must be answered in the negative. The first question is put at rest in the case of *Pocahontas Colliery Co. v. Commonwealth*, 113 Va. 108; and the second question by the case of *Saville, Clerk, v. Virginia Railway & Power Co.*, 114 Va. 444. Under the authority of these cases, the clerk is charged with the duty of collecting a tax on the amount of bonds or other obligations secured in the original deed of trust, together with any additional amounts which may have been secured in the first, second and third supplemental deeds of trust. The amounts so secured do not appear in the fourth supplemental deed of trust which you submitted to me and which I am returning herewith.

As will be seen from the case first cited, the fact that a part of the lands conveyed by the deed of trust is in West Virginia is entirely immaterial.

Very truly yours,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

TAXATION—*Deeds—Recordation—Computation of tax. Va. Code 1904, Sec. 590, and Tax Bill, Sec. 13.*

In a lease the "consideration or value contracted for" which is the basis of the computation of a recordation tax is the amount of rental or other consideration to be paid by the lessee for the use of the property involved, and where this is uncertain depending on future contingencies the clerk of court must estimate as best he can on the facts, and in the event of a refusal to pay the recordation tax, he should refuse to admit the instrument to record.

RICHMOND, VA., *March 10, 1915.*

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

DEAR SIR:

Yours of March 2nd received, together with letter from Mr. J. J. Hobbs, clerk of Alleghany county, inquiring as to the State tax to be charged on the recordation of the deed of lease, dated April 19, 1912, between Thayer and others, trustees, lessors, and the Low Moor Iron Co. of Virginia, lessee. The tax on this instrument is governed by the provisions of section 13 of the Tax Bill, as amended by 1910 Acts, p. 488, in which it is provided, among other things, as follows:

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

The same section also provides as follows:

"The tax on every deed, contract or agreement shall be determined and be 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 payment of any tax."

I presume that the instrument in question is to be presented for recordation for the first time in the clerk's office of Alleghany county, and that the tax is to be determined by the clerk of that county. I understand that the clerk desires your opinion as to the principles which shall govern him in exercising the duty imposed upon him by the statute, to-wit, to "determine" the tax.

You will observe, from the first quotation above, that the tax is to be computed upon "the consideration or value contracted for." I am of the opinion that in a lease the consideration or value contracted for is the amount of rental or other consideration to be paid by the lessee for the use of the property involved.

By a reference to page 5 of the printed lease sent you by the clerk, you will see that section 6 provides for a payment on the part of the lessee of \$17,139.34, and that sub-section 4, on page 7, provides that the lessee shall pay an annual dead rent for the leased premises of \$11,250.00 for a period of nine years, making a total of \$101,250.00. This would make the total consideration, so far as the same is set out in dollars and cents in the lease, of \$118,389.34 upon which the tax is to be computed at the rate set out in the quotation first above made.

I presume, however, that the clerk's difficulty in determining the amount of the tax grows out of sub-section 5, on page 9 of the printed list, in which it is provided that if, in any calendar year, after 1911 the lessee * * * shall ship from the leased premises more than 56,250 tons of iron ore, the lessee shall pay for the excess ore shipped a royalty of twenty cents per ton, and sub-section 6, in which it is provided that the lessee shall pay for each and every ton of limestone rock or sand removed from the leased premises the sum of one cent per ton.

From these provisions, it is manifestly impossible to predict, with any degree of certainty what the true consideration of the lease will turn out to be, inasmuch as it cannot be predicted with certainty the number of tons of iron ore which will be shipped, or the number of tons of limestone-rock or sand removed from the leased premises, yet the statute says that the "tax shall be determined and be collected by the clerk." Under the circumstances, I would advise the clerk to seek, by all means available, to ascertain what has heretofore been the output of iron ore, limestone-rock or sand from the said property, and inquire into what will probably be the output under the plan of operation contemplated by the lessee; and though I recognize the great difficulty of fixing such output with any degree of accuracy, yet I would advise the clerk to make a fair and just estimate, based on all available facts, and charge a tax on the said sum of \$118,398.34, together with an additional tax on the estimated rental which the lessee will have to pay on account of the royalty of twenty cents per ton on the output of iron ore in excess of 56,250 tons, and also an additional tax on the probable sum received for the limestone-rock or sand removed from the premises.

If the party offering the lease for recordation refuses to pay the tax determined by the clerk, the clerk's remedy is to refuse to admit the writing to record. Section 590 of the Code provides that "no deed or contract shall be admitted to record * * * until the tax on such deed or contract * * * is paid to the clerk."

I am returning you herewith the letter of J. J. Hobbs, clerk, dated March 10, 1915, as well as the printed copy of the lease referred to.

Very truly yours,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

TAXATION—*Estates of decedents—Liability of personal representatives. Va. Code 1904, Secs. 492, 492b, 2660 and 3326a.*

Since it is made the duty of a personal representative to list property for taxation, and is made illegal for him to distribute the funds until the taxes are paid, he is personally responsible for the payment of taxes accruing against the property while in his hands.

RICHMOND, VA., August 17, 1915.

HON. WM. H. SANDS,
Examiner of Records,
Richmond, Va.

DEAR SIR:

In the absence of the Attorney General, I am replying to your two letters, in which you raise the following question:

Whitney B. Davie qualified in 1898 on the estate of his brother, Pascal Davie, valued at over \$300,000. Within a year or two thereafter the estate was distributed and an ex parte account rendered, but no refunding bonds taken by the administrator.

valued at \$300,000. Within a year or two thereafter the estate was distributed and an *ex parte* account rendered, but no refunding bonds taken by the administrator. Since this distribution an examination disclosed that no tax was paid during the life of Pascal Davie on his estate in his hands. The question is whether the Commonwealth may extend the omitted taxes against the administrator as well as against the estate.

It is perfectly clear that a personal representative cannot be held personally responsible for the failure of his decedent to list for taxation property in the hands of the decedent; and that unless such taxes were assessed during the administration of the personal representative, he could not be compelled to respond personally therefor.

As to the taxes accruing against the property while in the hands of the personal representative, a different result follows from the statute law of Virginia. In section 492, Va. Code 1904, providing by whom property is to be listed and to whom it shall be taxed, we find the following provision:

"If the property be the estate of a deceased person, it shall be listed by the personal representative, or person in possession, and taxed to the estate of such deceased person."

In section 492b it is in effect provided that no decree or order shall be entered by any court of the Commonwealth directing the payment or distribution of any fund, securities or moneys, or other property under its control, or under the control of any fiduciary until all taxes and levies upon such funds, etc., are paid, unless the payment thereof be provided for in such decree or order; and it is further provided that no fiduciary shall pay out any funds in his hands under the order of any court unless a receipt for the taxes is produced showing that said taxes have been paid.

Analyzing the above statutes, we note (1) that it is the duty of the personal representative to list for taxation the estate of the deceased person; (2) the law requires the court not to distribute any funds, securities or moneys under the control of a fiduciary until the taxes and levies thereon are paid; and (3) the statute requires that no fiduciary shall pay out any funds in his hands under the order of any court unless a receipt for the taxes is produced showing that the said taxes have been paid.

Therefore it would seem to follow that if the taxes accrued against the property in the hands of a personal representative while it was held by him as personal representative, he would be personally responsible for the payment of said taxes. Under section 2660, providing the order in which the debts of decedents are to be paid by the personal representative, debts due the State and taxes and levies assessed upon the decedent previous to his death are made preferred obligations. And by section 2661, it is provided that a personal representative who, after twelve months from his qualification, pays a debt of the decedent shall not thereby be personally liable for any debt or demand against the decedent of equal or superior dignity, whether it be of record or not, *unless before such payment he shall have notice of such debt or demand*.

Where it is made the duty of the personal representative to list property for taxation, and it is made illegal for him to distribute the funds until the taxes have been paid, it would seem to be clear that he would be personally responsible in case of distribution before such taxes are paid. See *State v. Jones*, 39 N. J. L. 650, 652; *Bonaparte v. State*, 63 Md. 465, 470, 473; *Dresden v. Bridge*, 90 Mo. 489; *Williams v. Holden*, 49 Wend. 223; *Austin v. Varian*, 16 N. Y. App. 377.

In this connection it is well to call attention to clause 7 of section 3326a, as

amended by Acts of 1912, p. 571, providing that "all executors, administrators, trustees and all other representatives distributing estates within twelve months of their qualification shall be liable for the taxes on the full amount of such estates for the year commencing February 1st following their qualification, and they shall retain the same out of the estates, and the estates so distributed shall be exempted from taxation in the names of the parties beneficially interested therein." Of course, this statute does not apply to the case put by you, but will be applicable to all cases arising subsequent to the time when it became a law, to-wit, March 14, 1912.

Very truly yours,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

TAXATION—*Examiners of records—Powers as to omitted taxes—Duties of local board of review. Va. Code 1904, Secs. 508, 3326a and 3326b; Acts 1915, Ch. 116(7).*

If an examiner of records in the course of the examination of the annual reports of purchases of merchants and returns of tax-payers, and the examination of State and Federal records in connection therewith, should discover any omitted taxes, whether for current or past years, it is his duty to report the same (if necessary) and in turn report to the commissioner of the revenue, who is required to make assessment in pursuance of statute.

RICHMOND, VA., *July 2, 1915.*

To the STATE ADVISORY BOARD ON TAXATION,
Richmond, Va.

GENTLEMEN:

In response to your request for my opinion as to the duties of examiners of records in the matter of ascertaining and reporting omitted taxes for the current year and for past years, I reply that the duties of examiners of records are defined in section 508 (as amended by Acts 1904, p. 486), section 3326a (as amended by Acts 1912, p. 571), and section 3326b of Virginia Code 1904, and the act "to create a State Advisory Board on Taxation and county and city boards of review of assessments," etc., Acts 1915, ch. 116, p. 154. Taking up these statutes in the order of their passage:

It appears that section 3326a confers upon examiners of records certain duties in relation to taxation for the current year and for past years on property under control of fiduciaries and courts.

Section 3326b confers on the same officials certain duties as to the taxation of ships and other water craft.

Section 508 confers upon the examiners of records as well as upon the commissioners of revenue and "other assessing officers, commission or board" certain duties in relation to the assessment of omitted taxes, but this section does not, in my opinion, authorize such officer, commission or board to go beyond their respective spheres of duty as to the taxation of the several classes of property assigned them under previous statutes.

As to the fourth and last statute dealing with the duties of examiners of records, to wit., the said Act of 1915, hereinafter referred to as the new Tax Law, attention is called to section 7 defining the duties of the local board of review of assessments.

These duties, so far as pertinent to the present inquiry, may be briefly summarized as follows:

(a) To direct the commissioner of the revenue to enter into the assessment roll any property, real or personal, which is found to have been omitted.

(b) To direct the commissioner of the revenue to correct any entries found to be erroneous, either as to over or under valuation and to cancel duplicate assessments.

(c) To review reports of purchases by merchants and the annual returns of intangible personal property, income and money of all tax-payers "*as made or required to be made.*"

It is apparent that these duties are not separate, distinct and independent, but are closely related. The board performs the last mentioned duty, to wit., to review the report of purchases and annual returns of tax-payers in order that it may perform the two first mentioned duties, to wit., (a) direct the assessment of omitted taxes, and (b) correct erroneous valuations and duplicate assessments. In the performance of the board's duties to review said reports and returns, inseparable as it is from the duty to supply omissions and make corrections, the statute provides that the board shall have the assistance of the examiner of records, who must be a commissioner in chancery, and who is required by the new tax law to "examine the returns aforesaid and the records, both State and Federal, with a view of ascertaining and reporting for taxation the values to be extended by said commissioners of the revenue on *all* intangible personal property, incomes and money *liable to taxation under the laws of this State.*"

The belief has been expressed that it is not the purpose of the new tax law to provide new machinery for reaching back and assessing property found to be omitted. It is argued that the local board of review, and, therefore, its assistants, the examiners of records, must confine their labors to an examination of "reports of purchases of merchants and annual returns" of tax-payers and that they have no duty to perform with reference to taxes which in the course of their investigations they find may have been omitted for past years. There are several reasons why such a position cannot, in my opinion, be maintained. First, section 7, sub-section 1, provides that the board must direct the assessment of property "*which is found to have been omitted*"—this language is general and is not limited to the current year. Second, under sub-section 7 of the same section, it is provided that the board shall review reports of purchases and returns for taxation "*as made or required to be made*"—it is clear that this provision does not limit the board to returns which have been made, but extends their jurisdiction to returns which ought to have been made, that is to say, omitted property. Third, the same sub-section in defining the duties of the examiners of records as to their reports to the local boards of review provides that the examination of State and Federal records by the examiners must be done for the purpose of "*ascertaining and reporting for taxation,*" not property to be taxed for the current year, but "*all*" * * * property * * * *liable to taxation under the laws of this State.* Fourth, the same sub-section goes on to provide that after the report of the examiner to the board and the report of the board to the commissioner of the revenue, he "*shall assess taxes thereon as if such intangible property, income or money had been listed by the individual person, firm or corporation*"; thus showing that it was contemplated that omitted property should be taxed, that is to say, property which the tax-payer failed to list. Fifth, the same sub-section also provides that upon the request of the examiner of records the tax-payer should be summoned before the board to answer on oath such questions as may be pro-

pounded by said board or the *examiner of records*. The chief purpose of this provision seems to be to allow the examiner of records to put the tax-payer under oath and require him to disclose omitted property. There would be little reason to put him on the stand and question him as to property he had already returned because valuations could usually be proven by third parties, while undisclosed or omitted taxable property could best be discovered by questions propounded to the tax-payer himself.

In this connection it would be well to note that in none of these various provisions with reference to omitted taxes is language used limiting the operation of the new tax laws to omitted taxes for current years. There being no such limitation in the law, it should not be placed there by construction, especially when we bear in mind the result of such a construction. It would mean that the General Assembly in adopting a new tax system intended to provide a less efficient system for the collection of taxes which ought to have been collected in the past than for the collection of current taxes. Such a construction would mean that if next year the examiners of records should, in pursuance of their duties of investigation, discover that this year or in past years the State had not received taxes to which it was entitled, then the examiner is relieved of all duty to report the same for taxation. To illustrate, suppose that next year some large merchant should decide to retire from business and conveyed his real estate, business and intangible personal property to a third party, the instrument of conveyance being placed upon record; the examiner of records, in pursuance of his duties as defined by statute, finds the conveyance on record discloses that the merchant owned a large amount of taxable intangible property which had escaped taxation and that the consideration for the conveyance of the business was so great as to show clearly that the merchant's returns of purchases in former years were grossly below what they should have been; then if the duties of the examiners of records are limited to the current year, in such a case as that above stated, he has no duty to perform in reporting the merchant for taxation for past years. It is not sufficient to say that the commissioner of the revenue has authority to make such investigation and to assess such taxes, for, the very purpose of giving the examiners of records a function to perform with reference to the tax system, and putting upon him a special duty of examining the State and Federal records, was upon the theory that the examiner of records, being a commissioner in chancery and usually a lawyer, was familiar with records, especially the court records, and accustomed to examine the same, and, therefore, better fitted to bring to light facts disclosed by the records.

I do not believe that the General Assembly in creating a new tax system intended that such system should be less effective in the important matter of collecting omitted taxes for past years, or those which may hereafter from time to time be omitted, than it has provided for collection of current taxes.

Neither the language of the statute, nor the general policy of the law to penalize those who evade taxation, will permit me to place any construction on the new tax law which would prohibit one of the officials connected with the tax department of the State from reporting for taxation those who, by accident or design, have been able to evade for any past year their just share of the tax burdens.

My conclusion, therefore, is that under the new tax law, if an examiner of records, in the course of the examination of the annual reports of purchases of merchants and returns of tax-payers, and the examination of State and Federal records in connection therewith, should discover any omitted taxes, whether for current or past years, it is his duty to report the same to the local board of review, who must

review and correct the same (if necessary) and in turn report to the commissioner of the revenue, who is required to make assessment in pursuance of statute.

Respectfully,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

TAXATION—*Exemptions—Endowment funds of college. Va. Constitution, Sec. 183 (d).*

Where a corporation is organized which may result in the future in holding in trust endowment funds not invested in real estate for an educational institution, such funds are not exempt from taxation where they are not at present such permanent endowment funds.

RICHMOND, VA., *March 31, 1915.*

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

DEAR SIR:

You have referred to this office the question as to whether money invested by the Washington and Lee University Alumni, Inc., in mortgages in the State of Virginia will be subject to taxation, and have referred to us a letter from Mr. William Taylor Thom, secretary, enclosing a pamphlet containing copy of the charter of said corporation. We note that the corporation is a Virginia corporation, having been chartered by the State Corporation Commission of Virginia on June 29, 1910.

As the corporation was chartered in Virginia, the question as to whether funds invested by the said corporation in Virginia mortgages shall be subject to taxation involves the large question as to whether any of the intangible property of this corporation is subject to taxation in Virginia. In other words, all of the money, evidences of debts and other intangible property belonging to this corporation is subject to taxation in this State, whether invested in Virginia mortgages or mortgages of other States, unless section 183 of the Constitution exempts such property from taxation; and, as we shall see, the situs or location of an investment of funds does not determine the question as to whether such funds are subject to taxation in this State.

Section 183 of the Constitution, so far as applicable to the question here, provides that the property therein enumerated, and no other property, shall be exempt from taxation, State and local. The only property enumerated in said section which could be construed to include the property of this corporation is found in paragraph (d), to wit., "the permanent endowment funds held by * * * educational institutions directly or in trust, and not invested in real estate." This paragraph necessarily means that permanent endowment funds of a college or university held by such college or university, or held by other persons or corporations in trust for such college or university, shall be exempt from taxation. The question, therefore, to be solved is whether funds of the Washington and Lee University Alumni, Inc., may be construed to be permanent endowment funds held in trust for the Washington and Lee University. If they may be construed to be permanent endowment funds, then, whether they are invested in Virginia mortgages or not, they are exempt from taxation so long as they are not invested in real estate. On the other hand, if they cannot be construed as permanent endowment funds, then they are subject to taxation, whether invested in Virginia mortgages or not.

From the charter we learn that the purpose for which the corporation was formed

was to incorporate the alumni, or such of them as might comply with the requirements of the charter and the by-laws, "that for the benefit of the Washington and Lee University they may receive and hold money and other property, real and personal; may buy, erect, or receive by gift, devise, contract, conveyance, or otherwise, property, real or personal at Lexington, Rockbridge county, Va., or elsewhere within or without the State of Virginia; may hold or dispose of same on such terms and such conditions as by the duly authorized authorities of said corporation may be deemed proper and may be in accordance with the laws of Virginia, said disposition both of corpus and income to be made at such time, in such manner, and under such conditions as the duly authorized authorities of this corporation exclusively may deem proper; and may invest or reinvest any funds coming into the ownership of said corporation; and may hold, manage, and control all property coming in said corporation as aforesaid, as hereinafter named trustees or their successors may deem proper, under suitable rules and regulations to be made under the powers conferred by this charter, in order to aid the Washington and Lee University in any and all ways that may be deemed proper; and they may adopt any other methods or means authorized by law to advance and further the purpose of said incorporation and keep the bond between the Washington and Lee University and her alumni close and continuous. And said hereinafter named trustees or their successors shall be authorized to make such expenditures as may be found necessary or desirable for the wise conduct of their trust."

In the same pamphlet referred to above it is stated, on page 4, that "the first aim of the officers serving under this charter is to get from the alumni a sufficient 'working fund' to enable them to carry on an active campaign to obtain a large endowment for the university. * * * This working fund should be, and will be, given with the understanding that conditions may necessitate spending the last dollar of it before successful returns begin to show themselves." Thus, so far from the funds coming into the hands of this corporation being a *permanent* endowment fund for the benefit of Washington and Lee University, it is apparent that it is not permanent in any sense, and while it may result in a permanent endowment fund, that is a matter that only the future can disclose. Therefore, it would seem to be clear that not only money invested in Virginia mortgages, but all of the money and other choses in action belonging to this corporation should be listed for taxation in Virginia until such time as the corporation by its proper officers shall either turn the funds over to the Washington and Lee University as a permanent endowment fund or shall irrevocably constitute such funds as a permanent trust fund for the use of the Washington and Lee University.

While it does not seem possible to escape from the above conclusion, I deem it proper to say that the Supreme Court of Appeals, in construing section 183 of the Constitution, has been very liberal towards property which is exempted from taxation by said section. For instance, in the case of *Commonwealth v. Lynchburg Y. M. C. A.*, 115 Va. 745, the court exempted from taxation the building of the Lynchburg Y. M. C. A., although certain floors in said building were used as dormitories for members thereof, the Y. M. C. A. receiving in return for their use a monthly stipend; and th's in spite of the fact that section 183 provides that "whenever any building or land, or part thereof, mentioned in this section and not belonging to the State, shall be leased or shall be a *source of revenue or profit*, all of such buildings and land shall be liable to taxation as other land and buildings in the same county, city or town." The policy of the law which does not favor exemptions from taxation seems to have been reversed by the holding of the court in this case, and it may be

that the same policy would obtain in case of funds raised by the Washington and Lee Alumni, Incorporated.

Very truly yours,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

TAXATION—*Exemptions—When property is held by State. Va. Constitution, Sec. 183.*

Property owned by an individual or corporation which is leased to the State for ten years, renewable forever at the option of the State, is not "property directly or indirectly owned by the State however held," and, therefore, is not exempt from taxation.

RICHMOND, VA., *September 14, 1915.*

HON. C. LEE MOORE,

Auditor of Public Accounts,

Richmond, Va.

DEAR SIR:

Yours of September 7th, enclosing letter from Hon. A. B. Carney, Commonwealth's attorney, Norfolk county, dated September 4th, received. Before your letter came to hand Mr. Carney had talked with me on the subject and I had already informed him that I was of the opinion that property owned by an individual or corporation and leased to the State for ten years, renewable forever at the option of the State, was not "property directly or indirectly owned by the State however held" within the meaning of section 183 of the Constitution, and that such property is, therefore, not exempt from taxation. The owner still holds the title to the property and receives rental therefrom and, therefore, must be taxed as other landlords. The fact that the rents are paid by the State is immaterial.

The provision of the Constitution, above quoted, exempting property "*directly or indirectly owned by the State, however held,*" was not intended to relieve from taxation the owner of property simply because the State holds a lease on the same, but its evident purpose was that the State's property should be exempt whether the title was held "*directly*" by the State or "*indirectly owned by the State, however held*"—that is to say, whether through any of its various boards or public institutions.

Yours very truly,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

TAXATION—*Fiduciaries—Property in the hands of a commissioner—Personal liability. Va. Code 1904, Secs. 492, 492a, and 492b.*

Taxes accruing against the property in the hands of a commissioner while held by him as commissioner, render him personally responsible for the payment of said taxes if distribution is made by him without complying with the law.

RICHMOND, VA., *August 16, 1915.*

HON. C. LEE MOORE,

Auditor of Public Accounts,

Richmond, Va.

DEAR SIR:

You have referred to this office a letter from Mr. A. H. Light, Commonwealth's attorney for Campbell county, enclosing copy of a tax ticket and also a letter from

Mr. Jas. B. Easley, examiner of records, raising the question as to whether the commissioner of the court in the suit of *Marshall v. Marshall* is liable for taxes on property which was in his hands, as commissioner, and which he distributed without paying the taxes thereon. The tax ticket referred to is, so far as necessary to be considered, as follows:

‘F. S. Kirkpatrick, Commissioner in <i>Marshall v. Marshall</i> ,	
To the Treasurer of Campbell County.	
Tax for 1908 on \$8,830.00 of property.....	\$119 21
Tax for 1909 on 8,830.00 of property.....	123 62
Tax for 1910 on 8,830.00 of property.....	123 63
Total.....	\$366 46’’

I also find on tha tax ticket the date 1914, so I assume these taxes were not assessed until the year 1914, although I do not know whether this is a correct assumption or not.

Under section 492, Va. Code 1904, which provides by whom property is to be listed and to whom taxed, we find the following:

“If the property consists of money, bonds or other evidences of debt under the control or in the possession of a receiver or a *commissioner*, it shall be listed by and taxed to such receiver or commissioner; and the clerk of each court shall furnish the commissioner of the revenue with all bonds and funds held by the commissioners or receivers under the authority of the court.”

It is further provided by section 492a, Va. Code 1904, as follows:

“All notes, bonds and other evidences of debt held subject to the order of any court or receiver or commissioner of said court, whether executed for the the purchase price of real or personal property, shall be taxed to the clerk of said court or to a receiver or commissioner, as the same may be so held or be payable, and shall be exempted from taxation in the name of the parties beneficially interested therein.”

Section 492b, Va. Code 1904, as amended by Acts of 1910, p. 96, provides, in effect, that no decree or order shall be entered by any court of the Commonwealth directing the payment or distribution of funds or other property under its control, or under the control of a receiver or commissioner, or other officer or fiduciary until all taxes and levies upon such funds or other property shall be paid, unless the payment thereof be provided for in such decree or order; and it is further provided that no commissioner, fiduciary, etc., shall pay out any funds in hand under the order of any court unless a receipt for the taxes is produced showing said taxes have been paid.

Under the foregoing provisions of the statutes of Virginia we note, first, that it is the duty of the commissioner to list any money, bonds or other evidences of debt under his control for taxation, and such money, bonds and other evidences of debt is required to be taxed against the commissioner and exempted from taxation in the name of the parties beneficially interested therein. Second, the law requires the court not to distribute funds, securities or moneys under the control of the commissioner until all taxes and levies thereon are paid; and, third, the law requires that no commissioner shall pay out any funds in his hands under the order of any court unless a receipt for the taxes is produced showing that said taxes have been paid.

Therefore it would seem to follow that if the taxes aforesaid accrued against the property in the hands of the commissioner while it was held by him as commis-

sioner, he would be personally responsible for the payment of said taxes if distribution of said funds was made by him without complying with the law. I can find no direct adjudication on this subject, but the following cases, as to the liability of an executor who has settled an estate without paying taxes due thereon, would seem to be applicable:

State v. Jones, 39 N. J. L. 650, 652.

Bonaparte v. State, 63 Md. 465, 470, 473.

Dresden v. Bridge, 90 Me. 489.

Williams v. Holden, 49 Wend. 223.

Austin v. Varian, 16 N. Y. pp. 377.

Very truly yours,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

TAXATION—*Franchise and registration fees of corporations—Effect of bankruptcy*

A corporation which on account of being adjudicated a bankrupt cannot exercise any of its functions, and has, in fact, ceased to exist, cannot be required to pay a registration fee or franchise tax; but registration and franchise fees which became due and payable prior to the adjudication in bankruptcy may be proved and claim made therefor.

RICHMOND, VA., *February 1, 1915.*

HON. C. LEE MOORE,

Auditor of Public Accounts,

Richmond, Va.

DEAR SIR:

With reference to the matter of the Commonwealth's claim against the Foster Motor Car Co., Inc., a bankrupt, for registration fees and franchise taxes for the years 1914 and 1915, we desire additional information in regard to this case. It appears from the letter of J. R. Tucker, receiver, dated January 9th, addressed to you, that this company has been adjudged a bankrupt and has ceased to do business as a corporation, its entire assets having been sold under the direction of the bankrupt court. Under these circumstances it seems clear that the Commonwealth cannot recover any fees for the year 1915.

It is well established that a franchise tax may not be assessed against a bank where it is in the hands of a receiver and perpetually prohibited from doing business. *Commonwealth v. Lancaster, etc., Bank*, 123 Mass. 493. Such a tax, however, may be assessed where the corporation is exercising most of its powers but is prohibited from exercising only a few thereof. *Commonwealth v. Barnstable, etc., Bank*, 126 Mass. 526.

The test in such cases is not the doing of business, but the right to do business. *Attorney General v. Mass. Pipe Co.*, 179 Mass. 15, 60 N. E. 389; *Flint v. Stone Tracy Co.*, 220 U. S. 108, 55 L. ed. 389. Applying this test, it is clear that a corporation which cannot resume business at will may not be assessed. *Greenfield, etc., Bank v. Commonwealth of Mass.*, 97 N. E. 927.

Applying these rules to the present case, it seems clear that, since this corporation cannot exercise any of its functions, and in fact has ceased to exist, the Commonwealth cannot collect the registration fee or franchise tax for the year 1915.

As to the registration fee and franchise tax for 1914, the question on which we desire to be informed is whether the appointment of the receiver and the adjudication in bankruptcy took place before the registration fee and franchise tax for 1914

was assessable. If these fees were assessable before the adjudication in bankruptcy and the appointment of a receiver, then this is one of the taxes due to the State of Virginia which ought to be proven before the receiver and a claim therefor made. If, however, these fees were assessable after the adjudication in bankruptcy and the appointment of the receiver, the same rule would apply thereto as in the case of the 1915 fees.

Very truly yours,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

TAXATION—*Intangible personalty—Shares of stock of domestic insurance companies. Va. Constitution 1902, Secs. 168 and 170; Va. Code 1904, Tax Bill, Secs. 7, 8, 9, 17, 23, 24 and 26.*

Shares of stock of domestic insurance companies held by citizens and residents of Virginia are subject to taxation under the laws of this State.

RICHMOND, VA., *June 23, 1915.*

HON. C. LEE MOORE,

*Auditor of Public Accounts,
Richmond, Va.*

DEAR SIR:

Your letter of the 22nd instant, referring to this office a letter addressed to you and signed by Hon. Hill Carter, Hon. E. Randolph Williams and Hon. Jno. A. Coke, attorneys and shareholders in domestic insurance companies, has just been received. The question which you ask to be decided is, "Are the shares of stock of domestic insurance companies held by citizens and residents of Virginia subject to taxation under the laws of this State?"

This question depends upon the correct construction of the 7th sub-division of section 8 of the Tax Bill, as amended by chapter 70, Acts 1915, p. 100. That sub-section reads as follows:

"All shares of stock of corporations or joint stock companies, except such corporations and joint stock companies all of whose capital is taxed by this State, or which pay a franchise tax in this State, and banks, banking associations, trust and security companies, and insurance companies, which are otherwise taxed in this State."

Section 9 of the same chapter provides as follows:

"On all property embraced in classes one, two, three, four, five and seven in this schedule there shall be a tax of sixty-five cents on every one hundred dollars of the assessed value thereof, which shall be paid into the State treasury and applied to the payment of the expenses of the government. And any city in this State may levy a tax on such property assessed to residents therein at a rate not to exceed thirty cents on the one hundred dollars of assessed valuation thereof," etc.

Thus it will be seen that the question is a question of moment not only to the State, but also to the cities, counties and towns, for if the State may levy a tax of sixty-five cents on the shares of stock of insurance companies held by individuals, then the local municipalities may levy an additional tax.

It will be observed in the first place that by the terms of section 9 and section 8, sub-section 7 aforesaid, the State may tax all the shares of stock of corporations

whose capital is not otherwise taxed by this State, or who do not pay a franchise tax in this State, and except also, under certain conditions, banks, banking associations, trust and security companies, and insurance companies, and those conditions are defined by the relative clause "which are otherwise taxed in this State."

It is contended by the attorneys aforesaid that that relative clause "which are otherwise taxed in this State" has for its antecedent the words "banks, banking associations, trust and security companies, and insurance companies," and they claim that, since banks, banking associations, trust and security companies, and insurance companies, are otherwise taxed in this State, therefore, the shares of stock in such institutions are not taxable in the hands of an individual domiciled in Virginia. While they limit their argument to insurance companies, it necessarily must extend to the other enumerated classes. If the relative clause "which are otherwise taxed in this State" has for its antecedent the institutions enumerated therein, then their construction must be correct and shares of stock of such institutions will not be liable to the tax. On the other hand, if the relative clause aforesaid limits or has reference to, and has for its antecedent, the expression "shares of stock," then we will see in the sequel that their construction cannot be correct, and that such shares of stock are taxable in the hands of individual holders resident and domiciled in Virginia.

It is to be borne in mind that under section 168 of the Constitution of 1902, it is specifically required that "all property, except as hereinafter provided, shall be taxed." It is to be further borne in mind that section 170 of the Constitution of 1902 authorized the General Assembly to levy a license tax upon any business which cannot be reached by the *ad valorem* system, and, further, to impose State franchise taxes and, in their discretion, to make the same in lieu of taxes upon other property, in whole or in part, of a transportation, industrial or commercial corporation; and then that section goes on further to provide:

"Whenever a franchise tax shall be imposed upon a corporation doing business in this State, or whenever all the capital, however invested, of a corporation chartered under the laws of this State shall be taxed, the shares of stock issued by any such corporation shall not be further taxed."

It is a clear inference that if, under the present system of taxation in Virginia, all the capital of the aforesaid enumerated institutions, to-wit: banks, banking associations, trust and security companies, and especially insurance companies, is subject to taxation, then it follows that the shares of stock issued by such corporations are not further subject to be taxed. This makes it necessary, therefore, to examine the present method of taxing insurance companies in order that we may ascertain, if possible, whether all the capital of such companies is subject to taxation. It may be remarked parenthetically that, under the system of taxation of banks and banking associations, trust and security companies, in the aforesaid sub-section 7, the capital of such banks and banking associations is not subject to taxation, but it is specifically provided by section 17 of the Tax Bill, as amended by Acts of 1915, p. 115, that "the stockholders in such banks, banking associations, trust and security companies shall be assessed a tax on their shares of stock therein;" and, therefore, the reason why an individual is not required to make a return of the stock in banks and banking associations, trust and security companies under Schedule C, sub-section 7, is because, not the bank, but his stock therein, is otherwise taxed in this State. In other words, the tax upon banks, banking associations, trust and security companies does not exempt stockholders therein from taxation in this State, and we have, therefore, the

prima facie presumption in the beginning that the tax upon insurance companies will not exempt stock therein from being taxed in this State, since they are classified with banks, banking associations, trust and security companies.

Under section 26 of the Tax Bill as it heretofore existed (see Acts 1910, p. 224, vol. 3, p. 516), the real and personal property of insurance companies was required to be listed and assessed on the land and property books of the commissioners of revenue in the same manner as other real and personal property was assessed and tax was imposed thereon. Personal property, as used in said section, embraced, of course, both tangible and intangible property, and, therefore, included capital of such companies. Since, under the law as it then existed, the capital of insurance companies was taxed, it followed of necessity, from the constitutional provision quoted above, that the shares of stock in the hands of the stockholders, citizens of Virginia, were not subject to tax. Under section 26 of the Tax Bill, as amended by the Acts of 1915, p. 109, the real estate and *tangible* personal property situated in this State of insurance companies is required to be listed and assessed for taxation, but intangible personal property is not listed nor taxed.

As we have seen above, sections 23 and 24 of the Tax Bill were likewise amended by Acts of 1915, p. 106, and under those sections, insurance companies are now required to pay an annual license tax based on the gross premium income derived from business in this State. Fire, marine, surety, guaranty, fidelity and like insurance companies are required to pay a license tax of $2\frac{3}{4}$ per cent. upon the gross amount of all premiums, dues, etc., from business in this State, while life insurance, and like insurance companies, are required to pay a license tax of $2\frac{1}{4}$ per cent. upon the gross amount of all premiums, assessments, etc., received from business in this State. By section 26 of the Tax bill, as amended as aforesaid, the license tax on gross premiums provided for in section 23 and the tax on real estate and tangible personal property provided for in section 26 is declared to be in lieu of all other license fees, taxes or levies whatsoever for State, county, municipal or local purposes; and it follows, therefore, that every person, partnership, company or corporation doing an insurance business in this State is required to pay the following taxes:

- (1) Tax on real estate and tangible personal property.
- (2) An annual license tax based on the gross premium income derived from business in this State during the preceding year, which annual license tax is two and three-fourths per cent. upon its gross premium income from business in this State in the case of fire, marine, surety, guaranty, fidelity and like insurance, and in the case of life insurance and like insurance it is two and one-fourth per cent. upon its gross premium income derived from business in this State.

And it likewise follows that when an insurance company has paid the taxes provided for aforesaid, such insurance company is exempted from paying any other license fee, taxes or levy whatsoever for State, county, municipal or local purposes.

But it is contended, as we have seen, that the taxes provided for aforesaid also exempt shares of stock in the hands of citizens of this State from taxation. It will be noted that section 26 quoted above does not so provide in express terms, nor can it be inferred that such was its meaning. Shares of stock are the property of the owners of such stock, and when the statute, after providing certain taxes against the corporation, exempts the property of the corporation from other taxation, this does not include the shares of stock in the hands of individuals. The shares of stock held by the individual owner are something wholly different from the capital or capital stock of the company, although all the shares taken together constitute the

company and represent its franchise, capital and property. *Allen v. Commonwealth*, 98 Va. 80; *State Bank v. Richmond*, 79 Va. 113; *Union Bank v. Richmond*, 94 Va. 316. It follows, therefore, that a corporation, being a legal entity entirely distinct from its stockholders, its capital stock, franchise and assets may be taxed; and, at the same time, a tax may be laid upon the shares of stock in the hands of individual holders thereof. *Id.*

In view of this distinction, the argument of the attorneys, that the amended Tax Law was intended to exempt stock in the hands of individual owners from taxation because it appears from the report of the Joint Committee on Tax Revision that the statute recommended by them was to supercede other taxes on insurance companies, does not seem tenable.

It is certainly true that the tax on capital of insurance companies which formerly obtained was abolished by the new system of taxation, but it by no means follows that, because an increased license fee was charged, therefore, the legislature intended to tax capital. As a matter of fact, there is a broad distinction between a license fee, which is in the nature of an excise tax for the privilege of doing business in the State, and a tax on property, which would include capital. It was specifically decided in *Scottish Union Insurance Co. v. Winchester*, 110 Va. 451, that the specific license tax upon insurance companies of \$200.00 a year, and in addition thereto a sum equal to 1¼ per cent. upon the gross income derived from business in this State constituted not a property tax, but a privilege tax. The history of this section is given in that case, and the argument therein shows conclusively that as the statute now exists it cannot be held that the present statute imposes any other than a privilege tax. We may make the inference that since the percentage was increased in the new law, the legislature, therefore, intended not to tax the capital of insurance companies, and such is a fact as we have shown above, for, under the present system, no intangible property of insurance companies is required to be listed or taxed. Therefore, there does not now exist any constitutional objection to taxing the shares of stock of such companies in the hands of residents of this State.

It follows from the foregoing considerations that the relative clause in subdivision 7 of section 8 of the Tax Bill, to-wit: "which are otherwise taxed in this State," must be construed to refer to *shares of stock* of banks, banking associations, trust and security companies, and insurance companies, and not to those institutions, to-wit: banks, banking associations, trust and security companies, and insurance companies. By this interpretation, we avoid a contradiction in the law, for, as we have seen above, the shares of stock of banks, banking associations, trust and security companies are otherwise taxed, but the shares of stock of insurance companies are not otherwise taxed.

My conclusion, therefore, is that you have correctly interpreted the law in your letter aforesaid and also in the circular letter, dated June 16th, addressed to commissioners of the revenue, examiners of records and local boards of review, which you have submitted with your aforesaid letter to this office.

Very truly yours,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

TAXATION—*Intangible personalty—Situs—Insane person with non-resident committee.* Va. Code 1904, Sec. 492.

Where an insane person is confined in a Virginia hospital and has a non-resident

committee who qualified in Virginia, the intangible personal property under the control of the committee may be taxed in Virginia.

RICHMOND, VA., *April 2, 1915.*

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

DEAR SIR:

Replying to your letter of March 2, 1915, I beg to advise as follows:

Facts: A lunatic confined in the Eastern State Hospital has a committee who is a non-resident of Virginia and who qualified in Virginia.

Question: May the intangible personal property under the control of this committee be taxed by Virginia?

1904 Va. Code, section 492, provides:

“If the property be owned by an idiot or lunatic, it shall be listed by and taxed to his committee, if any.”

The decisions as to whether for purposes of taxation the *situs* (place of taxation) of intangible personal property of a lunatic is at the residence of the lunatic or at that of his committee are not entirely harmonious. 7 Am. & Eng. Ann Cases, 680.

But the weight of the authorities hold that in the absence of statutory provisions the personal property of the lunatic is taxable at the residence of the lunatic.

Louisville v. Sherley, 80 Ky. 71.

West Chester School v. Darlington, 38 Pa. St. 157.

Kerland v. Whatley, 4 Allen (Miss.) 462.

State v. McCausland, 154 Mo. 185.

Mason v. Thurber, 1 R. I. 481.

Brookover v. Kase, 83 N. E. (Ind.) 524.

Contra:

Kinehart v. Howard, 90 Md. 1.

Kells v. Muskegon, 123 N. W. (Mich.) 21.

A chronological examination of the Virginia cases bearing on this subject is as follows:

In *City of Staunton v. Stoul's Executors*, 86 Va. 321, it was held that the *situs* of personal property of the deceased is at the domicile of the testator for purposes of taxation, and not at the residence of the executors.

In *Hughes v. Staunton*, 97 Va. 518, under a statute allowing cities to levy upon *any property therein*, and on such other subjects as may at the time be assessed with State taxes *against persons residing therein*, it was held that the city of Staunton, in which the guardian qualified, could not tax the fiduciary funds when both guardian and ward resided in Lynchburg.

In *Commonwealth v. Williams*, 102 Va. 778, it was held that intangible personal property owned by a citizen and resident of this State is subject to taxation in the county or corporation of this State in which the owner resides, although the evidences of ownership be deposited for safekeeping outside of the State.

This case, at least, establishes the doctrine that the State has the *power* to levy the tax it here seeks to levy.

In *Hurt v. Bristol*, 104 Va. 213, the committee of a lunatic qualified before the court in Bristol, Va. He resided in Washington county, Va., while the lunatic re-

sided in Tennessee. The court held that the personalty of the lunatic was taxable at the residence of the committee, but not at the place of qualification.

The syllabus in the Virginia report states:

"The choses in action of a lunatic in the hands of his committee and about which there is no litigation are taxable at the place of residence of the committee and not that of the lunatic."

A careful reading of the case, confirmed by the syllabus in the case in 51 S. E. 223, discloses that the decision did not, expressly or by implication, hold such a doctrine. The sole holding in the case is to be found correctly stated in the syllabus in 51 S. E. 223:

"Where a committee of a lunatic was appointed and qualified in the corporation court of the city of Bristol, but had his domicile elsewhere, he was taxable on credits in his hands belonging to such lunatic in the county of his domicile, and not in the city of Bristol."

Thus, it is clear that the question here in issue was not involved in that case.

In *Selden v. Brooke*, 104 Va. 832, it was held that intangible personalty in the hands of a non-resident trustee, in the income from which a person over the age of twenty-one years residing in this State has a life estate is, by virtue of section 492 of the Code, taxable in this State in the county or corporation in which the beneficiary resides. The court says:

"It is the policy of this Commonwealth to impose taxes upon all intangible property of its citizens in the county or corporation of their residence, without regard to the situs of the physical symbols by which such property is evidenced."

Then, after discussing the great doubt existing as to whether the statute should be construed as taxing such property, the court continues:

"If the construction contended for on behalf of the appellant, that the domicile of a non-resident trustee fixes the situs of the intangible personal property for purposes of taxation, were to prevail, it would afford ready means of escape from taxation and divert from the treasury of the State a very large amount of revenue to which, in our judgment, it is justly entitled. The contention that the construction indicated would render the statute unconstitutional proceeds upon the hypothesis that the tax is against the non-resident trustee, whereas he is personally unaffected by the imposition, and is but the conduit through the medium of which the tax upon the property of a citizen passes into the State treasury."

In *Pendleton v. Com.*, 110 Va. 229, it was held that in the case of a resident of Virginia, money belonging to him whether deposited in a bank in or out of the State, is taxable, but where he is not such a resident, his general deposits of his own money in a bank of this State are not taxable here.

The conclusion reached upon the facts of this case may be briefly summarized as follows:

By the great weight of the cases in other States, taxes on intangibles are to be laid at the domicile of the lunatic regardless of the committee.

In Virginia it is clear that intangible personalty is taxable by Virginia where the creditor or owner is a domiciled Virginian, regardless of where the evidences of such intangibles are situated.

In regard to this particular case, it is clear that, if it be assumed that the committee may be taxed, then he is taxable in the corporation or county in which he is

domiciled rather than that in which he qualified as committee. But the question where the committee is a non-resident and the lunatic a resident has not been adjudicated in this State. However, in the case of a resident *cestui que* trust and a non-resident trustee, although founding its decision upon a statute of doubtful meaning, the court used logic and language sufficiently broad to indicate that its decision would have been the same, irrespective of such statute, and from this the irresistible deduction is that the same would be held in the case here put.

It is, therefore, submitted that a tax on the intangible property of a lunatic domiciled in Virginia may be levied, though his committee be a non-resident handling the intangibles elsewhere.

Hardly need it be said that this opinion is limited to intangible personalty, and is inapplicable to realty or tangible personalty.

Very truly yours,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

TAXATION—*Intangible personalty—Situs—Non-residents.* Va. Code 1904, Tax Bill, Secs. 8, 9 and 26.

The State has the right to tax bills receivable, obligations or credits and other intangible assets of non-residents, except insurance companies, arising from business done in this State.

RICHMOND, VA., August 17, 1915.

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

DEAR SIR:

In the absence of the Attorney General, I am replying to your letter of June 30, 1915, referring to this office a letter of Mr. Wm. H. Sands, examiner of records, in which he asks the following query:

"Should funds in the hands of or loaned by agents for a non-resident be taxed under section 9 of the Tax Laws, and if so, can it be taxed to the agent who is a resident of this State or must it be taxed against the actual owner thereof?"

This question seems to be answered by the amendment to section 9 of the Tax Bill, as found in chapter 70, Acts 1915, p. 101. This amendment is contained in the last sentence of the aforesaid section 9, as amended, and reads as follows:

"The provisions of this section of this schedule shall apply with equal force to any person or corporation representing in this State business interests that may claim a domicile elsewhere, the intent and purpose being that no non-resident person or corporation, either personally or through any agent, shall transact business here without paying to the State a corresponding tax with that exacted of its own citizens, and all bills receivable, obligations or credits and other intangible assets arising from the business done in this State are hereby declared assessable within this State and at the business domicile of said non-resident person or corporation, his or its agent or representative."

By the express terms of the aforesaid amendment, the taxes on intangible property provided for in sections 8 and 9 of the Tax Bill apply with equal force to any person or corporation representing in this State business interests claiming a domicile elsewhere, and all bills receivable, obligations or credits and other intangible assets

arising from business done in this State are declared assessable within this State, and at the business domicile of said non-resident person or corporation, his or its agent or representative. Under section 8, the classification in Schedule C includes bonds, notes and other evidences of debt, bonds of individuals and all demands and claims however evidenced, whether secured by deed of trust, judgment or otherwise, or not so secured.

Therefore, I would conclude that money loaned by agents for non-residents would come under the aforesaid provisions of sections 8 and 9 as evidences of debt arising from business done in this State, and, therefore, are assessable in this State at the business domicile of the agent loaning the money.

In this connection, it is proper to state that the above provision of section 9 changes the law of Virginia with regard to the situs of intangible property for the purpose of taxation. It has long been the rule that the State has no jurisdiction to assess a tax as a personal charge against a non-resident, and that, as a general rule, the personalty of a non-resident cannot be taxed unless it has an actual situs within the State. *Pendleton v. Commonwealth*, 110 Va. 229. And it has been the general rule, also, that intangible property of a non-resident has no actual situs within the State for the purpose of taxation. This is an old fiction of the law which has begun to wear itself out, as will be seen from the following quotations.

Beale on Foreign Corporations, p. 654, treating of this subject, says:

"But there is a growing tendency to assign certain kinds of intangible property to some situs, and permit their taxation there. In *Adams Express Co. v. Ohio State Auditor*, Brewer, J., used this most suggestive and pregnant language:

"In conclusion, let us say that this is eminently a practical age; that courts must recognize things as they are, and as possessing a value which is accorded to them in the markets of the world; and that no finespun theories about situs should interfere to enable these large corporations, whose business is, of necessity, carried on through many States, from bearing in each State such burden of taxation as a fair distribution of the actual value of their property among those States requires."

Again, in section 502, p. 655, Beale says:

"Certain exceptional kinds of intangible property may without too great use of fictions be assigned a real situs. Certain examples of this kind, established by authority, have already been considered; but these are assigned a situs by treating them as quasi-tangible. Property still recognized as intangible may, however, have such connection with some place as to give jurisdiction over it to the sovereign of that place."

Again in section 493, p. 652, the learned author uses the following language:

"Where a foreigner has an agent within the State, by whom investments are made, who collects the income and transmits it to his principal, it is usually held that the 'credits' have a situs in the hands of the agent within the State and may be taxed there. * * *

"If, however, the credit is left in the hands of an agent in the State not for investment, but merely to be collected and the proceeds transmitted to the owner abroad, the better view is that it is not property within the State. In such a case Chief Justice Magruder (in *Reat v. People*, 201 Ill. 469, 66 N. E. 242) said: 'Where the owner of such credits or securities is a non-resident of Illinois, and is absent from that State, his securities, remaining in this State in the hands of an agent, are only subject to taxation in this State when they are so left in the hands of the agent for the purpose of having them renewed or collected, in order that the money realized from such renewal or collection may be reloaned by

the agent as a permanent business. The credits of the non-resident owner, so remaining in Illinois, must constitute the subject matter or stock in trade of the business of the owner as conducted by the agent!"

The amendment to section 9 aforesaid was taken from section 7, Acts of 1898, of the laws of Louisiana. Even before the passage of said act it was held in Louisiana that the State had the right to tax credits and moneys, including notes secured by mortgages on real estate, which credits, moneys and notes were in the hands of an agent of the owner in New Orleans, who collected the proceeds thereof and the interest as it became due and deposited the same in a bank in New Orleans. *Comptoir National D'Escompte de Paris v. Board of Assessors*, 52 La. Ann. 1319, 27 So. 801. This case was affirmed by the Supreme Court of the United States in *New Orleans v. Stempel*, 175 U. S. 309, 44 L. ed. 174.

The Louisiana statute aforesaid, from which our amendment was drawn, came under review in the Supreme Court of the United States in the case of *State Board of Assessors v. Comptoir National D'Escompte de Paris*, in 191 U. S. 388, where it was held that a State is not forbidden by the Federal Constitution to tax credits arising out of loans on collateral security made by the local agent of a foreign corporation, who retains the collateral as evidence of the indebtedness, takes the customer's so-called check, which is recorded as an overdraft, upon which the customer is charged interest, and which is finally sent to the home office to which the money, when repaid, is remitted by an exchange transaction, unless re-loaned by the local agent to other parties.

By reference to 11 Am & Eng. Ann. Cases, p. 739, there will be found an extended note giving all the authorities on the subject of the right of the State to tax evidences of debt belonging to non-residents, where the rule is laid down as follows:

"Where bonds, notes or other evidences of debt, owned by a non-resident, are in the possession or under the general management of an agent for purposes of renewal, collection or investment, or for business purposes generally, they are within the power of the State, where the agent resides, to subject them to taxation."

See, also, case note in 55 L. R. A. (N. S.) pp. 903, 914, on the subject of situs, as between different States or countries, of personal property for purposes of taxation.

See, also, 27 Harvard Law Review, 219.

The preceding portion of this letter is not applicable to the taxation of moneys and credits of insurance companies chartered under the laws of other States and countries which have been duly licensed to do business in the State of Virginia, for, by the express terms of section 26 of the Tax Bill, as amended by Acts of 1915, ch. 77, pp. 106, 109, it is provided that the license tax on gross premiums and the tax on real estate and tangible personal property, provided for in said act to be paid by insurance companies, "shall be in lieu of all other license fees, taxes or levies whatsoever for State, county, municipal or local purposes, which shall be construed to include their agents." * * *

Very truly yours,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

TAXATION—*Intangible personalty—Situs—Non-residents. Va. Code 1904, Secs. 487, 489 and 492.*

Although stocks and certificates of stock and bonds have always been outside of Virginia and in the possession of a non-resident agent or attorney of the resident of Virginia, such stocks and bonds, and indeed all intangible personal property, including money belonging to such resident, is assessable for taxation in this State in the county or city wherein the owner of such stocks and bonds resides.

RICHMOND, VA., August 27, 1915.

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

DEAR SIR:

You have referred to this office the letter of Hon. Shirley Carter, chairman local board of review, city of Winchester, stating the following case and query:

A wealthy lady has lived in the city of Winchester for twenty years and is a legal resident there. She has returned a large income for taxation, but claims that all of her stocks and bonds are in New York, and hence that her stocks and bonds are not taxable in Virginia.

The question involved is whether the stocks and bonds, and other intangible property of a resident of Virginia are taxable in this State, although the evidences of debt are kept in another State.

Section 487, Virginia Code 1904, as amended by chapter 147, Acts 1915, p. 223, providing the form of the personal property book and what to be entered therein, contains the following:

"Upon the personal property book shall be entered * * * all taxable tangible and intangible personal property, all taxable money, all taxable income which the law requires the commissioner of the revenue of each district, county or city to assess."

Section 489, as amended by the same statute, and providing for the construction of the revenue laws, uses the following language:

"In the construction of the laws for the assessment and collection of taxes * * * the word 'money' shall be construed to mean bullion, gold, silver and copper and other coins, and all notes made currency by the laws of the United States government; also a deposit or deposits with any bank or other corporation or firm or person, or in the possession or under the control of the owner, whether such money be actually in or out of this State and belonging to a citizen of this State. The word 'credits' shall be construed to mean all solvent debts, claims or demands owing or coming to any person, whether the evidences of such debts, claims and demands be in writing or not, and shall be construed to embrace all money and credits constituting capital employed in business in or out of this State by himself, his agent or other person for him to his credit with a bank, firm or person."

It will be observed, from the above statutes, that money (which is intangible personal property) belonging to a citizen of this State is taxable here, whether it is deposited in Virginia or out of this State. And it is also to be observed that credits of citizens of this State are taxable, whether it is capital employed in business in or out of this State.

The policy of the Virginia law is shown by the decision of the Supreme Court in *Selden v. Brooke*, 104 Va. 832, where it was held that intangible personal property

in the hands of a non-resident trustee in the income of which a person over the age of twenty-one years, residing in this State, has a life estate, is, by virtue of section 492 of the Code, taxable in this State in the county or corporation in which the beneficiary resides. In deciding this case, the court said:

"It is the policy of this Commonwealth to impose taxes on all intangible personal property of its citizens in the county or corporation of their residence without regard to the situs or the physical symbols by which such property is evidenced."

The specific question here involved came before the court in *Commonwealth v. Williams*, 102 Va. 778, in which it was held that intangible personal property owned by a citizen and resident of this State is subject to taxation in the county or corporation in this State in which the owner resides, although the evidences of ownership be deposited for safekeeping outside of the State.

In this connection, it is proper to cite the following quotation from section 492, Va. Code 1904:

"If the property consists of money, bonds, stocks or other evidences of public or private debts in any county or city other than that of his residence, or State other than Virginia, it shall be listed by and taxed to the owner thereof."

Therefore, the conclusion is inevitable that, although the stocks and certificates of stocks and bonds have always been out of the State of Virginia, and in the possession of a non-resident agent or attorney of the resident of Virginia, such stocks and bonds, and indeed all intangible personal property, including money belonging to such resident, is assessable for taxation in this State in the county or city wherein the owner of such stocks and bonds may reside.

Very truly yours,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

TAXATION—*Intangible personalty—Situs—Trust funds.* Va. Code 1904, Secs. 491, 492 and 1043.

A trust fund for purposes of taxation is divisible and taxable in the proper proportions wherever the beneficiaries reside.

RICHMOND, VA., August 23, 1915.

HON. R. T. W. DUKE, JR.,
Attorney for the Commonwealth,
Charlottesville, Va.

DEAR SIR:

The Attorney General has requested me to reply to your letter dated July 6th, in which you make the following statement and query:

"Some time during the year 1913 the corporation court of Charlottesville appointed L. T. Hanckel, Jr., and H. W. Walsh trustees of the estate of Henry Hartnagle, and they hold a sum of about \$18,000.00 in bonds as such trustees. Walsh lives in the county and Hanckel in the city. There are five *cestquis que* trust, of whom only one resides in the city of Charlottesville and the others are non-residents of both county and city.

"The question now arises, where is this fund taxable—in the county or in the city? Or should it be divided—one trustee living in the county and one in the city. The trust fund itself is of course indivisible, the trustees having given joint bond."

The answer to this question seems to depend upon the proper construction of section 492 of the Act of 1887, as amended by Acts of 1897-98, p. 519, which provides by whom property is to be listed and to whom it shall be taxed. This statute was construed in *Selden v. Brooke*, 104 Va. 832, in which it was held (syllabus) that intangible personal property in the hands of a non-resident trustee, in the income from which a person over the age of twenty-one years residing in this State has a life estate, is, by virtue of the statute aforesaid, taxable in this State in the county or corporation in which the beneficiary resides.

In that case, it is true that the trustee was a non-resident and the beneficiary a resident of this State, but the court based its decision upon the portion of the statute reading as follows:

"If the property is a separate property of a person over twenty-one years of age or a married woman, it shall be listed and taxed to the trustee, if any they have, and if they have no trustee, it shall be listed by and taxed to themselves; in either case, it shall be listed and taxed in the county or corporation where they reside. * * * If the property is held for the benefit of another, it shall be listed and taxed to the trustee in the county of his residence (except as hereinbefore provided)."

The court, in construing the above provision, used the following language:

"While the statute may be unskillfully drawn, we are of opinion that by fair construction the case in judgment is obviously within its provisions. The income from the trust fund upon which the tax is imposed constitutes, in a certain sense, the separate property of Elizabeth T. Selden, a person over twenty-one years of age, who has a trustee and resides in the city of Richmond. The language 'if the property is held in trust for the benefit of another, it shall be listed and taxed to the trustee in the county of his residence (except as hereinbefore provided)' is controlled by the antecedent provision that whether the person whose property is amenable to taxation has or has not a trustee, the property shall in either case be listed and taxed in the county or corporation where they reside. Though the tax is assessed in the name of the trustee, the burden is in reality imposed upon the beneficial owner, a resident of the Commonwealth who enjoys the protection of its laws along with other citizens and who, in fairness, ought to contribute her due proportion of revenue for the support of the government. The term 'separate estate' in the connection in which it occurs imports separate ownership by the person designated, in contradistinction to an equitable separate estate or a legal separate estate of a married woman under our statute."

I cannot see that the decision in the above case is affected by the fact that there was a non-resident trustee. The language of the statute would equally apply whether the trustee were resident or non-resident. If you will note the statute as it was in the Code of 1887, and then will read the same as it appears in the Acts of 1897-98, p. 519, noting the italicised portions in said Acts, it becomes apparent that the law which was theretofore applicable to taxing a married woman's separate estate is amended so that the same rule shall apply to the separate property of persons over twenty-one years of age and the separate property of married women; but there is an amendment added that in either case, that is whether they have a trustee or not, the separate property of persons over twenty-one years of age and of married women shall be listed and taxed in the county or corporation where the person over twenty-one years of age or the married woman, as the case may be, may reside; and the court says of the provision requiring that if property be held for the benefit of another, it shall be listed by and taxed to the trustee in the county of his residence (except as hereinbefore provided), that this language is controlled by the

prior language requiring property to be listed and taxed in the county where the beneficiary resides.

Applying the above decision to the case which you state, it would appear that the trust fund for purposes of taxation must be held to be divisible and taxable wherever the beneficiaries reside, that is, one-fifth to the city of Charlottesville, one-fifth to the county of Albemarle, and the other three-fifths in the counties or cities wherein the beneficiaries reside. If the other three beneficiaries are non-residents of the State, then the question becomes more complicated, for we have two trustees, one residing in one jurisdiction and one in another; and in such case, it would seem that the fund would have to be divided for purposes of taxation. But this is a very doubtful question.

I must confess that the solution above is not without difficulty, but it seems to be the only one possible under the decision of *Selden v. Brooke*. As the court hints, the statute was very inartistically amended and is not very clear as to what is meant by the separate estate of a person over twenty-one years of age. The court's construction of separate ownership in contradistinction to the equitable separate estate or the separate legal estate of a married woman under the Virginia statute, as applied to the facts in that case, means a trust fund consisting of intangible personal property in the income of which the *cestui que* trust had a life estate.

In the case of *Hughes v. Staunton*, 97 Va. 518, cited by you in your letter, it was held that where a guardian qualified in one city of the State where he and his ward both resided, and subsequently both the guardian and ward removed to another city and the funds of the ward are invested in the latter city, then the funds are properly taxable in the latter city and not in the former. The court only cites section 1043 of the Code, but does not refer to section 492 or section 491, both of which would seem to have been applicable to the question before the court.

As intimated above, this opinion is rendered not without some doubt as to its correctness, but with the belief that it is the best solution of a very vexed question.

Very truly yours,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

TAXATION—*Local Board of Review—Appointment in cities. Acts 1915, Ch. 116; Acts 1914, Ch. 28.*

In the case of a city which has no corporation or hustings court, the judge of the circuit court of the county in which such city is situated is not empowered to appoint a local board of review for such city.

RICHMOND, VA., August 14, 1915.

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

DEAR SIR:

In the absence of the Attorney General, I am responding to your letter referring to this office the question of the validity of the appointment of the board of review for the city of Hampton.

As the board of review has been appointed for the city of Hampton, it is proper to call your attention to the fact that neither the opinion of the Attorney General nor of the Auditor, nor of the State Advisory Board on Taxation, will be binding

upon any one, and such an opinion can only have a persuasive effect. The matter will have to be definitely settled by the courts; and, under these circumstances, this opinion is rendered with reluctance, as it might be construed as interfering with the function of some court. But, at your request, I am, however, giving you the benefit of my research in regard to the matter.

Chapter 116 of the Acts of 1915, sub-section 6, provides, so far as this question is concerned, as follows:

"On or before the first day of June, nineteen hundred and fifteen, and annually thereafter on or before the first day of February, the judge of the circuit court of each county and the judge of the corporation court or hustings court of each city and the judge of the circuit court of each city which has no other court of record shall, either in term time or vacation, appoint three qualified voters residing in such county or city to compose a local board of review of assessments for said county or city."

By inquiry of the Secretary of the Commonwealth, I learn that Hampton has been a city of the second class since 1908; and by reference to the Acts of 1914, chapter 28, p. 43, it appears that the legislature of Virginia has recognized the fact that Hampton is a city.

But, it is also true that while Hampton is a city of the second class, it differs from all other cities of the second class in the fact that it has no hustings or corporation court, nor has it a circuit court. In other words, all other cities of the second class have a court of record, consisting of either a corporation or hustings court or a circuit court, with a separate clerk and separate court officers from the county in which they are located.

In addition, as pointed out in the letter of Hon. Wm. C. L. Taliaferro, city attorney for Hampton, the city treasury of Hampton handles only city funds and no funds belonging to the State, the State funds being collected by the county treasurer and the assessment of property in the city of Hampton is made by the county commissioner.

In view of the above facts, the language of the act as quoted does not seem to confer upon any court authority to appoint a local board of review for the city of Hampton. It will be noted that authority is conferred upon the following judges: (1) judge of the circuit court of each county; (2) judge of the corporation or hustings court of each city; and (3) judge of the circuit court of each city which has no other court of record. Now, I do not think it can be contended that authority is given here to the circuit court of a county to appoint a local board of review for a city; but it seems clear that the language of the act allows the judge of the corporation or hustings court of a city to appoint a local board of review for a city in those cases where the city has a hustings or corporation court; and that the language of the act also allows the judge of the circuit court of each city having no other court of record to appoint a local board of review for the city; but there is no language in the act which would allow the judge of the circuit court of a county to appoint a local board of review for a city located in said county, any more than there is language in the act allowing the judge of the circuit court of a county to appoint a local board of review for a town situated in said county.

Therefore, I am constrained to believe that the appointment of the local board of review for the city of Hampton will be held invalid, if it is contested before the courts. But, as intimated above, this opinion is rendered only at your request and rather against my better judgment and desires for the simple reason that I do not wish to be put in the position of, in any way, criticising the action of the court in

making the appointment. This opinion, therefore, is rendered merely because I am of a different opinion, but not for the purpose of in any way usurping the functions of the court.

Very truly yours,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

TAXATION—*Local board of review—Right to withdraw report. Acts 1915, Ch. 116.*

Where a local board of review receives from the examiner of records his complete reports of omitted taxes for the years 1912, 1913 and 1914, which it reviews and certifies to the proper officers, it has no legal right to withdraw the reports in order that the same may be withheld until after the meeting of the General Assembly.

RICHMOND, VA., *October 3, 1915.*

HON. H. C. STUART, *Chairman,*
State Advisory Board on Taxation,
Richmond, Va.

DEAR SIR:

I have yours of September 28th transmitting certain correspondence between Mr. John B. Minor, chairman of the local board of review for the city of Richmond, and the State Advisory Board on Taxation. You requested my opinion upon the questions raised in the correspondence. Upon reading the same, together with the circular of the State board of September 11, 1915, referred to in the correspondence, I find a number of questions discussed. I take it for granted, however, that my opinion at this time is desired only upon the question propounded by the local board of review, at whose request my opinion is now asked.

It appears that in the circular of the State board, issued September 11th, you advised that

“Examiners of Records and Local Boards of Review postpone assessments of such property (omitted property for previous years) and the merchants’ license tax and incomes omitted from taxation for years previous to 1915, though all possible data should now be secured for future use.”

It appears from the circular that the purpose of the State board in giving this advice was to afford the General Assembly at its next session an opportunity to declare the policy of the State with reference to such assessments.

In reply to this circular, the local board of review informed your board that before the receipt of your advice of September 11th they had received from the examiner of records his complete reports of omitted taxes for the years 1912, 1913 and 1914, and had reviewed and certified said reports to the proper officers.

The local board now desires to know whether, in the opinion of the Attorney General, they may withdraw said reports in order that the same may be withheld until after the meeting of the General Assembly. I am of the opinion that the local board of review has no legal right to withdraw said reports for the purpose indicated, nor do I understand from the reading of the correspondence that your board has ever asserted that the local board has any such right.

I am not sure that you desire my opinion on any other questions referred to in the correspondence and circular, hereinbefore mentioned, but if you intended to

include in your request any other questions referred to, I will be glad for you to indicate specifically the questions upon which you desire my opinion.

Yours very truly,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

TAXATION—*Local board of review—Examiner of records—Refusal to report examinations to board.* Va. Code 1904, Sec. 821; Acts 1915, Ch. 116.

If an examiner of records refuses to make report of his examinations to the local board of review, he may be proceeded against before the circuit or corporation court and removed for incompetency or gross neglect of official duty.

RICHMOND, VA., August 16, 1915.

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

DEAR SIR:

I have your letter of August 2nd, in which you state that the local board of review of the city of Williamsburg and county of James City has called upon the examiner of records for that county and city to furnish information to enable them to review the assessments of fiduciary property made by him, the board being of opinion that assessments have been omitted and other property erroneously assessed. It seems that the examiner has refused to furnish the information and the local board of review desires to be advised how it may proceed to get the desired information.

From chapter 116, Acts of 1915, p. 154, et seq., the powers and duties of the local board of review include the following:

- (1) To direct the Commissioner of the Revenue to enter in the assessment roll any property found to have been omitted.
- (2) To direct the Commissioner of the Revenue to correct any entries found to be erroneous.
- (3) To hear and determine the complaints of taxpayers and members of the boards of supervisors and to direct the corrections in the assessment books.
- (4) The board has the power, upon its own motion, to change an assessment deemed erroneous by raising or lowering the same.
- (5) The board also is given authority to appeal to the circuit court for the correction of any erroneous assessment of lands or other property.
- (6) The board is given the power to review the reports of the annual returns of property of all taxpayers, "and to this end, they shall direct the Examiner of Records * * * and it shall be the duty of the said examiners * * * to assist the said Local Boards of Review in the examination of the reports of the returns of taxpayers."

It is further required that, as soon as such examinations and valuations are made by the examiner of records, he shall make report thereof to the local board of review, which shall review the same and make report thereon to the commissioners of the revenue.

In the instructions to local boards of review, circular No. 2, issued by the State Advisory Board on Taxation, we find the following, on page 10:

"Investigation of the assessment of this property (fiduciary property) should be taken up by the local board of review with the examiner of records to see that the examiner of records has fully discharged his duty under the law with respect to its assessment."

The above quotations amply justify the instructions here given to the local boards of review by the State Advisory Board on Taxation. In addition, we note that it is made the duty of the examiner of records to report to the local board of review his examinations and valuations of property omitted.

Under section 821, Va. Code 1904, circuit courts of the counties and corporation courts of the cities have power to remove from office all county, city and district officers elected or appointed for their respective counties, cities and districts, for malfeasance, misfeasance, incompetency or gross neglect of official duty. Under this section, it would seem that if the examiner of records refuses to make report of his examinations to the local board of review, he could be proceeded against before the circuit court.

Very truly yours,
CHRISTOPHER B. GARNETT,
Assistant Attorney General.

TAXATION—*Local board of review—Raising assessments—Right of individual to a hearing. Acts 1915, Ch. 116(7).*

Local boards of review may not raise an assessment without giving the taxpayer thereby affected a hearing.

RICHMOND, VA., August 23, 1915.

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

DEAR SIR:

You have referred to this office query put to you by Mr. T. W. Wade, commissioner of the revenue for Lexington district, Rockbridge county, Va., in a letter dated August 19, 1915, in which he requests you to inform him whether the local board of review has the right to raise an assessment on property without giving the owner a hearing.

I am of opinion that, under the Acts of 1915, ch. 116, p. 154, sec. 7, local boards of review may not raise an assessment without giving the tax-payer thereby affected a hearing.

Very truly yours,
CHRISTOPHER B. GARNETT,
Assistant Attorney General.

TAXATION—*Omitted taxes—Examiners of records—Commissions. Acts 1914, Ch. 199; Acts 1915, Ch. 116(7).*

Examiners of records are entitled to commissions on account of omitted taxes whether for past or current year within the limits of the amount appropriated therefor, but such commissions, so far as omitted moneys are concerned, must be upon valuations added as a result of the examiners' investigations, and so far as omitted intangible personal property, incomes and purchases of merchants are concerned such commissions must be based upon valuations added as a result of the investigations and examinations of the examiners on property, incomes and purchases not returned by the tax-payers.

RICHMOND, VA., October 30, 1915.

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

DEAR SIR:

In response to your request for my opinion as to whether you are authorized to pay commissions to examiners of records on valuations added to the tax rolls by them on account of omitted taxes prior to the year 1915, I hereunder quote the provisions of the statute on the subject, being a part of section 7 of chapter 116, Acts 1915, page 154:

"The examiner of records shall upon the valuations added as a result of his investigations and examinations of the returns of intangible personal property and incomes of taxpayers not returned by them in counties and towns receive commissions at the rate of one-tenth of one per cent. on the first million dollars of such additions, and upon additional valuations of intangible personal property and incomes in excess of one million dollars he shall receive commissions at the rate of one-thirtieth of one per cent.

"And upon the valuations added to the returns of intangible personal property and incomes of taxpayers, not returned by them, in cities he shall receive commissions at the rate of one-tenth of one per cent. on the first five hundred thousand dollars of such additions, and upon additional valuations in excess of five hundred thousand dollars he shall receive commissions at the rate of one-thirtieth of one per cent.

"Upon valuations of money added as the result of his investigations and examinations the examiner of records shall receive commissions at the rate of one thirtieth of one per cent. on such valuation, and upon additions to purchases of merchants, not returned by them, he shall receive commissions at the rate of five per cent. on the increase in the license taxes paid by the merchants resulting from the increase in purchases."

Under date of July 2, 1915, I advised the State Advisory Board on Taxation that the act above referred to authorized the examiners of records to report for taxation not only omitted taxes for the current year, but also for past years. It therefore follows that my answer to your question must be that examiners of records are entitled to commissions on account of omitted taxes whether for past or current years; but you will observe by the terms of the statute quoted such commissions so far as *omitted monies* are concerned must be upon valuations added as a result of the examiner's investigations and examinations; and so far as omitted intangible personal property, incomes and purchases of merchants are concerned such commissions must be based upon valuations added as a result of the investigations and examinations of the examiners on *property, incomes and purchases not returned by the tax-payers*.

The provisions of the law quoted taken in connection with the appropriation for examiner's commissions, appearing on page 350 of Acts of 1914, authorizes you, within the limits of said appropriation, to pay said commissions to the examiners of records.

Yours truly,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

TAXATION—*Proceedings against persons rendering false lists—Assessment of omitted taxes. Va. Code 1904, Secs. 503, 508, 572 and 681.*

Proceedings instituted by petition to collect omitted taxes should be brought

in the name of the Commonwealth for the omitted taxes due the Commonwealth, and in the name of the county and district for the omitted taxes due the county or district, respectively.

Proceedings taken against persons rendering false tax lists are not barred by the fact that the tax-payer prior to the institution of such proceedings pays his omitted taxes, although the amount paid is credited on such judgment as may be rendered in the proceedings.

Provisions of the law relating to the mode of recovering and enforcing payment into the treasury of public monies collected and of debts to the Commonwealth have no reference to cases where the tax-payer has not paid into the treasury taxes due.

RICHMOND, VA., May 4, 1915.

MR. H. G. MOFFETT,
Commonwealth's Attorney,
Washington, Va.

DEAR SIR:

The Attorney General has asked me to write you with reference to correspondence which has ensued between you and himself and between you and the Auditor of Public Accounts, in reference to certain omitted taxes due by A. W. Dearing and others.

It appears, from the correspondence aforesaid, that A. W. Dearing owes to the county, State and district in which he lives a large amount in taxes on property owned by him, but which was not returned for taxation. It appears that Mr. Dearing has failed to return for taxation bonds held by him and secured by deeds of trusts of record in the counties of Rappahanock, Culpeper, Fauquier, Warren and Clark. By comparison of said bonds, so held by him, with the bonds listed in the sworn interrogatories made by Mr. Dearing as far back as 1900, some of his omitted taxes have been definitely ascertained, and it has been found that he failed to give in over \$300,000.00 in intangibles in the year 1913.

The commissioner of the revenue, under the authority of section 508 of the Code, has listed these omitted taxes and has assessed the taxes thereon at the rate prescribed for each year, adding thereto interest at the rate of six per cent. per annum. The tax bill has been presented to Mr. Dearing, and it is understood that he intends to contest the taxes.

As Commonwealth's attorney, you contemplate taking proceedings against said Dearing for knowingly rendering a false list of his personal property and swearing to said list, said proceedings to be had under section 503 of the Code, which authorizes a Commonwealth's attorney in such a case to file his petition in the circuit court of the county wherein the list was taken, setting forth the omissions in the list of the false values annexed to any of said subjects, and asking the court to summon the person giving the list to answer the petition.

Certain questions are raised by you in the course of the correspondence which I will endeavor to take up and answer. The first question which arises is, in whose name should the proceedings under section 503 be instituted. This depends upon the question as to whether section 503 is a criminal statute or is a proceeding for the collection of taxes. If it be in the nature of a prosecution for rendering a false list, evidently the proceeding should be in the name of the Commonwealth alone. If, however, it is a proceeding to collect omitted taxes and not penal in its nature, the proceeding should be in the name of the Commonwealth for its taxes and in the name of the county and district for the county and district taxes. It seems evident that

the statute is not of a criminal character, for the proceedings are to be instituted by petition and not by warrant or indictment; and, therefore, I would conclude that the proceedings thereunder should be brought in the name of the Commonwealth for the omitted taxes due the Commonwealth and in the name of the county and district for the omitted taxes due the county and district, respectively.

The second question which I shall consider is, if the tax-payer pays his taxes under section 508, does that preclude the Commonwealth's attorney from proceeding under section 503. Section 503 was originally section 58 of chapter 206 of the Acts of 1874-5, and section 508 of the Code was section 62 of said chapter 206 of the Acts of 1874-5; and, therefore, I take it that both should be read together, and, if consistent with each other, that both should be applied in any given case, so far as possible. The object of section 503 seems to be both to collect omitted taxes and to impose a penalty for false returns. The object of section 508 is to prescribe the duties of the commissioner when he ascertains that any taxes have not been assessed, or have been assessed at less than the law requires. Even though action has been taken under section 508, it would seem to be possible to proceed under section 503, and, after securing judgment thereunder, to have any amount which has been paid under section 508 credited on said judgment. The verdict of the jury under section 503 simply ascertains whether the tax-payer rendered a false return or not, whereupon the court renders the judgment against the accused for double the amount of taxes imposed on the property so omitted. The issues before the jury under section 503 are, first, did the defendant render a false list of his personal property, choses in action, moneys, credits, capital, income, salary or other subjects of taxation, and did he swear to such list? and, second, what was the amount of property omitted by the defendant in his returns for taxation? If the jury find the first issue against the defendant and return, as to the second issue, a detailed list of the property subject to taxation, and omitted by the defendant in his list, then it is made the duty of the court to enter up judgment against the accused for double the amount of taxes imposed upon the property so omitted, together with the costs thereon.

As said before, if the defendant has, under section 508, paid tax on omitted property which has been assessed by the commissioner, the said sum may be credited on the amount of the said judgment.

Third: Section 681 referred to by you does not seem to have any application to proceedings of this character. Chapter 30 of the Code, of which section 681 is a part, relates to the mode of recovering and enforcing payment into the treasury of public monies collected and of debts to the Commonwealth generally, whereas sections 503 and 508 relate to the assessment and collection of taxes. After an officer has received from the taxpayer, or other person, money due to the Commonwealth, then chapter 30 applies; but so long as the tax-payer has failed to pay his taxes, then chapter 24 on the assessment and collection of taxes applies. I cannot see that sections 681, et seq., have any reference whatever to proceedings contemplated by you.

In one of your letters I also find a reference to section 572 of the Code. This section is a part of the old law relating to erroneous assessments and to redress against erroneous assessments of taxes. (567 et seq. Va. Code 1904.) These sections provide that any person aggrieved by any assessment of his property for taxation may, within two years from the first day of September of the year in which such assessment is made, apply for relief to the court in which the commissioner gave bond and qualified, and that if the court be satisfied that the applicant is erroneously assessed, and "that the erroneous assessment was not caused by the failure or re-

fusal of the applicant to furnish a list of his personal property to the commissioner on oath as the law requires * * * the court may order that the assessment be corrected;" and it is further provided in section 572 that if the error in any county or city levy, or other local tax, was caused by the failure or refusal of the applicant to furnish the commissioner with the proper description, exhibition or list, or with the necessary information as required by law, the court shall refuse relief. These provisions seem to refer to the annual assessments for taxation. I do not know whether, when a commissioner, proceeding under section 508, assesses back taxes which have been omitted, the same provisions would apply. It would be a matter for the court to decide, but I would infer that in such a case, the court would try to get at the actual facts and enter its order so that taxes should be paid only for the years in which the property was assessable.

If I have not fully answered your queries, please let me know and I will endeavor to clear up any points as to which you may desire my opinion.

Very truly yours,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

TAXATION—*Railroads—Gross receipts earned in this State—Validity under Federal Constitution. Va. Constitution, Secs. 176, 177 and 178; Va. Code 1904, Tax Bill, Secs. 27 and 28.*

A franchise tax of one per cent. upon the gross receipts of a railroad corporation earned in this State is not invalid as applied to interstate carriers as burderning interstate commerce.

RICHMOND, VA., *January 26, 1915.*

HON. E. P. COX,

*Speaker House of Delegates,
Richmond, Va.*

DEAR SIR:

On January 22, 1915, I received from Hon. John W. Williams, clerk of the House of Delegates, a copy of the following resolution:

"Whereas, the joint committee on tax revision, at pages 133 and 134 of their report, suggests that the franchise tax of one per cent. upon the gross earnings of railroads is of doubtful constitutionality under recent decisions of the Supreme Court of the United States; and

"Whereas, the said committee recommends the repeal of this tax; and it becomes important for this House to be informed as to the legal status of this tax;

"Therefore, be it resolved, that the Attorney General of Virginia be, and he is hereby requested to report to the House as promptly as he can whether in his opinion this tax is constitutional, giving the authorities upon which he bases his conclusion."

By reference to the report of the Joint Committee on Tax Revision, pp. 133 and 134, we find a suggestion that the method prescribed by law in Virginia for ascertaining the amount of the franchise tax of railway and canal corporations is unconstitutional. The method of ascertaining the amount of said tax is found in sections 177 and 178 of the Constitution of 1902, which reads as follows:

"Sec. 177. Each such railway or canal corporation, including also any such as is exempt from taxation as to its works, visible property, or profits, shall also pay an annual State franchise tax equal to one per centum upon the gross

receipts hereinafter specified in section One Hundred and Seventy-eight, for the privilege of exercising its franchises in this State, which, with the taxes provided for in section One Hundred and Seventy-six, shall be in lieu of all other taxes or license charges whatsoever upon the franchises of such corporation, the shares of stock issued by it, and upon its property assessed under section One Hundred and Seventy-six; provided, that nothing herein contained shall exempt such corporation from the annual fee required by section One Hundred and Fifty-seven of this constitution, or from assessments for street and other public local improvements authorized by section One Hundred and Seventy; and provided further, that nothing herein contained shall annul or interfere with, or prevent any contract or agreement by ordinance between street railway corporations and municipalities, as to compensation for the use of the streets or alleys of such municipalities by such railway corporations."

"Sec. 178. The amount of such franchise tax shall be equal to one per centum of the gross transportation receipts of such corporations for the year ending June the thirtieth of each year, to be ascertained by the State Corporation Commission, in the following manner:

"(a) When the road or canal of the corporation lies wholly within this State, the tax shall be equal to one per centum of the entire gross transportation receipts of such corporation.

"(b) When the road or canal of the corporation lies partly within and partly without the State, or is operated as a part of a line or system extending beyond this State, the tax shall be equal to one per centum of the gross transportation receipts earned within this State, to be determined as follows: By ascertaining the average gross transportation receipts per mile over its whole extent within and without this State, and multiplying the result by the number of miles operated within this State; provided, that from the sum so ascertained there may be a reasonable deduction because of any excess of value of the terminal facilities or other similar advantages in other States over similar facilities or advantages in this State."

These provisions were enacted as a part of the Tax Bill. (Section 28 of chapter 148, Acts 1902-3-4, p. 169, Va. Code 1904, p. 2205.)

As the statute is in words and figures almost a verbatim copy of the sections of the Constitution aforesaid, there can be no doubt but that the statute itself complies with the Constitution of Virginia, and no question can be raised as to its validity under that Constitution.

It only remains to be considered, therefore, whether the statute is in contravention of any of the provisions of the Constitution of the United States. It is suggested in the aforesaid report of the Committee on Tax Revision that the statute (and, therefore, the constitutional provision) may be in contravention of the so-called commerce clause of the Federal Constitution, Article I., section 8, clause 3, which grants power to Congress "to regulate commerce with foreign nations and among the several States and with the Indian tribes," and as will be found in the sequel, this opinion will be confined to that question.

It may be noted at the outset that the constitutionality of these provisions has never been questioned by the corporations themselves; for they have acquiesced therein for the past twelve years and have paid the franchise tax required thereby ever since the Constitution went into effect, amounting in 1914 to \$629,000, while the tax paid on property was \$402,000. (Report of Committee on Tax Revision, p. 129.)

It is a well-established principle of constitutional law that a *court* will not declare a *statute* unconstitutional unless the nullity and invalidity are placed, in its judgment, beyond reasonable doubt. In such a case, to doubt is to affirm; and, therefore, every reasonable doubt must be solved in favor of the legislative action. This rule of construction would seem to apply with strong force in a case where the

provisions of a State Constitution are attacked. *Butler v. Pennsylvania*, 10 How. 402, 415, 13 L. ed. 472; *Plumley v. Massachusetts*, 155 U. S. 461, 479, 39 L. ed. 223.

While this rule is undoubtedly a guide for courts in construing statutes and constitutional provisions, and while a State legislature will, as a matter of course, hesitate a long time before enacting a statute in the teeth of a provision in the Constitution of the State, section 181 of the Constitution of 1902 specifically authorizes the legislature after the year 1913 to modify or change the method of assessment and taxation of railroad and canal corporations.

It is proper to get a clear analysis of the different taxes which may be assessed against railway and canal corporations under the laws of the State of Virginia.

An examination of sections 176, 177 and 178 of the Constitution of 1902, and of sections 27 and 28 of the Tax Bill will show that railway and canal corporations are taxed as follows:

(1) On real property and on tangible personal property, the tax is thirty-five cents on every one hundred dollars of the assessed value thereof; just as in the case of individuals and other corporations; and the said tax of thirty-five cents is distributed to the same purposes as in the case of individuals and other corporations.

(2) On intangible personal property (except money) the tax is thirty-five cents on every hundred dollars of the assessed value thereof, as in the case of individuals and other corporations, and distributed in the same way, and the enumeration made under this head does not include the value of the property in this State as a "going concern," but the value of its "franchise" is specifically excluded.

(3) Under sections 177 and 178 of the Constitution of 1902, carried into section 28 of the Tax Bill, every railway or canal corporation is required to "pay to the State an annual State franchise tax equal to one per centum upon the gross transportation receipts * * * for the privilege of exercising its franchises in this State;" which, with the property tax aforesaid, is declared to be "in lieu of all taxes or license charges whatsoever upon the franchises of such corporations and the shares of stock issued by it." * * *

The method of ascertaining said amount is laid down in the provisions of the Constitution quoted above.

The first time the question of the taxation by a State of receipts of corporations from interstate commerce ever came before the Supreme Court of the United States was in the year 1872. In the case of *State Tax on Railway Gross Receipts*, 15 Wall. 284, 21 L. ed. 164, the court upheld a tax on the gross receipts of railroads, including receipts from interstate commerce. The ground upon which the tax was sustained was that the tax was upon a fund which had become the property of the company and had become mingled with its other property. This case, which was decided by a majority of six to three, was disapproved and its reasoning declared unsound in *Phila. & S. S. Co. v. Pennsylvania*, 122 U. S., 30 L. ed. 1200. In this latter case, the court construed a statute taxing all corporations engaged in transportation and doing business in Pennsylvania, whether resident or non-resident, directly on their gross receipts, requiring them to "pay to the State treasury, for the use of the Commonwealth, a tax of eight-tenths of one per centum upon the gross receipts of such company for tolls and transportation, telegraph business or express business." The case before the court was that of a domestic company engaged in interstate traffic. The court held the statute unconstitutional, and in abandoning the position taken in *State Tax on Railway Gross Receipts*, said:

"It would seem to be rather metaphysics than plain logic for the State officials to say to the company, 'We will not tax you for the transportation

you perform, but we will tax you for what you get for performing it.' Such a position can hardly be said to be based on a sound method of reasoning."

It was claimed in *Maine v. Grand Trunk Railway*, 142 U. S. 217, that the latter case overruled the former, but the majority opinion expressly affirmed and distinguished that case.

By an examination of the Debates of the Constitutional Convention, vol. 2, pp. 2670, 2671, we learn that the provisions of the Constitution of 1902, quoted above, imposing an annual State franchise tax upon railway and canal corporations, were taken from the Maine statute, which was construed in *Maine v. Grand Trunk Railway*, 142 U. S. 217, 35 L. ed. 994. Said statute, passed in 1881, declared that every corporation, person, or association operating a railroad in the State should pay to the State treasurer for the use of the State an annual excise tax for the privilege of exercising its franchises in the State, and it provided that the amount of such tax should be ascertained as follows:

"The amount of the gross transportation receipts, as returned to the railroad commissioners for the year ending the thirtieth of September next preceding the levy of such tax, shall be divided by the number of miles of railroad operated to ascertain the average gross receipts per mile; when such average receipts per mile shall not exceed twenty-two hundred and fifty dollars, the tax shall be equal to one-fourth of one per cent. of the gross transportation receipts; when the average receipts per mile exceed twenty-two hundred and fifty dollars and do not exceed three thousand dollars, the tax shall be equal to one-half of one per cent. of the gross receipts, and so on, increasing the rate of tax one-fourth of one per cent. for each additional seven hundred and fifty dollars of average gross receipts per mile, or fractional part thereof; provided the rate shall in no event exceed three and one-fourth per centum. When a railroad lies partly within and partly without the State, or is operated as a part of a line or system extending beyond, the tax shall be equal to the same proportion of the receipts in this State as herein provided and its amount determined as follows: The gross transportation receipts of such railroad line or system, as the case may be, over its whole extent within and without the State, shall be divided by the total number of miles operated to obtain the average gross receipts per mile, and the gross receipts in this State shall be taken to be the gross receipts per mile multiplied by the number of miles operated within this State."

In that case, the defendant was a corporation, created under the laws of Canada, having its principal place of business at Montreal, and operated a railroad within the State of Maine, under a charter from that State, from the city of Portland to the boundary of the State line. Return was made, as provided by law, of the gross transportation receipts over its road (149½ miles in length, including 89½ miles in the State of Maine), and upon this return a tax was assessed pursuant to the statute set out above. As the road failed to pay said tax, an action was brought by the State to recover the tax for the years 1881 and 1882. The railroad defended the action on the ground that the tax imposed under the statute was invalid, because the statute was in conflict with the commerce clause of the Constitution of the United States. The court upheld the constitutionality of the statute in a majority opinion of five to four, Mr. Justice Field delivering the majority opinion, Mr. Justice Bradley, with whom Justices Harlan, Lamar and Brown concurred, delivering the minority opinion.

The only difference between the Maine statute and our constitutional provisions are, first, that in the Maine statute the percentage of gross receipts charged varies according to the average receipts per mile from one-fourth of one per cent. of the gross receipts to three and one-fourth per cent. thereof, whereas under the Vir-

ginia Constitution a flat rate of one per centum upon gross receipts is fixed; second, in the case of a road or canal lying partly within and partly without the State, the Virginia constitutional provision requires that from the sum ascertained as the gross transportation receipts earned within this State there may be deducted a reasonable sum because of any excess of value of the terminal facilities or other similar advantages in other States over similar advantages or facilities in this State. Third: The Maine statute in addition provides that the buildings of a railroad and its lands and fixtures outside of its right of way shall be subject to taxation in the several cities and towns in which they are situated, just as other property therein is taxed; and it is further provided that the excise or franchise tax, together with the local tax aforesaid, shall be in lieu of all taxes upon such railroad, its property and stock. Thus the Maine plan or system of taxation of railway corporations differs from ours also in this, that we have *State* and *local* taxation of *all* the *real* and *personal* property of railroads, except their franchises, and our franchise tax may be called an attempt to commute value of the franchise alone; while the Maine system has *local* taxation of the lands and fixtures of railroads outside of the right of way, and their franchise or excise tax is an attempt to commute the value of its franchise and of its other real and personal property not locally taxed. That the franchise of a corporation is a thing of value, that is usually considered personal property and subject to separate State taxation is made clear by the language of Mr. Justice Field in *Home Silver Mining Co. v. New York*, 143 U. S. 305, 313. Also as we have seen, our Constitution specifically excepts the franchise of a railway corporation from the enumeration of property subject to State and local taxation.

Thus, it seems clear that the Virginia plan is as fair to the corporations as the plan in the Maine statute; and if the case of *Maine v. Grand Trunk Railway* still remains as the guide to the court, the validity of the Virginia constitutional provision and statute must be upheld, unless in its application and in relation to other taxes, it be found as a matter of fact that the tax constitutes a burden on interstate commerce.

The *Maine Case* has been many times cited with approval by the Supreme Court of the United States. In *Baltic Mining Co. v. Massachusetts*, 231 U. S. 68, 58 L. ed. 127, we find:

"It is commerce itself which must not be burdened by State exactions which interfere with the exclusive Federal authority over it. A resort to the receipts of property or capital employed in part at least in interstate commerce, when such receipts or capital are not taxed as such but are taken as a mere measure of a tax of lawful authority within the State, has been maintained. *Maine v. Grand Trunk Rwy.*" * * *

In *U. S. Express Co. v. Minnesota*, 223 U. S. 335, 343, 56 L. ed. 459, the court said:

"In *Maine v. Grand Trunk Rwy.* this court sustained a tax which required every railroad operated within the State to pay an annual tax for the privilege of exercising its franchises therein, determined upon a proportion of gross transportation receipts, which in that case was shown to be those of a railroad partly within and partly without the State, such gross receipts being derived from its entire business, State and interstate. The resort to gross receipts, in the opinion of the court, was merely a means of ascertaining the business done by the corporation, and thus measuring the tax which was held to be within the power of the State."

For other cases, explaining in the same manner and approving *Maine v. Grand Trunk Railway*, see:

Ewing v. Leavenworth, 226 U. S. 464, 469, 57 L. ed. 303;

Oklahoma v. Wells Fargo Co., 223 U. S. 298, 301, 56 L. ed. 445;

Flint v. Stone Tracy Co., 220 U. S. 108, 165;

Mich. Central v. Powers, 201 U. S. 245, 296;

Hanley v. Kansas City Co., 187 U. S. 617, 621;

Pittsburgh Rwy. v. Backus, 154 U. S. 421, 431.

But in *Galveston H. & S. A. R. Co. v. Texas*, 210 U. S. 421, 431, 52 L. ed. 1031, the Supreme Court of the United States, on appeal from a State court, considers the constitutionality, under the commerce clause, of a statute of Texas imposing a tax upon railroad corporations and other persons owning or controlling a line of railroad in that State, equal to one per cent. of their gross receipts. Section 1 of said statute imposed under such railroads "an annual tax for the year 1905 and for each calendar year thereafter equal to one per centum of its gross receipts if such line of railroad lies wholly within the State." In that case, the lines of the railroads concerned were wholly within the State; but they connected with other lines, and in some instances much the larger part of their gross receipts was derived from the carriage of passengers or freight coming from, or destined to, points without the State of Texas. It was contended for the State that the case of *Maine v. Grand Trunk Railway*, *supra*, controlled the case at bar, and for the railroads that the case of *Phila. & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, contained the proper rule to govern the case. As in the *Maine Case*, so here the court was divided, the ratio being five to four. The majority, through Mr. Justice Holmes, affirmed the *Pennsylvania Case* as unshaken and as stating established law; and then went on to hold that the Texas statute did amount to an attempt to regulate commerce among the States; and was, therefore, unconstitutional. The court, in commenting upon the decision in *Maine v. Grand Trunk Railway*, *supra*, said (p. 226):

"In *Maine v. Grand Trunk R. Co.*, *supra*, an annual excise tax for the privilege of exercising its franchise was levied upon every one operating a railroad in the State, fixed by percentages, varying up to a certain limit, upon the average gross receipts per mile, multiplied by the number of miles within the State when the road extended outside. This, at first sight, looked like a reaction from the Philadelphia & Southern Mail Steamship Co. case. But it may not have been. The estimated gross receipts per mile may be said to have been made a measure of the value of the property per mile. That the effort of the State was to reach that value and not to fasten on the receipts from transportation as such was shown by the fact that the scheme of the statute was to establish a system. The buildings of the railroad and its land and fixtures outside of its right of way were to be taxed locally as other property was taxed and this excise with the local tax, were to be in lieu of all taxes. The language shows that the local tax was not expected to include the additional value gained by the property being part of a going concern. That idea came in later. The excise was an attempt to reach that additional value. The two taxes together fairly may be called a commutation tax," citing *Picklin v. Taxing District*, 145 U. S. 1, 23, 36 L. ed. 601, 607; *Postal Tel. Cable Co. v. Adams*. 155 U. S. 688, 697, 39 L. ed. 311, 316, and other cases.

The court then goes on to say that it matters not by what name the exaction may be called, if it amounts to no more than the ordinary tax upon property, or a just equivalent therefor, ascertained by reference thereto, it was not inconsistent with the Constitution, and that the State should be allowed to tax the property *at its actual value as a going concern*, but could not be allowed to tax an interstate

business. The court seems to hold that the whole scheme of State taxation must be taken into account; and that if, considering the whole scheme of taxation, the excise or privilege tax, together with the property tax, amounts to no more than ordinary taxes upon the railway property in the State as a *going concern*, it will not be inconsistent with the Constitution, but that if, considering the whole scheme, the tax amounts to more than a tax upon the property as a going concern, if the legislative scheme is not simply to value property, but to reach receipts from interstate commerce, then it would bear upon that commerce so directly as to amount to a regulation "in a relatively immediate way."

In *Meyer v. Wells Fargo Co.*, 223 U. S. 297, 56 L. ed. 445, the court considered an act of Oklahoma providing for the levy and collection of a gross revenue tax upon public service corporations in that State. The said statute provided as follows:

"Every corporation hereinafter named shall pay the State a gross revenue tax which shall be in addition to the taxes levied and collected upon an *ad valorem* basis upon the property and assets of such corporation, equal to the per centum of the gross receipts hereinafter provided for, if such public service corporation operate wholly within the State, and if such public service corporation operate partly within and partly without the State, it shall pay tax equal to such proportion of said per centum of its gross receipts as the portion of its business done within the State bears to the whole of its business,"

With a proviso for fixing a different proportion if it "more fairly represents the proportion which the gross receipts of any such public service corporation for any year within this State bear to its total gross receipts." The tax laid upon express companies was three per cent. of their gross receipts.

It was claimed by the express company that the statute was unconstitutional as a regulation of commerce among the States; and in sustaining this position, the court said that the statute in question was "so similar to the Texas statute held bad in *Galveston H. & S. A. R. Co.*, 210 U. S. 217, 52 L. ed. 1031, as to show that if one is not copied from the other, they have a common source. It would be possible only by some extraordinary turn of ingenuity to sustain this after condemning that."

It is to be noted that the statute laying the tax expressly provided that it should be in addition to the tax levied and collected upon an *ad valorem* basis, upon the property and assets of such corporation.

After holding that the tax was not a property tax, the court said that as all the property and assets were subject to *ad valorem* taxes, therefore, "this tax cannot be an attempt to reach the value of what is by law to be valued and taxed in a different way. It would be difficult to apply to a tax levied in these days the explanation of *Maine v. Grand Trunk Railway Co.*, 142 U. S. 217, given in *Galveston, H. & S. A. R. Co.*, 210 U. S. 217, 226; *Flint v. Stone Tracy Co.*, 220 U. S. 217, 226, and to suppose it intended to reach only the additional value given by its being a part of a going concern to property already taxed in its separate items. There is nothing sufficient to indicate such a limitation, and for the reasons given above, on the authority of *Fargo v. Hart*, 193 U. S. 490, 48 L. ed. 761, it is plain that the gross receipts from all sources could not have been used as a means for estimating the going value of the property in the State. In *Fargo v. Hart*, 193 U. S. 490, 48 L. ed. 761, the court held that personal property owned by a non-resident express company and situated outside of the State, could not have been taken into account in fixing the value, for taxation of its property within the State, on the theory that the possession of such property by the company gave it a better credit and thus a better opportunity to

obtain business; and, as seen above, this is the case which Mr. Justice Holmes refers to as the basis for the decision in the Oklahoma case.

In *U. S. Express Co. v. Minnesota*, 223 U. S. 335, 56 L. ed. 459, the court upheld the constitutionality of a statute requiring express companies to file a statement showing the entire receipts, including all sums earned or charged, whether received or not, for business done within the State, including its proportion of gross receipts for business done in the State by such company in connection with other companies, and authorizing the auditor to assess upon each express company a tax of six per cent. upon its gross receipts for business done in the State for the preceding calendar year, which should be in lieu of all taxes upon its property. The action was brought by the State of Minnesota to recover certain items which it was claimed were omitted from the returns of the express company and which were properly the subject of taxation under the statute. It was contended for the express company that the assessment of taxes upon its earnings from shipments by a consignor in the State of Minnesota to a legitimate consignee within the State, which shipments were forwarded by the express company between the points of origin and destination over railroads partly within and partly without the State of Minnesota, was unconstitutional in that it was an attempt of the State to regulate interstate commerce. It was held in the State court that nine per cent. of the tax claimed on this class of earnings should be deducted from the amount of the recovery allowed in the court of original jurisdiction since it was disclosed that only ninety-one per cent. of the mileage was within the State of Minnesota. This decision of the State court was sustained by the court merely referring to *Lehigh Valley R. R. Co. v. Pennsylvania*, 145 U. S. 192, 36 L. ed. 672. It was held in the State court that it was the intention of the legislature in the statute under consideration to include the earnings from transportation from points within the State to points without the State, also from transportation from points without the State to points within the State, and also from points without the State to points without the State passing through the State, and it was contended that as this was clearly interstate commerce, the tax was a burden upon interstate commerce, and, therefore, an infraction of the exclusive power of Congress to regulate commerce among the States. Mr. Justice Day, in delivering the opinion of the court sustaining the validity of the statute, said:

"It is thoroughly well settled in this court that State laws may not burden interstate commerce. As one form of burden may exist in taxing the conduct of interstate commerce, such taxation has been uniformly condemned. Examples of that character may be found in *Fargo v. Michigan*, 121 U. S. 230; *Philadelphia S. S. Co. v. Pennsylvania*, 122 U. S. 326; *Ratterman v. Western Union Tel. Co.*, 127 U. S. 411; *Leloup v. Mobile*, 127 U. S. 640; *Western Union Tel. Co. v. Pennsylvania*, 128 U. S. 39; *Western Union Tel. Co. v. Alabama*, 132 U. S. 472; *Galveston H. & S. A. Ry. Co. v. Texas*, 210 U. S. 217.

"While we have no disposition to detract from the authority of these decisions, this court has had also to consider and determine the effect of statutes which undertake to measure a tax within the legitimate power of the State by receipts which came in part from business of an interstate character. In that class of cases a distinction was drawn between laws burdening interstate commerce, and laws where the measure of a legitimate tax consists in part of the avails or income from the conduct of such commerce.

"In *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217, this court sustained a tax which required every railroad operated within the State to pay an annual tax for the privilege of exercising its franchises therein, determined upon a proportion of gross transportation receipts, which in that case were shown to be those of a railroad partly within and partly without the State, such gross receipts being derived from its entire business, State and interstate. *The resort*

to gross receipts, in the opinion of the court, was merely a means of ascertaining the business done by the corporation, and thus measuring the tax, which was held to be within the power of the State. * * *.

"A question in principle not unlike the one here presented, came before this court in *Flint v. Stone Tracy Co.*, 220 U. S. 107. In that case it was contended that the income of the corporations sought to be taxed under the Federal law, included, as to many of the companies, large investments in municipal bonds and other securities beyond the Federal power of taxation. It was held, after a review of some of the previous cases in this court, that, where the tax was within the legitimate authority of the Federal government, it might be measured, in part, by the income from property not in itself taxable, and the distinction was undertaken to be pointed out between an attempt to tax property beyond the reach of the taxing power and to measure a legitimate tax by income derived in part at least, from the use of such property. *Stone v. Tracy*, *supra*, 162, 3, 4 and 5."

In *Flint v. Stone Tracy Co.*, 220 U. S. 106, the court had under consideration the corporation tax, imposed by Congress in the Tariff Act of 1906. In answering the contention that as some of the corporations had large investments in municipal bonds and other non-taxable securities, therefore the selection of the measure of income from all sources was void, the court again distinguished the *Texas Case* from the *Maine Case*. Said Justice Day, delivering the opinion of the court (p. 163):

"There is nothing in these cases (*Galveston H. & S. A. R. Co. v. Texas* and *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1) contrary, as we shall have occasion to see, to the former rulings of this court which hold that where a tax is lawfully imposed upon the exercise of privileges within the taxing power of the State or nation, the measure of such tax may be the income from the property of the corporation, although a part of such income is derived from property in itself non-taxable. The distinction lies between the attempt to tax the property as such and to measure a legitimate tax upon the privileges involved in the use of property."

And again, at p. 165, the court says:

"It is therefore well settled by the decisions of this court that when the sovereign authority has exercised the right to tax a legitimate subject of taxation as an exercise of a franchise or privilege, it is no objection that the measure of taxation is found in the income produced in part from property which of itself considered is non-taxable. Applying that doctrine to this case, the measure of taxation being the income of the corporation from all sources, as that is but the measure of a privilege tax within the lawful authority of Congress to impose, it is no valid objection that this measure includes, in part at least, property which as such could not be directly taxed. See in this connection *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217, as interpreted in *Galveston, H. & S. A. R. Co. v. Texas*, 210 U. S. 217, 226."

From these cases it is possible to make certain clear deductions.

1. The State may tax a railway corporation engaged in interstate commerce; and, in establishing its scheme of taxation, the State may tax such a corporation's property independently of any value it may have "as a going concern," and, in addition, may take into account the value of its property as a going concern; or, as stated by Mr. Justice Holmes, it may tax such property not merely as a congeries of unrelated items, but in its organic relations, taking into account the augmentation of its value from the commerce in which it is engaged.

2. If the scheme of taxation is a method of ascertaining or commuting this value, and is not an attempt to reach and tax as such receipts from interstate commerce, then the scheme will not be held contrary to the commerce clause of the Federal Constitution.

3. In the *Maine Case*, the court sustained a scheme of taxation which included (a) local taxation of part of the real estate and fixtures of a railroad; (b) a franchise tax varying from one-quarter of one per cent. to three and one-quarter per cent. on gross receipts from interstate and intrastate commerce earned within the State, as a commutation of the value of the property not subject to taxation and also of the value of its property "as a going concern" not reached by the other taxes thereon.

4. In the *Texas Case*, the court declared invalid a scheme of taxation which included therein a direct tax of one per cent. upon receipts from interstate and intrastate commerce earned within the State, and in addition provided for a tax upon the railroad's property as a going concern, thus in effect taking the receipts from interstate commerce into account twice. Examining the brief of counsel for the railroads in the *Texas Case*, we find that the property of the railroads had been assessed, equalized and taxed and that the companies had paid *ad valorem* taxes to the State, counties, municipalities and school districts, or to quote (p. 165): "Here the State first taxes the property at the same *ad valorem* rate as other property real and personal in the State; proceeding further, it taxes the franchises of the corporation owning the property; it then taxes under the guise of an occupation tax, the passenger receipts from passenger travel wholly within the State at the rate of one per cent. on the gross receipts of the corporation, thus again taxing the product of the same property that had already paid its full quota of *ad valorem* taxation."

5. In the *Oklahoma Case*, the court declared invalid a scheme of taxation which included (a) an *ad valorem* tax upon the *property* and *assets* of the express company (which would include the value of its franchise), and in addition included (b) a tax of one per cent. upon gross receipts from interstate and intrastate commerce.

6. In the *Minnesota Case*, the court upheld the validity of a tax upon an express company of six per cent. upon its receipts from all sources, including both interstate and intrastate commerce, which was in lieu of all taxes, upon the theory that such a tax was a fair commutation of the taxes upon its property as a going concern.

7. Any system of State taxation of a railroad property will be held invalid which is not a fair commutation of its value as a going concern, upon the ground that any taxation in excess of its value as a going concern.

From these deductions, it is clear that the case of *Maine v. Grand Trunk R. Co.* has not been overruled, but that on the contrary it has been expressly approved and its principles extended. While it is true that Mr. Justice Holmes in *Oklahoma v. Wells Fargo Co.*, 223 U. S. 298, does seem to criticise and throw doubt upon the decision of the *Maine Case* in the following language: "It would be difficult to apply to a tax levied in these days the explanation of *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217, given in *Galveston, H. & S. A. R. Co. v. Texas*, 210 U. S. 217, 226; *Flint v. Stone Tracy Co.*, 220 U. S. 107, 162, 165, and to suppose it intended to reach only the additional value given by its being part of a going concern to property already taxed in its separate items," it is a truly remarkable fact that on the day on which Mr. Justice Holmes handed down the opinion in the *Oklahoma Case*, Mr. Justice Day handed down the unanimous opinion of the court in *U. S. Express Co. v. Minnesota*, 223 U. S. 335, doing just what Mr. Justice Holmes said it was impossible to do, to-wit: applying to a tax levied by the State of Minnesota, taxing express companies on gross receipts, the same explanation of the *Maine Case* which had been applied in the *Texas Case* and in the *Corporation Tax Case* of 1906, and distinguishing the *Maine Case*, and reaffirming the *Maine Case* and the *Corporation Tax Case*.

The question, therefore, for decision is whether, under the whole scheme of taxation upon railway and canal corporations in Virginia, the privilege tax imposed

by sections 177 and 178 of the Constitution, together with the property tax, amounts to more than a tax upon the property of such corporations as going concerns, or, to state it in another way, whether the scheme has been devised not simply to value property, but to reach receipts from interstate commerce. In the *Texas Case*, the court said that they rather inferred, from the judgment of the State court and from the argument on behalf of the State, that another and distinct State tax on the property of the railroad was upon a valuation of that property taken as a going concern. Therefore, it is essential, to determine whether there is any other tax in Virginia upon the valuation of railway and canal corporations taken as "going concerns," and, if not, then to determine whether this tax is so burdensome as to reach interstate receipts.

As we have already seen, the scheme of taxation of railway and canal corporations in Virginia embraces, first, a tax upon their real property; second, a tax upon their tangible personal property; third, a tax upon their intangible personal property (and in all of these cases the same tax is prescribed as in the case of individuals or other corporations, and this enumeration does not include, but in terms excludes, the value of the franchise); fourth, the tax prescribed by sections 177 and 178 of the Constitution, called a franchise tax, the method of ascertaining which has already been described; and it is to be particularly noted, in this connection, that the Constitution, in section 177, specifically provides that the aforesaid taxes "shall be in lieu of all other taxes or license charges whatsoever upon the franchises of such corporation and shares of stock issued by it, and upon its property assessed under section 176," with certain provisos not pertinent here; and it is further laid down in section 176 that no tax shall be laid upon the net incomes of such corporations.

Bearing in mind, therefore, these limitations, it seems clear that it was the *intention* of the makers of the Constitution of 1902 to reach the value of the railway and canal property in this State as "going concerns" in the method prescribed by sections 177 and 178, and to prevent their taxation, in any other way, as going concerns; and an examination of our statutes discloses the fact that there is no other tax imposed by our law upon the valuation of railway and canal corporations as "going concerns."

It only remains to be considered, therefore, whether the franchise tax of one per cent. upon the gross receipts of such corporations, earned in this State, is a burden upon interstate commerce, or to state the question in another way, whether this tax, with the property tax, is more than a fair tax upon the property of such corporations as going concerns.

It is submitted that so far as its *form* is concerned, this tax is not more burdensome than the statute approved in the *Maine Case*; and that our plan carefully avoids the defects disapproved by the court in the *Texas* and *Oklahoma* statutes. But a law may be perfect in form and yet, in its application, may be unconstitutional. Therefore, it is impossible to give a categorical answer to the question as to whether in its application, our statute is burdensome upon the interstate commerce of these corporations. This is a question of fact which in a particular case will depend upon the facts and circumstances of that case. Some information as to this subject is given in the Report of the Committee on Tax Revision, ch. 4, pp. 128-152. It is entirely conceivable and possible that a tax of one per cent. on gross receipts, together with the tax on property, might in the case of one railway corporation operate as a burden on its interstate commerce, whereas, in the case of another, it might not affect receipts from that commerce. As said above, this is a question of fact and

not of law, and as such, cannot be decided in a hypothetical case, such as is here presented.

Hardly sufficient time has been at my disposal to consider, as it should be considered, a question, of such great moment to the State, involving, as it does, the validity of a tax by which the State realizes the sum of over \$600,000.00 annually. My investigations have been sufficient, however, to lead me to the conclusion that if the legislature deems it wise to substitute another plan for the one now in operation, it should do so only after mature deliberation and the examination of all the precedents, in order to be certain that any proposed new plan is in accordance with all of the provisions of the Federal Constitution, as interpreted and applied by the court of last resort.

Respectfully submitted,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

TAXATION—*Real estate—Effect of right to separate improvements—Machinery. Va. Code 1904, Sec. 485, and Tax Bill, Sec. 2.*

Even though a lease provides that the lessee covenants to pay all taxes on the real estate and "on any improvements that the lessee may put thereon during the term of the lease," and that the lessee shall have the right to remove the improvements at the expiration of the lease, such improvements are nevertheless taxable as real estate.

Machinery is taxable as personal property where the machinery belongs to one person and the real estate to another.

RICHMOND, VA., *October 6, 1915.*

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

DEAR SIR:

You have referred to this office correspondence between yourself and Mr. A. B. Dickinson, requesting you to instruct the assessors of land in Richmond, Va., as to the method by which they should assess certain improvements upon real estate owned by Josephine T. Woodward and by her leased to the Montague Manufacturing Company, under a lease dated the 1st day of July, 1913.

Under the terms of said lease (which is for three years), the lessee covenants to pay all taxes on the real estate and "on any improvements that the lessee may put thereon during the term of the lease and during any continuation or extension thereof," and it is further provided in the lease that the lessee shall have the "right to remove from the said premises, at the expiration of the said term, any improvements that may have been put thereon by the said lessee."

The question involved is how the buildings and machinery which have been erected on said property by the lessee shall be assessed.

It is true that the ownership of a house erected upon land may be severed from the land by express stipulation. 1 Minor on Real Property, p. 29, where the following language is used in a foot-note:

"Indeed, in case of trade fixtures the same may be sometimes said of permanent buildings whose foundation is in the ground, the tenant being given the right to remove them at the end of his term as being his property and not a part of the land."

When we come to examine the tax laws of Virginia, we find that it is provided that the tax on tracts of land and lots, and the improvements thereon, shall be a tax of ten cents on every hundred dollars of the assessed value thereof, and that the tax on all tangible personal property shall be a tax of ten cents on every hundred dollars of the assessed value thereof, so that, so far as the result is concerned to the State, it matters not whether the improvements in this case be classified as real property or tangible personal property; but the law seems to contemplate that the improvements upon land shall, for purposes of taxation, be treated as part of the realty, and I do not think that the assessing officers of the Commonwealth are required to differentiate between houses built upon land which may, by agreement between owners of the land and the lessees thereof, be treated as belonging to the lessee and not to the owner of the land. It will be observed that in the instant case the lessee is required to pay taxes thereon, and that there will not be any difference to the lessee or to the State whether it be treated as realty or personalty. I would advise, therefore, that the land and the buildings thereon should be assessed to the owner of the land, to-wit: Josephine T. Woodward.

As to the machinery, under section 485, Virginia Code 1904, the commissioner is required to assess this as personal property, since the machinery belongs to one person and the real estate to another.

Very truly yours,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

TAXATION—*Reports of treasurers—Commissioner of accounts. Va. Code 1904, Secs. 604 and 862; Acts 1914, Ch. 330.*

It was the duty of a county treasurer to present his 1914 annual accounts to the Commissioner of Accounts in order that they should be audited during that year.

RICHMOND, VA., *April 15, 1915.*

MR. V. L. ARNOLD,
Commissioner of Accounts,
Waverly, Va.

DEAR SIR:

On account of the press of public business, it has been impossible to answer before this your letter of February 10, 1915, in which you request me to advise you whether or not the Commissioners of Accounts are supposed to have stated the 1914 annual accounts of the county treasurers and report said annual accounts to court as directed by chapter 330 of the Acts of 1914.

Chapter 330 of the Acts of 1914, p. 604, provides, so far as this question is concerned, that each treasurer of a county shall make his annual settlement as required by sections 604 and 862 of the Code. (Section 604 requires the treasurer to make his final settlement with the Auditor of Public Accounts on or before the 15th day of June of each year, and section 862 requires the treasurer to settle with the board of supervisors at the July or August meeting of the board, or within sixty days thereafter.) The Act of 1914 then goes on to require that the treasurer, as soon as practicable after making his annual settlements aforesaid, shall present to the Commissioner of Accounts a copy of each of said annual settlements, together with the vouchers in connection therewith, whereupon it shall be the duty of the commis-

sioner of accounts to audit the said settlements and report the same to the circuit or corporation court.

The Act of 1914 took effect on June 18, 1914, and as the settlements required by sections 604 and 862 were fixed by law prior to the passage of the act, the only question is whether the law became effective requiring the treasurer, as soon as practicable after making his settlements, to present a copy of his settlements to the Commissioner of Accounts, etc. There seems to be no doubt but that the law became effective for this purpose on June 18, 1914, and that it was the duty of the treasurer under the said statute to present his accounts to the Commissioner of Accounts in order that they should be audited during that year.

Very truly yours,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

TAXATION—*Segregation—Intangible personalty—Constitutionality. Constitution, Sec. 168.*

An act which provides for local taxation of intangible personalty but provides that the county may not tax such property if taxable by a town is unconstitutional, because not uniform within the territorial limits of the authority levying the tax.

There is no constitutional requirement that all classes of property be taxed at the same rate.

RICHMOND, VA., *February 6, 1915.*

TO THE HOUSE OF DELEGATES

OF THE GENERAL ASSEMBLY OF VIRGINIA,

Richmond, Va.

GENTLEMEN:

I am in receipt of a resolution passed by your honorable body on last evening requesting my opinion, in writing, upon the constitutionality of the senate amendment (known as the "Tavenner amendment") to House Bill No. 8, providing for partial segregation of subjects of taxation. The bill as it passed the House provided that intangible personal property should be the subject of State taxation only. The purpose of the Tavenner amendment was to allow, in addition to the State tax, a local or municipal levy not exceeding thirty cents per one hundred dollars. The amendment in question is as follows:

"provided that each city and each incorporated town may levy upon all said taxable intangible personal property liable in such city or town and segregated to the State for purposes of taxation, an additional tax not to exceed thirty cents upon each hundred dollars, and each county may levy upon all said taxable intangible personal property liable in such county and segregated to the State for the purposes of taxation, except such as may be assessable under this act in incorporated towns, a tax not to exceed the rate of thirty cents upon each hundred dollars, the proceeds of collection to be applied by such city, town or county, as other taxes are applied, and"

1. The first question raised is whether the proposed amendment violates section 168 of the Constitution, which provides that * * * "all taxes, whether State, local or municipal, shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax." * * * From an examination of the terms of the amendment, it will be seen that the board of supervisors of a county would have no authority to tax intangible personal property of citizens of

the county who resided in incorporated towns. If, therefore, the board of supervisors of a county should levy a tax on intangible personal property and the council of a town located in the county should fail to levy such a tax, then those citizens of a county residing outside the corporate limits of towns would be subject to a tax on "intangibles" while those citizens of the same county residing in incorporated towns would be free from such tax. Under this condition the question arises whether such a tax would be obnoxious to the terms of the Constitution declaring that "taxes must be uniform * * * within the territorial limits of the authority levying the tax." This question, of course, would not arise where such a tax in towns was levied by the town council, because the territorial limits of their taxing authority is within the corporate lines. In the case of *Campbell v. Bryant*, 104 Va. 509, the court decided that the General Assembly had no power to exempt the taxable persons and property in a town situated within the limits of a county and forming a part thereof, and based its decision upon the section of the Constitution above quoted.

I am, therefore, to say the least, doubtful as to whether the courts would uphold the Tavenner amendment in its present form, and if your honorable body shares in the doubt here expressed, I respectfully suggest for your consideration that the able constitutional lawyers in your body may be able to so change the Tavenner amendment as to substantially accomplish its purpose and at the same time relieve it from the constitutional objection referred to.

2. Another objection which has been raised to the amendment is that it provides for a tax on intangible property at a rate other and different from the rate which may be levied on real estate within the same jurisdiction. I can find no provision of the Constitution which requires all classes of property to be taxed at the same rate. It is not uncommon to tax real estate at one rate and other classes of property at another rate. The present General Assembly at its regular session, fixed the rate of taxation on money at another and different rate from that levied on other classes of property. In as much as there is no constitutional provision to the contrary, I am of the opinion that the objection here referred to is not well taken.

3. The third objection which has been raised to the amendment is that it undertakes to segregate intangible personal property for State taxation only, and then provides that it shall also be subject to local taxation. In answer to this objection it should be stated that under the amendment, segregation as applied to intangible personal property is a misnomer. Such property is not thereby segregated. It is left for taxation both to the State and the localities just as at present; the only change being in the rate of taxation to be fixed by the State and the localities respectively. No one would doubt that it is perfectly competent for the General Assembly to change the prevailing rates of taxation.

In justice to the General Assembly and to the Attorney General it should be borne in mind that the views here expressed are necessarily hurriedly formulated. Your resolution was not received until last evening and I am informed that the short time still at the disposal of the General Assembly makes it desirable that your body should have for its consideration this morning such views as I have been able to form within the limited time allotted me, so that, if you share in such views, you may, if you so desire, devote your attention at once to eliminating from the bill, as far as possible, the constitutional questions raised.

Respectfully submitted,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

TAXATION—*Segregation—Intangible personalty—Powers of General Assembly. Constitution 1902, Secs. 168, 169 and 173; Va. Code 1904, Secs. 833a and 1042.*

The General Assembly has the power to pass a law requiring that intangible property of citizens of towns be subject to town taxation, and at the same time provide that such property shall not be taxable by the cities and counties.

RICHMOND, VA., February 2, 1915.

His Excellency, H. C. STUART,
Governor of Virginia,
Richmond, Va.

DEAR SIR:

You have requested me to give you my opinion as to the following question:

In a plan of partial segregation of kinds or classes of property, specifying that lands and tangible personal property (except rolling stock of railroads operated by steam) shall be subject to the levy of local taxes, and that intangible personal property and the rolling stock of railroads operated by steam shall be subject to the levys of State taxes, and further providing for the levy of a tax of ten cents on the hundred dollars of the assessed value of lands and tangible personal property (except rolling stock as above) for State purposes to be distributed for the benefit of the public free schools, would it be constitutional to provide that in towns (but not in cities) intangible personal property shall be subject to the town levy, but not to the county levy?

It is a fundamental principle that "the power of the State, acting through its governmental agencies, to tax its citizens, is absolute and unlimited as to persons and property." This power to tax is a legislative power and cannot by the legislature be delegated to any other department of government, nor to any person or corporation, with one exception, to-wit: local municipalities and counties in Virginia may be and are authorized by the legislature to exercise the power of taxation for local purposes. *Bull v. Read*, 13 Gratt., 54 Va. 78, 99, and cases cited.

Municipal corporations have no power of taxation unless the power be plainly and unmistakably conferred, and laws conferring on them the power of taxation must be strictly construed. *Richmond v. Richmond, etc., R. Co.*, 21 Gratt., 62 Va. 604; *Peters v. Lynchburg*, 76 Va. 927; *Whiting v. West Point*, 89 Va. 741. But when a charter confers upon a municipality the general power of taxation, then the municipality may tax all persons and subjects of taxation, except such as may be limited by the laws of the State or the United States. *Hardin v. Radford*, 112 Va. 547. But the general power of taxation is not a contract between the State and municipality, securing to the municipality the absolute power of taxation beyond the control or modification of the legislature. The power of exemption is, like the power of taxation, an essential element of sovereignty, and can be surrendered or diminished, but only in explicit terms; and, therefore, the legislature may at any time abridge the general power of taxation, either by express words or in general revenue laws. *Richmond v. Richmond, etc., R. Co.*, 21 Gratt., 62 Va. 604; *Orange, etc., R. Co. v. Alexandria*, 17 Gratt., 58 Va. 176, 184; *Norfolk v. Griffith Powell Co.*, 102 Va. 115.

It has been said by our Supreme Court that the legislature may delegate to a municipality for local taxation *all* or *any* portion of its power of taxation within the corporate limits of the municipality. *Norfolk v. Griffith Powell Co.*, 102 Va. 115. Therefore, unless there be some constitutional restrictions in the way, it would seem to be entirely competent for the legislature to confer upon municipalities the power

to tax only a part of the subjects upon which the State has the right to impose a tax.

It may be well at this point to consider what powers of taxation have been conferred upon cities, towns and counties for local purposes, and upon what subjects they may now levy taxes.

The authority of cities and towns to make levies in the State is conferred by section 1042, Virginia Code 1904, which provides that the levy ordered by the council of a city or town "may be upon the male persons in said city or town above the age of twenty-one years, and upon any property therein, and on such other subjects as may at the time be assessed with State taxes against persons residing therein."

It will thus be seen that by the terms of this statute, the subjects of taxation in a city or town for local purposes are: first, male persons in said city or town above the age of twenty-one; second, any property therein which would include property, real and personal, tangible and intangible, as enumerated in the tax bill; and, third, such other subjects as may at the time of the levy be assessed for State taxes against persons residing in the city or town.

In addition, municipalities have the power of charging a license fee for acts done therein, but it is not necessary to notice this power here.

The boards of supervisors in the counties are authorized to make the levies of all taxes for local purposes. The subjects of taxation are in general all property within the county which has been assessed with taxes for State purposes. For a more particular enumeration of the property within the county subject to a county levy by the board of supervisors, see Acts 1914, page 721, Pollard's Code Biennial, 1914, section 833a.

Section 173 of the Constitution authorizes the legislature to pass a statute enabling the councils of cities and towns and the boards of supervisors of the counties to levy a capitation tax for local purposes, but no such statute has been passed.

The boards of supervisors have no power to charge license fees.

It would seem to follow from the principles and cases above that unless there is some constitutional restriction, the State may withdraw from the municipalities any of the subjects of taxation which to the legislative mind seems wise.

Under the present state of our law it has been held that the legislature may grant to a municipality a power of taxation different from and greater than the power granted to such municipalities by general law. *Chambers v. Roanoke*, 114 Va. 766.

Bearing in mind, then, the power of the legislature, let us consider in connection therewith that portion of section 169 of the Constitution of 1902, which reads as follows:

"Nothing in this Constitution shall prevent the General Assembly, after the first day of January, nineteen hundred and thirteen, from segregating for the purposes of taxation the several kinds of classes of property, so as to specify and determine upon what subjects State taxes, and upon what subjects, local taxes may be levied."

Now, if independently of this provision the legislature has the right to withhold some and bestow other portions of its power of taxation upon municipalities, and if a municipality may by special act be granted a greater power of taxation than is granted to municipalities in general, then it would seem clear that the legislature has the power to grant to one class of municipalities some subjects of taxation and to withhold those subjects from another class. Since it is within the power of the legislature to amend or repeal the charter of a municipality and thus to alter or abolish

its government, it would seem to follow as a corollary that the legislature may in its discretion grant different powers of taxation to different classes of municipalities.

Nor is this power affected by the provision of section 168 of the Constitution that "all taxes, whether State, local or municipal, shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax." The object of this provision is to require that State taxes shall be uniform upon persons, upon real estate and upon the different classifications of personal property found in our Tax Bill; that local taxes shall be uniform upon the subjects of local taxation, and that municipal taxes shall be uniform upon the subjects of municipal taxation, so that any individual who is required to pay a higher State, local or municipal tax on any subject of taxation than another individual on the same class may escape the erroneous assessment. It was not intended to require, nor does the section require, that the subjects of taxation in a town should be the same as the subjects in the State, or as in a county or city, but even independently of section 169, the legislature has always had the power of specifying and determining upon what subjects a town could levy its tax, and the requirement of section 178 above is fully met, when, after the State determines and specifies the subjects for town taxation, the council of the town levies a uniform tax upon the different subjects granted to it by the legislature.

It may be well to quote the language of Staples, J., in *Richmond v. Richmond & Danville R. Co.*, 21 Gratt., 62 Va. 604, 617:

"The authorities also establish that these (that is, municipal) corporations are mere auxiliaries of the government, established for the more effective administration of justice; and that the power of taxation confided to them is a delegated trust. In the exercise of this power they act as agencies of the State, and not by virtue of any inherent authority. And whether the Legislature may or may not utterly destroy this power of taxation in particular cases, still it must be exercised under the control and authority of the State. The manner of apportionment, the form of assessment and collection, the species of property which shall be the subject of taxation or exemption, are matters purely within the legislative discretion, except where the constitution ordains the rule."

In that case, the State had by charter declared all the real estate belonging to the railroad to be personalty and had exempted all the property of the railroad from taxation. The court held that this provision of the charter of the railroad limited the power of the city of Richmond in its charter to tax all real and personal estate in the city.

A careful examination of the Constitution seems to indicate that there is no restriction upon the power of the legislature to bestow different subjects of taxation upon municipalities or withhold them. It is true that section 183 of the Constitution does declare that the property set out therein and no other shall be exempt from taxation, State and local, but the object of this section is not to prevent segregation or separation of subjects and kinds of property for the purposes of local taxation and for the purposes of State taxation, but simply to require that after the system of segregation has been adopted, then no property shall be exempt from either State or local taxation except the property specified in said section.

We are, therefore, forced to the conclusion that the legislature has the power to specify and determine that intangible property of citizens residing in towns may be subject to town taxation, while at the same time providing that intangible property shall not be subject to taxation by the cities and counties.

I am taking the liberty of enclosing herein copy of an opinion rendered by me on March 5, 1914, to Hon. A. C. Harman and Hon. J. M. Hart, on the power of the

legislature to fix the situs for taxation of certain rolling stock belonging to railroad corporations. From an examination of this opinion, you will see that the courts have sustained the power of the legislature to fix the situs for taxation of tangible personal property, so that the different localities through which the railroad passes may avail themselves thereof for the purposes of taxation. These authorities while not directly in point in the question here, do bear upon the power of the State to segregate rolling stock so that it shall be subject to State taxation only; for manifestly if the legislature may determine that instead of allowing one municipality to tax rolling stock, it will allow other municipalities and counties the privilege, surely it has the power to take away from all these municipalities and counties the power which it has seen fit to give them.

Very truly yours,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

TAXATION—Segregation—Power of General Assembly—Rolling stock of railroads
Va. Constitution 1902, Sec. 169.

The General Assembly has the power to make a classification which segregates for State taxation the rolling stock of railroads and leaves for local taxation all other tangible personal property.

RICHMOND, VA., February 1, 1915.

His Excellency, H. C. STUART,
Governor of Virginia,
Richmond, Va.

DEAR SIR:

Referring to the question submitted by Hon. R. L. Gordon directly, and by him through you, as to whether the Constitution will permit the segregation of the rolling stock of railroads for State taxation and of other tangible personal property for local taxation, I beg leave to say that, in my opinion, the Constitution contains no provision which would prevent such segregation. Section 169 of the Constitution provides as follows:

“Nothing in this Constitution shall prevent the General Assembly, after the first day of January, nineteen hundred and thirteen, from segregating for the purposes of taxation, the several kinds or classes of property, so as to specify and determine upon what subjects, State taxes, and upon what subjects, local taxes may be levied.”

I cannot find that the question has ever been passed upon directly by the courts, but following the well-established principles of constitutional construction, I have no doubt that the classification proposed is entirely reasonable and would be upheld. The rolling stock of railroads is in its nature transitory, moving about from one part of the State to the other, and it is a perfectly natural and logical subject of State taxation. The Constitution left to the General Assembly the power to classify the subjects of taxation and to “determine upon what subjects, State taxes, and upon what subjects, local taxes may be levied,” and I feel certain that the courts would not interfere with any reasonable classification which the General Assembly may make, especially a classification which is so natural and logical as the one here referred to.

Very truly yours,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

TAXATION—*State Advisory Board on Taxation—Powers—Constitutionality. Va. Constitution, Secs. 6 and 50.*

An act which provides that the State Advisory Board on Taxation shall have the authority to decide upon the probable revenue that will be needed for State purposes, and if, in the opinion of the board, such estimated needs be in excess of the expected available revenues, then the board shall call upon the several counties and cities of the Commonwealth to contribute to the State treasury in accordance with the aggregate wealth of the counties and cities to be ascertained in such a manner as the board may determine a sufficient sum to meet the requirements of the State government as ascertained by the board is unconstitutional, both as an unwarranted delegation of legislative powers and as not specifically stating a tax.

RICHMOND, VA., January 19, 1915.

TO THE FINANCE COMMITTEE,
House of Delegates,
Richmond, Va.

GENTLEMEN:

I am in receipt of a letter, dated January 18th, from Hon. Hill Montague, a member of your committee, in which I am informed that you desire the opinion of the Attorney General upon a number of questions involving the constitutionality of the so-called "Partial Segregation Plan," embodied in the bill found on page 217 of the Report of the Joint Committee on Tax Revision.

I desire your committee to bear in mind that there is a wide difference of opinion on some of the questions which I here undertake to discuss, and that the reported cases show that the courts themselves are not in agreement. The fact, however, that the questions submitted by you are surrounded with very great difficulty, and are the cause of such great difference of opinion, does not relieve me of the responsibility as Attorney General to give you my opinion for what it may be worth. I submit my views with deference, not only on account of the shortness of the time given me to pursue my investigations, but because I am informed that able constitutional lawyers in the General Assembly entertain opinions at variance with those here expressed. I feel sure, therefore, that my opinion will not be given undue weight as against the opinions of the learned lawyers who served on the joint committee and who helped in framing the bill, the constitutionality of which is now brought into question by your communication.

I am aware of the reluctance of the courts in declaring unconstitutional the acts of a legislative body, especially such acts as involve the entire tax system of a Commonwealth, the setting aside of which might be attended with such serious results. However, in answering your questions I am pursuing the course of advising against not only such provisions as are in my opinion clearly unconstitutional, but also those provisions which might possibly be set aside by the courts as over-stepping the legislative limitations prescribed by the Constitution.

Those features of the bill to which your questions are addressed are all embodied in sections 6 and 7, which read as follows:

"6. During the month of February of each year the board shall make an estimate of the probable revenues that will be available for State purposes at the beginning of the next ensuing fiscal year, and also of the probable revenues that will be needed for State purposes at the said period. If such estimated needs shall be in excess of the expected available revenues, calculated as aforesaid by the board, then, in that event, the board shall call upon the several counties and cities of the

Commonwealth to contribute to the State treasury a sufficient sum to meet the requirements of the State government ascertained as aforesaid; but in no event shall such estimate be more than five per centum in excess of the expenditures of the State government for the last preceding year, unless otherwise ordered by the express enactment of the General Assembly. In ascertaining the quota of such contributions to be made by each county and city, the board shall apportion it in accordance with the aggregate taxable wealth of said county and city, to be ascertained in such manner as the board may determine. At the time of making such estimates, should it appear that the revenue derived from the sources available for taxation by the State shall be sufficient to meet all reasonable demands upon the State treasury, then the board shall make no requisition upon the counties or cities."

"7. On or before the first day of March of each year the secretary of the board shall notify in writing the treasurer of each county or city of the total supplemental sum needed as aforesaid for State purposes, and of the proportion due from such county or city estimated by the board as aforesaid, and such treasurer shall communicate the said notice to the chairman of the board of supervisors or the president of the most numerous branch of the city council or the head of the governing board of such county or city, and such board of supervisors, city council or governing board shall fix the county or city levy with reference to such contribution to the State treasury. The treasurers of the several counties and cities shall remit to the treasurer of the Commonwealth on or before the first day of February following such notification the amount stated therein as being due from such county or city. * * *

Section 6, above quoted, undertakes to delegate to a State Board of Taxation the authority to decide upon "the probable revenues that will be needed for State purposes, and if, in the opinion of the board, such estimated needs be in excess of the expected available revenues, then the board shall call upon the several counties and cities of the Commonwealth to contribute to the State treasury a sufficient sum to meet the requirements of the State government" as ascertained by the board. The same section further provides that the board shall apportion the deficiency "in accordance with the aggregate wealth of the counties and cities, to be ascertained in such a manner as the board may determine."

The levy of taxes is a legislative function and cannot be delegated, while the assessing or valuing of property for taxation and the collection of taxes are administrative functions. "The original responsibility of determining the expediency and decreeing the existence of the tax must be borne by the legislature." Gray's Limitations of the Taxing Power, section 539.

It will be noted that it is not proposed by the bill to have the tax board make an estimate of the probable needs of the State and report the same to the General Assembly, in order that the latter may make the levy necessary to meet such needs, but it is proposed to vest the board not only with the authority to decide what are the needs of the State, but in effect to make a levy to meet the needs as estimated by the board. The only limitation upon the action of the board is that the revenue raised shall not be more than five per cent. in excess of the expenditures of the State government for the last preceding year. But this limitation does not, in my opinion, make the section any less open to the constitutional objection to which I have referred. I am aware that boards and administrative officers are often charged with the duty of making estimates as the bases of levies, but the legislative body cannot surrender its duty to pass upon the necessity and rate of the levy. In the proposed bill, it is undertaken to vest the board with the power to assess or value the "aggregate taxable wealth," and also to decide what amount it is necessary to raise by taxation. And all this is to be done without reference to the General Assembly.

I am, therefore, of the opinion that the bill is not only obnoxious to the principle that a legislative body cannot delegate its authority to fix the amount of a tax levy, but also probably in violation of section 50 of the Constitution, which requires that "every law imposing * * * a tax *shall specifically state* such tax"; and probably also in violation of section 6 of the Bill of Rights, providing that the people shall not be taxed "without their own consent or that of their *representatives* duly elected."

I am also of the opinion that the section referred to is unconstitutional in so far as it undertakes to authorize the State Board of Taxation to make an apportionment among the counties and cities "in accordance with the aggregate taxable wealth of said county and city, to be ascertained in such manner as the board may determine." The manner of determining the values upon which taxes are to be levied must be prescribed by the General Assembly itself; and in every plan under which property is assessed for taxation there must be embodied a provision giving an aggrieved taxpayer the right to appeal to some legally constituted tribunal for relief against an erroneous assessment. This is required both by the provisions of the State and Federal Constitutions which provide that no person shall be deprived of his property without due process of law. This necessarily implies a notice to the taxpayer and an opportunity to be heard. The bill does not provide for these essential features.

While I am forced to the conclusion that the bill recommended by the Joint Committee is unconstitutional, I am of the opinion that there is nothing unconstitutional essentially inherent in the plan of partial segregation, and I feel certain that the many able lawyers in the General Assembly can devise a plan which will not be open to constitutional objection. Partial segregation is no new device; in fact, our General Assembly has already partially segregated subjects of taxation, notably in case of money on deposit or in possession or control of the owner, such money having been segregated for State purposes by act of the present General Assembly passed at its regular session.

I am sending you this communication by messenger, in order that I may comply with your request and deliver you this opinion at the session of your committee to be held at 10 o'clock this morning.

Very truly yours,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

Statement

Showing the Current Expenses of the Office of the Attorney General from November 1, 1914, to October 31, 1915.

1914.		
Nov.	1. Balance to credit of contingent fund.....	\$ 72 42
	5. The Beaufont Company, rental of water stand.....	75
	5. M. A. Powers, amounts paid for laundry and for handling and unpacking law books.....	1 65
	6. Western Union Telegraph Company, telegrams, October, 1914.....	1 44
	21. Postmaster, Richmond, Va., postage stamps.....	10 00
Dec.	17. Western Union Telegraph Company, telegrams November, 1914.....	2 29
	21. Chesapeake and Potomac Telephone Company of Virginia, long distance calls.....	2 30
1915.		
Jan.	5. Remington Typewriter Company, typewriter ribbons.....	75
	5. Western Union Telegraph Company, telegrams, December, 1914.....	78
	5. Lucy E. Hogan, stenographic services.....	9 00
	5. Chesapeake and Potomac Telephone Company of Virginia, long distance calls.....	6 25
	5. LeRoy Shorts, laundering towels.....	1 00
	15. R. M. F. Williams, Jr., copy of opinion <i>State of West Va. v. Adams Express Co.</i>	5 60
Feb.	3. J. A. Skinner, taking down awnings.....	1 00
	3. L. M. Krouse, drinking water.....	1 00
	3. A. B. Clarke & Son, clock watch.....	1 25
	3. Chesapeake and Potomac Telephone Company of Virginia, long distance calls.....	60
	3. Lawyers' Co-operative Publishing Company, vol. 58, United States Supreme Court Reports.....	6 00
	18. Everett Waddey Company, office supplies.....	6 60
	25. Everett Waddey Company, 2 copies Virginia's Code Biennial, 1914.....	8 50
	25. Postmaster, Richmond, Va., postage stamps.....	5 66
		72 42
Mar.	1. Appropriation to defray current expenses to March 1, 1916.....	\$ 500 00
	2. J. A. Skinner, rehanging curtains and equipping same with reversing pulleys.....	3 50
	2. Hill Directory Company, Inc., Richmond City Directory.....	6 00
	2. Appeals Press, subscription year ending February 29, 1916.....	5 00
	2. The Michie Company, 28 numbers Virginia Law Register.....	14 00
	2. Western Union Telegraph Company, telegrams, February, 1915.....	6 83
	2. Bell Book and Stationery Company, Seligman's Essays on Taxation.....	4 00
	2. Richmond Transfer Company, hire of taxicab.....	1 50
	2. Everett Waddey Company, 2 volumes Va. Code, 1904.....	15 00
	9. Bancroft-Whitney Company, 5 volumes Ruling Case Law.....	30 00
	10. Chesapeake and Potomac Telephone Company of Virginia, rental two telephone extension sets, year ending February 29, 1916.....	12 00
	12. The American Law Book Company, part payment on one set Cyclopaedia of Law and Procedure.....	50 00
	16. Postmaster, Richmond, Va., postage stamps.....	10 00
	20. Chesapeake and Potomac Telephone Company of Virginia, long distance calls.....	75
	20. Richmond Art Company, hanging paintings in office Attorney General.....	75
	23. Expert Letter-Writing Company, fac-simile letters.....	7 00
	23. Richmond Advertising Agency, fac-simile letters.....	2 00
Apr.	2. Eddie Greenhill, cleaning furniture and wood work, office Attorney General.....	5 00
	2. William World, cleaning furniture and wood work, office Attorney General.....	2 50
	6. Everett Waddey Company, office supplies.....	7 30
	6. Chesapeake and Potomac Telephone Company of Virginia, long distance calls.....	75
	14. Gunn Disinfecting Company, liquid soap.....	1 00
	14. Miss M. L. Hunter, desk covers.....	1 00
	14. Virginia Stationery Company, office supplies.....	2 30
	14. Bixby's Letter Company, duplicating letters.....	1 75

Statement

STATEMENT SHOWING TRAVELING EXPENSES—CONTINUED.

1915.	
Jan. 30.	C. B. Garnett, expenses trip to Washington, D. C., in connection with suit of <i>R. W. Hunter, executor, v. Commonwealth</i> \$413 55
	\$ 44 35
Feb. 28.	Unexpended and reverting to the general fund of the Commonwealth..... \$ 306 18
Mar. 1.	Appropriation to defray necessary traveling expenses to March 1, 1916..... \$ 700 00
10.	C. B. Garnett, expenses trip to Washington, D. C., in case of <i>J. G. Davis v. Commonwealth</i> \$25 80
12.	Jno. Garland Pollard, expenses trip to Washington, D. C., in connection with West Virginia Debt Case..... 16 90
20.	Chesapeake and Potomac Telephone Company of Virginia, long distance calls, West Virginia debt case..... 75
May 4.	Jno. Garland Pollard, expenses two trips to Washington, D. C., in connection with West Virginia debt case..... 49 00
6.	Western Union Telegraph Company, telegrams in reference to West Virginia debt case..... 3 08
10.	Jno. Garland Pollard, expenses trip to Washington, D. C., in connection with Virginia cities—North Carolina rate case..... 30 66
12.	Chesapeake and Potomac Telephone Company of Virginia, long distance calls, West Virginia debt case..... 1 50
27.	C. B. Garnett, expenses trip to Baltimore, Md., in connection with case of <i>R. W. Hunter, Executor v. Commonwealth</i> 25 75
June 7.	C. B. Garnett, expenses to Wytheville, Va., to appear before Supreme Court of Appeals..... 22 90
July 2.	Merchants Transfer and Storage Company, hauling records, West Virginia debt case..... 50
3.	Postal Telegraph Company, telegrams West Virginia debt case..... 51
9.	Western Union Telegraph Company, telegrams in reference to West Virginia debt case..... 4 39
26.	Jno. Garland Pollard, expenses trip to Fredericksburg, Va., in connection with violations liquor and gambling laws, Colonial Beach..... 5 10
Aug. 10.	Jno. Garland Pollard, expenses trip to Hopewell, Va., August 3, 1915, in connection with violations liquor and gambling laws..... 5 40
10.	Jno. Garland Pollard, expenses trip to Hopewell, Va., August 9, 1915, in connection with violations liquor and gambling laws..... 11 85
Sept. 4.	C. B. Garnett, expenses trip to Staunton, Va., to appear before Supreme Court of Appeals..... 13 55
Oct. 6.	Jno. Garland Pollard, expenses trip to Washington, D. C., in connection with West Virginia debt case..... 13 74
27.	Jno. Garland Pollard, expenses trip to Washington, D. C., in connection with West Virginia debt case and Martha Washington will case..... 10 89
	\$ 242 27
31.	Balance to credit of appropriation for necessary traveling expenses..... \$ 457 73

Statement

Showing Amounts Expended from the Appropriation for Furniture for the Attorney General's Office.

1914.	
Nov. 1.	Balance to credit of appropriation for furnishings and general improvements in the office of the Attorney General..... \$ 40 03
1915.	
Feb. 16.	Everett Waddey Company, part payment on furniture..... 40 03

Statement

Showing Amounts Expended from Appropriation for Additional Clerical and Stenographic Services in the Office of the Attorney General.

1915.		
Mar.	1. Appropriation for additional clerical and stenographic services in the office of the Attorney General.....	\$ 1,200 00
	31. M. L. Wallerstein, services as law clerk.....	\$ 100 00
May	1. Miss M. L. Hunter, services as stenographer, April, 1915.....	50 00
	1. M. L. Wallerstein, services as law clerk, April, 1915.....	50 00
June	9. Miss M. L. Hunter, services as stenographer, May, 1915.....	50 00
	14. M. L. Wallerstein, services as law clerk, May, 1915.....	50 00
	30. Miss M. L. Hunter, services as stenographer, June, 1915.....	50 00
	30. M. L. Wallerstein, services as law clerk, June, 1915.....	50 00
Aug.	2. M. L. Wallerstein, services as law clerk, July, 1915.....	50 00
	2. Miss M. L. Hunter, services as stenographer, July, 1915.....	50 00
Aug.	31. M. L. Wallerstein, services as law clerk, August, 1915.....	50 00
	31. Miss M. L. Hunter, services as stenographer, August, 1915.....	50 00
Oct.	1. M. L. Wallerstein, services as law clerk, September, 1915.....	50 00
	1. Miss M. L. Hunter, services as stenographer, September, 1915.....	50 00
		<hr/> 700 00
	31. Balance to credit of appropriation for additional clerical and stenographic services.....	\$ 500 00

Statement

Showing Law Books Purchased for Use in the Office of the Attorney General, and Paid For Out of the Appropriation to Defray Current Expenses.

1915.			
Feb.	3.	Lawyers' Co-operative Publishing Company, vol. 58, United States Supreme Court Reports.....	\$ 6 00
	25.	Everett Waddey Company, 2 copies Virginia Code Biennial, 1914.....	8 50
Mar.	2.	Appeals Press, Virginia Appeals.....	5 00
	2.	The Michie Company, 28 numbers Virginia Law Register.....	14 00
	2.	Bell Book and Stationery Company, Seligman's Essays on Taxation.....	4 00
	2.	Everett Waddey Company, 2 vols. Virginia Code, 1914.....	15 00
	9.	Bancroft-Whitney Company, 5 vols., Ruling Case Law.....	30 00
	12.	The American Law Book Company, part payment on one set Cyclopedia of Law and Procedure.....	40 00
May	4.	The Michie Company, Virginia Law Register.....	5 00
July	1.	American Law Book Company, Annotations 1914 and 1915, Cyclopedia.....	13 50
	10.	The Michie Company, 2 numbers Virginia Law Register.....	1 00
Sept.	15.	Geo. M. West, 4 numbers Virginia Law Register.....	2 00
	15.	S. B. Adkins & Company, 2 numbers Virginia Law Register.....	1 00
	25.	S. B. Adkins & Company, 3 numbers Virginia Law Register.....	1 50
			<hr/>
			\$ 156 50

APPENDIX

Virginia v. West Virginia.

SUPREME COURT OF THE UNITED STATES.

No. 2, Original.—October Term, 1914.

COMMONWEALTH OF VIRGINIA, Complainant,
v.
STATE OF WEST VIRGINIA, Defendant. } In Equity.

[June 14, 1915.]

Mr. Justice Hughes delivered the opinion of the court.

Upon the hearing in 1911, it was determined that the public debt of Virginia, as of January 1, 1861—of which West Virginia agreed to assume “an equitable proportion”—amounted to \$33,897,073.82; that, in view of a reduction secured by Virginia and with the consent of her creditors, the amount to be apportioned was \$30,563,861.56; that the apportionment should be made according to the estimated value of the property of the two States at the time of their separation, June 20, 1863; and that upon this basis the proportion of West Virginia was 23.5 per cent., making her share of the principal of the debt \$7,182,507.46. While the fundamental issues were thus decided, the controversy was not completely determined. In view of the consideration due to the character of the parties, and of the fact that the cause was “a quasi-international difference referred to this court in reliance upon the honor and constitutional obligations of the States concerned,” it was deemed advisable to go no farther at that stage but to afford opportunity for conference and adjustment. Accordingly, the question of interest was left open. *Virginia v. West Virginia*, 220 U. S. 1, 35, 36.

At the following term, a motion on the part of Virginia that the court should proceed at once to final decree was denied in the light of the public reasons urged for the granting of further time. 222 U. S. 17. Another application of this sort was made by Virginia in November, 1913, and was again refused, and the cause was assigned for final hearing in April, 1914. 231 U. S. 89.

At that time, West Virginia as a result of her investigations asked permission to file a supplemental answer asserting the existence of credits, which she claimed as against the portion of the principal debt assumed, and also alleging grounds why she should not be charged with interest. Without expressing an opinion as to the propriety of allowing any of the described items of credit, and refraining from applying the ordinary and more restricted rules of procedure which would govern in cases between private litigants, the court granted the application to the end that this public controversy should be determined only after the amplest opportunity for hearing and with full recognition of every equity that might be found to exist. The subject matter of the supplemental answer, considered as traversed by Virginia, was at once referred to Charles E. Littlefield, Esq., the Master before whom the former proceedings had been had, with directions to hear and consider such pertinent evidence as West Virginia might offer, and such counter-showing as Virginia might make, and to report the evidence with his conclusions deduced therefrom, together with a statement of his views “concerning the operation and effect of the proof thus offered, if any, upon the principal sum found to be due by the previous decree of this court”—that decree meanwhile to remain wholly unaffected. 234 U. S. 117.

The Master's report has been filed, all the questions remaining to be determined have been fully argued, and the case is before us for final decree.

At the outset, the Master states that the extensive investigation involved in the later reference, with respect to the existence and the value of the various assets claimed as credits, was then prosecuted for the first time; and that so far as these items had been referred to in the earlier proceeding, it was for an entirely different purpose in the main. The Master reports that, in his view, the assets as detailed by him were applicable according to their value as of January 1, 1861, to the public debt of Virginia which was to be apportioned as of that date; that the value of these assets then amounted to \$14,511,945.74, of which West Virginia's share—23½ per cent.—would be \$3,410,307.25. That if this amount were to be credited to her in reduction of her liability there should be offset certain moneys and stocks received by her from the Restored Government of Virginia aggregating \$541,467.76, leaving a net credit to West Virginia of \$2,868,839.49. This would reduce West Virginia's liability for principal from \$7,182,507.46 to \$4,313,667.97. The Master also concluded that West Virginia by virtue of her contract with Virginia is liable for interest from January 1, 1861, the date as of which her share of the principal is determined.

The ground for the allowance of the credits is that the moneys and securities in question had been specifically dedicated to the payment of the public debt. The moneys embraced cash in the sinking fund on January 1, 1861, and the securities had been purchased with proceeds of the debt. In 1838, the General Assembly of Virginia in authorizing the negotiation of loans provided that the stock of any joint stock company purchased with the money so borrowed, together with the dividends and other net income which might accrue therefrom to the Commonwealth, should be, and were, "appropriated and pledged" for the payment of the interest and for the final redemption of the principal borrowed. Act of April 9, 1838, sec. 3. The constitution of 1851 directed the creation of a sinking fund which was to be applied to the debt (Art. IV. sec. 29) and, with respect to the State's stocks, thus provided: "The General Assembly may, at any time, direct a sale of the stocks held by the Commonwealth in internal improvement and other companies; but the proceeds of such sale, if made before the payment of the public debt, shall constitute a part of the Sinking Fund, and be applied in like manner." *Id.*, sec. 30. In 1853, the legislature in establishing the sinking fund enacted a corresponding provision. Act of March 26, 1853, sec. 3. The question then is not one of the division of public property, merely because of its character as such. In the light of the origin and nature of the investments which the Master has reviewed and valued, and of the provisions of the constitution and statutes of the State, it is clear that these particular assets must be regarded as a fund specially devoted to the payment of the debt to be apportioned. In this view, West Virginia is entitled to have these assets taken into account in fixing the amount of her liability. It cannot be conceived that, being held for the undivided debt, it was intended that they should be applied exclusively to Virginia's share. As West Virginia is to bear 23½ per cent. of the debt as it existed on January 1, 1861, she should be credited with a similar part of the fund fairly valued, which had been pledged for its discharge. This equity is inherent in the obligation.

Both parties have filed exceptions to the report of the Master. The first two exceptions on the part of Virginia, and of her committee of bondholding creditors, raise the same point—that is, that the Master erred in selecting January 1, 1861, instead of June 20, 1863 (the date of separation), as the time as of which the value of the assets should be ascertained.

The question must be determined by reference to the terms of the contract between the two States (220 U. S. p. 28) upon which the liability is based. The undertaking is found in the provision of the constitution of West Virginia, which conditioned her admission to the Union. It is as follows (Art. VIII, sec. 8):

"An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January in the year one thousand eight hundred and sixty-one, shall be assumed by this State; and the Legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof, by a sinking fund sufficient to pay the accruing interest, and redeem the principal within thirty-four years."

It is not to be doubted that this fixed January 1, 1861, as the date of cleavage with respect to the amount of the debt to be apportioned. It is not important that this date was prior to the separation of the two States. It was competent for the

parties to fix a date, and they did so. The explanation of the selection may readily be found in the course of events, but it is sufficient to note that the selection was made. The ascertainment of the ratio of division must not be confused with the fixing of the amount to be divided. With regard to the former, we decided that we must look to the time when West Virginia became a State, that is, in determining the general resources of the two States when the separation was effected. 220 U. S. p. 34. But we did not refer to that time for the purpose of ascertaining the indebtedness which was to be apportioned. That, it was definitely stipulated by the agreement, was the debt as it stood on January 1, 1861. *Id.*, p. 27. It follows that credits then existing were to be applied as of that date. Otherwise, the net amount which equitably was to be divided would not be determined. For example, it is not disputed that on January 1, 1861, there were over eight hundred thousand dollars in cash in the sinking fund. If the amount of the debt was to be ascertained as of that date for the purpose of equitable division, the sinking fund would have to be credited as of the same date, either in reduction of the debt or by crediting to each State her proper share according to her proportion of the debt. We know of no method of accounting which would settle and finally divide the debt as of January 1, 1861, and credit the sinking fund as of 1863. The same is true of the assets which had been specifically appropriated for the payment of the debt. The very ground of the credit of their value implies that it should be allowed as of the time fixed for the taking of the account of the indebtedness to be apportioned. The exceptions referred to cannot be sustained.

There is the further exception presented by the bondholding creditors (not by Virginia) to the refusal of the Master to hold that Virginia should not be charged with a value in excess of the price or amount that she actually received. The argument treats the ultimate realization by Virginia as the criterion. We must again refer to the contract. It was not intended to create and it did not create for the two States a partnership or community of interest in these assets, or provide that they should be held in trust by Virginia for West Virginia. It contemplated that each State should assume a fixed amount of the debt—not that there should be equitable co-ownership of a sinking fund to be liquidated for joint account. It did not look to a future accounting for moneys realized after the vicissitudes of civil war. There was to be a complete and final determination of West Virginia's "equitable proportion" of the debt existing on January 1, 1861, and the account with Virginia was to be closed. As to this share of West Virginia, she was to establish her own sinking fund. There was, however, the equity arising from the fact that moneys and securities had been specially set apart for the payment of the debt. The facts as to this were well known and, as we have said, it cannot be supposed that West Virginia's fair and just proportion was to be fixed on a basis which denied her an appropriate share in the fund thus constituted, applying that which was meant for the whole only to Virginia's part. In view of the situation of the parties, and of the equitable adjustment which was contemplated, the question necessarily becomes one of valuation as of the selected date, and not solely of the amount realized in the later years.

It is argued that we should take the ultimate proceeds whenever they were received, and by discounting these upon a six per cent. basis, find their value as of January 1, 1861, (assuming that to be the proper date), and credit the amount thus ascertained as the then value of the securities. This contention cannot be maintained. It would seem to be clear that such a method could only be justified in exceptional instances, in the absence of other and better evidence. The amount of the ultimate proceeds may have probative force in particular cases, according to the proved circumstances, but it is not the criterion of the value to be determined.

We are thus brought to the findings as to value. The various items, and the amounts allowed, are classified by the Master (following the arrangement of the supplemental answer) as follows:

Class A, cash in Sinking Fund.....	\$ 819,250 03
Class B, stock of Richmond, Fredericksburg and Potomac Railroad Company.....	323,167 36
Class C, various other stocks, loans, etc., (19 items).....	7,352,594 65
Class D, interest and dividends accruing prior to January 1, 1861, and subsequently received (20 items).....	345,554 80
Class E, bank stocks.....	3,802,357 48

Class F, stocks sold to Atlantic, Mississippi and Ohio Railroad Company.....	\$ 204,688 42
Class G, stock of James River and Kanawha Company.....	1,664,333 00
Total.....	\$14,511,945 74

Virginia and the bondholding creditors do not except to these findings on the basis of January 1, 1861, with respect to Class A, Class C (items 5 to 18, inclusive), and Classes D, E, and F. They except to the findings as to the value of the securities in Class B, Class C (items 1 to 4, inclusive, and item 19), and Class G. West Virginia has filed exceptions to the findings as to the same items (save item 19 in Class C) and also excepts to the findings of value in ten other instances. There are no exceptions on either side with respect to Class A and Class D.

To avoid repetition, the exceptions of both parties will be considered in connection with each item in dispute.

1. *Class B. Stock of the Richmond, Fredericksburg and Potomac Railroad Company.* Virginia held 2,752 shares, of the par value of \$275,200, out of a total stock issue of \$1,116,100. This stock she still owns.

In connection with this item and the other valuations to which they except, Virginia and the bondholding creditors complain that the Master disregarded published quotations and based his findings upon book value and earnings. The quotations referred to appeared in the "Richmond Dispatch" a newspaper of high reputation, and embraced reports of sales by brokers of good standing. It is unquestioned that in proving the fact of market value, accredited price-current lists and market reports, including those published in trade journals or newspapers which are accepted as trustworthy, are admissible in evidence. *Cliquot's Champagne*, 3 Wall. 114, 141; *Fennerstein's Champagne*, 3 Wall. 145; *Chaffee v. United States*, 18 Wall. 516, 542; *Sisson v. Cleveland & Toledo Rwy. Co.*, 14 Mich. 489; *Cleveland & Toledo Rwy. Co. v. Perkins*, 17 Mich. 296; *Whitney v. Thacher*, 117 Mass. 523; *Fairley v. Smith*, 87 N. C. 367; *Moseley v. Johnson*, 144 N. C., 257; *Nash v. Classon*, 163 Ill. 419; *Washington Ice Co. v. Webster*, 68 Me. 43; *Harrison v. Glover*, 72 N. Y. 451. We need not stop to review the decisions that are cited with respect to the extent of the preliminary showing of authenticity that is required (*Whelan v. Lynch*, 60 N. Y. 467; *N. & W. R. R. Co. v. Reeves*, 97 Va. 284; *Fairley v. Smith*, supra) inasmuch as all the quotations asserted to have any bearing were received in evidence by the Master. We are now simply concerned with the question of their importance or weight, and whether they can be deemed to have the controlling effect that is sought to be ascribed to them.

Thus, with respect to the stock of the Richmond, Fredericksburg & Potomac Railroad Company, the published quotations were extremely meager. There was no stock exchange at Richmond and the transactions shown are very few. There is mention of two sales at 80 in November, 1860, but the number of shares sold is not stated or whether the sales were public or private. There are no reports of earlier sales or of any between that time and April, 1863. During this period, no quotations appear under the head of "Bid" or "Asked." In December, 1860, and also in the early part of 1861, under the head of "Quoted" there is mention of 76½ and 77 "Last sales," but nothing appears at these times under the head of "Sales," and the time and amount of the "last sales" referred to are not given. In short, we have very infrequent transactions, of unknown significance, which fall short of furnishing a satisfactory indication of the value of the large block of stock held by the State.

The fact, however, that there was no sufficient proof of market value was not an insuperable obstacle to the making of a fair valuation. It was clearly proper to introduce evidence tending to show the intrinsic value of the shares. *Nelson v. First National Bank*, 69 Fed. 798, 803; *Crichfield v. Julia*, 147 Fed. 65, 73; *Henry v. North American Railway Construction Co.*, 158 Fed. 79, 81; *Murray v. Stanton*, 99 Mass. 345; *Industrial & General Trust, Ltd. v. Tod*, 180 N. Y. 215, 232; *State v. Carpenter*, 51 Ohio St. 83; *Redding v. Godwin*, 44 Minn. 335; *Moffitt v. Hereford*, 132 Mo. 513. For this purpose, resort was had to corporate accounts and reports of the company's affairs. With respect to the competency of the proof (in the case both of this company and of others, the value of whose shares was in question) in the absence of supporting testimony as to the facts recited, the Master refers in his report to the provisions of the statutes of Virginia. By the act of March 15, 1856, it was provided that every railroad corporation in which the Commonwealth was interested

as a stockholder or creditor should annually make report to the Board of Public Works showing the condition of the property and containing full information with respect to capital stock, indebtedness, details of cost, physical characteristics, equipment, statistics of transportation, and a detailed statement with an appropriate classification of earnings and expenses. By the same act reports were required from canal and navigation companies. The Master says: "The State was a stockholder in all of these corporations. By her statute she required the returns to be made on oath for the information of the public. She published them for public information as true, and the publications are now a part of her public records." As such they were deemed to be admissible against her in this litigation. They were, of course, not regarded as conclusive, and the question of their weight was reserved.

In the case of the road now under consideration, the book value, based on the cost of the railroad and net current assets, was practically 150 as of January 1, 1861. It had increased from 144.2 on March 31, 1859, to 150.4 on March 31, 1861. This book value was deduced from the annual trial balances as of March 31 in each year, purporting to show assets and liabilities. The greater part of the surplus was invested in construction. There was evidence that the cost was carried forward carefully from year to year, generally under classified headings, and it did not appear to contain items that were not legitimate. The annual reports indicated the making of repairs and renewals to keep the road in good condition. Between 1848 and 1861, there were outlays amounting to \$132,841.93, largely for added equipment and improvements, which had been charged to operating expenses. As to earnings, it appeared that the road had been built about 1837. There had been paid in dividends to March 31, 1861, \$1,099,280.64. There were no dividends in 1856, 1857, and 1858. One-half of the dividends in 1854, and the dividends of 1855, 1859 and 1860, were paid in bonds; they were deducted in arriving at book value. The dividends for the eleven years ending with 1860 averaged 5.09 per cent. The Master found that capitalizing these on a six per cent. basis would give a value of \$84.83 per share. He concluded that a fair estimate was to take the average of the book value and this "earning value" as indicated by the dividends, or 117.43 per share. This gave for the total holding of the State a value of \$323,167.36, which the Master allowed.

West Virginia excepts to the finding upon the ground that the book value of 150 per share should have been taken. This would make a difference in the total value of the stock of \$89,632.64 or in the amount of West Virginia's credit of \$21,063.68.

The exception is not well taken. It is urged that the book value represents actual value where books are correctly kept. This is not necessarily true, as books may be said to be correctly kept, in a sense, when they truly state the items set forth. But cost carried forward may not be the same as present value. Despite repairs and renewals, a suitable allowance for depreciation may not have been made. It would be too much to say that there is any controlling presumption and it clearly would not have been just to value the shares on a statement of book cost and surplus without taking into consideration the earning capacity. It is also complained that if the dividends for fifteen years (from 1850 to 1864) had been taken the average would have been higher; but this included dividends after 1861 paid in Confederate currency. It may be said that in this instance (as distinguished from others to which we shall presently refer) the Master arrived at his 'earning value' by taking the dividends declared instead of the actual net receipts, and that the latter exceeded the former. But the statement introduced gave the dividends; there was no separate computation of earnings, and these are not shown except as they may be computed from the trial balances which we have only for three years prior to March 30, 1861.

The Master sought to give proper weight to all considerations. His estimate upon this record could be only an approximation, but aside from any question as to the propriety of the precise method of calculation employed, there can be no doubt that the result has support in the evidence and does full justice to West Virginia. The exceptions are overruled.

2. *Class C. Items 1 to 4, inclusive.* These are railroad stocks and loans. In view of what has already been said, the exceptions may be disposed of briefly. The exception of Virginia and the bondholding creditors is substantially the same as that taken with respect to the item in Class B, and West Virginia insists that the full book value of the securities should have been allowed.

Item 1.—17,490 shares (par value \$50) of the stock of the Orange and Alexandria

Railroad Company. There was, in addition, a loan of \$398,670.60 to this company for which the Master allowed the face value.

There are no market quotations of this stock in 1860 or 1861. The company was incorporated about the year 1848. The book value was 50.27 in 1856, and 53.32 in 1860. This was deduced from the trial balance of 1856 and from the subsequent profits set forth by the reports to the State. There was no showing of allowance for depreciation. Dividends had been paid on preferred stock in 1857-9. It does not appear that any dividends were declared in 1860 or 1861, although apparently dividends to the amount of \$31,604.09 had accrued prior to January 1, 1861, for which the State received dividend bonds; the time of the declaration of these is not given. The road was operated at a profit. Capitalizing the profits for five years ending with 1860 at 6 per cent. the Master found a value of 12.28, and taking the average of this value and the book value (53.32), he estimated the shares at 32.80, or at a total value of \$573,672.

Item 2.—12,000 shares (par value \$100) of the stock of the Richmond and Danville Railroad Company. Loan of \$565,803.34 was allowed at face value.

There were published quotations of two sales, one in November, 1860, at 60, and another in January, 1861, at 57. The report does not give the number of shares sold or whether the sale was public or private. There is reference at various dates under "Quoted" to "Last sales," but actual sales are not stated prior to 1863, except as mentioned above. The company was incorporated in 1847. The book value of the stock in 1860 (derived from the trial balance of 1856 and the later profits) was 137.37. The total stock was \$1,981,197.50. Apparently, only one dividend had been declared—in 1859, at four per cent. But the profits were large. For six years they had been about nine per cent., and in 1860 they rose to about eleven per cent. The average for five years ending with 1860 was \$179,782.12, which capitalized on a six per cent. basis would give a stock value of \$2,996,368.67. In view of this showing of profit the Master allowed the book value, with a deduction of five per cent. or 132.37 per share, making for the 12,000 shares held by the State an allowance of \$1,588,440.

The exception of West Virginia in this instance merely relates to the deduction of five per cent. The Master treated the book value as virtually a "liquidation value" and held that to arrive at a fair estimate of the actual value there should be some deduction for the expense of realization and this, upon the testimony of the expert for West Virginia, he fixed at five per cent.

Item 3.—3,856 shares (par value \$100) of the Richmond and Petersburg Railroad Company. Dividend bonds amounting to \$33,408 were allowed at face value.

There are no quotations under the head of "Sales," but simply references under "Quoted" to "Last sales" (from 64 to 57½), without particulars. The road had been incorporated in 1836 and its outstanding stock in 1860 amounted to \$835,750. The book value at that time was 121.86. The dividends for four years had averaged nearly six per cent. The yearly profits averaged more, or \$53,627.66, which capitalized gave a share value of 106.95. The Master took the average of the book value and so-called earning value, allowing per share 114.40, or for the total of the State's stock, \$441,126.40.

Item 4.—Stock of the Virginia Central Railroad Company. The State held on September 30, 1860, \$1,891,670.68, in par value, of this stock, out of the then total stock of \$3,152,854.23. By December 30, 1860, through additional payments on her subscription, the holdings of the State were increased to \$1,927,382.57. There were also a loan of \$90,032.82 and dividend bonds amounting to \$143,508 for which face value was allowed.

There are quotations of two sales in November, 1860, at 50, but without details as to amount sold or character of sale. There are no other quotations of actual sales down to 1863, but simply references to "Last sales," as in the other cases above noted. The book value per share in 1860 was 131.16. Dividends were paid apparently to the amount of a little more than four per cent. in 1859, and nearly five per cent. in 1860. Profits for four years, ending with 1860, averaged \$221,234.06 which capitalized at six per cent. gave a share value of 116.95. Taking the average of this and the book value, or 124.05, the Master allowed for the shares owned by the State, \$2,390,918.08.

It must be concluded that with respect to these four securities (as in the case of the item in Class B) the quotations did not afford sufficient proof of market value to sustain the contentions of Virginia. On the other hand, in the absence of a more

complete showing with respect to the physical property and its condition, the expenditures for maintenance and the extent of depreciation, it is wholly impossible to say that the book cost represented the actual value at the time to which the inquiry was addressed. Book cost, as we have said, would be a more or less doubtful criterion. After the lapse of so many years, an appraisal of this sort is obviously a matter of the greatest difficulty, and while the Master's valuation of these stocks may be regarded as a liberal one it is probably as fair an estimate as could be made upon the facts presented.

3. *Class C.* Items 6, 8, 10, and 17. The exceptions in these instances are solely by West Virginia.

Item 6. Stock of the Alexandria, Loudoun and Hampshire Railroad Company. It appeared that between the time of incorporation (1853) and January 1, 1861, Virginia had invested in this stock \$993,248. There were further investments making the total in April, 1862, \$1,017,248. All this stock was sold by Virginia on November 25, 1867, at five dollars a share, that is, for \$50,862.40. The proportion of this price applicable to the stock held on January 1, 1861, was \$49,662.05. This was the amount first stated as its value in West Virginia's exhibit of the values of items in Class C; but, subsequently, in the course of the proceedings the claim that the stock should be valued at par was advanced. The Master estimated the value at \$35,096.85, that is, taking the amount as of January 1, 1861, which would produce the above stated sum of \$49,662.05 at the date of sale.

The evidence, as West Virginia concedes, is meager. There are no market quotations. It does not appear that any dividends had ever been paid or that any profits had ever been earned. There is no statement of assets and liabilities, of traffic conditions, or of the results of operation. There is little knowledge of the physical condition of the road. West Virginia's contention is that the stock should be valued at par upon the ground that this is presumed to be the value and that Virginia had paid for it at that rate.

Statements may be found to the effect that par value is *prima facie* actual value (*Appeal of Harris*, 12 Atl. Rep., 743; *Moffitt v. Hereford*, *supra*), but if such statements can be deemed to announce a comprehensive rule, to be applied in the absence of evidence as to the property and business of the corporation, we cannot regard it as well founded. There is no such presumption of law and common experience negatives rather than raises such an inference of fact. We took this view in *Fogg v. Blair*, 139 U. S. 118, 127, when we criticized the supposition "that the court, in the absence of averment or proof to the contrary would assume that it (stock) was worth par, or had substantial value." See also *Griggs v. Day*, 158, N. Y. 1, 23; *Warren v. Stikeman*, 84 App. Div. (N. Y.), 610; *Beatty v. Johnson*, 66 Ark. 529. Shares represent the proportionate interest of the shareholders in the corporate enterprise, and a rule that this interest in the absence of all supporting evidence should be taken as actually worth the par of the shares would be wholly artificial. There is no exigency in the administration of justice which requires or justifies such an extreme assumption.

In the present case, upon this record, it would be wholly improper to say that this stock was worth \$50,862.40. Nor is there any evidence upon which we can ascribe value to it apart from the fact of the subsequent sale. West Virginia in claiming the credit had the burden of proving value, and it was not sustained save as value could be deduced from the amount of the proceeds. The exception must be overruled.

Item 8. Loan to Virginia and Tennessee Railroad Company.

In 1853 Virginia made loan to this company of \$1,000,000, which was secured by mortgage. The loan was outstanding on January 1, 1861. In 1863, payments were made in Confederate money amounting to \$886,685—equal on a gold basis to \$97,601.46. These payments the Board of Public Works of Virginia attempted to repudiate by its resolution of February 4, 1868, upon the ground that the Second Auditor of Virginia had no authority to receive them. That the moneys were returned is not clearly established. The Master finding no evidence of the value of the loan aside from the fact that these payments had been made took their value (in gold), computed as of January 1, 1861, and allowed the sum of \$84,799.90. West Virginia excepts upon the ground that the loan should have been taken at her valuation of \$886,685.

The company was incorporated in 1836 under the name of the Lynchburg and Tennessee Railroad Company. In 1860 Virginia held stock of the par value

of \$2,270,525 and her holdings were subsequently increased to \$2,300,000. It is urged that the book value of the shares on June 30, 1860, was 99.90, but we have no statement of assets and liabilities or of net earnings. The only year for which the result of operation is given (the one preceding June 30, 1860) showed a loss. It does not appear that any dividends were paid prior to 1864, and then Virginia received \$138,000, which the Master figures as being equivalent in gold to one-half of one per cent.

In 1861 interest had accumulated upon the loan above mentioned to the amount of \$280,000. Between 1861 and 1863 payments were made aggregating this amount in Confederate currency, the gold equivalent being \$91,986.33. This accrued interest was made the subject of separate claim by West Virginia and was allowed in Class D at the value (in gold) of the payments, as of January 1, 1861, that is, \$86,133.63. And to this finding there is no exception.

In 1870 Virginia transferred her stock in this road and whatever interest she had in the loan, together with her interest in other stocks and loans, to the Atlantic, Mississippi and Ohio Railroad Company for \$4,000,000, secured by a second mortgage for that amount, subject to a first mortgage of not more than \$15,000,000, which was to provide for existing liens, new construction and repairs and improvements. The payment of the \$4,000,000 was to be in instalments of \$500,000 each, the first of which was to be made fifteen years later, in 1885. In addition to the stock and loan of the Virginia and Tennessee Railroad Company, there were embraced in this sale by Virginia 12,000 shares of the stock of the Norfolk and Petersburg Railroad Company, together with her claim for the unpaid balance (\$163,000), and interest, of a loan of \$300,000 to that company; 1,034 shares of the stock of the Virginia and Kentucky Railroad Company; and 8,035 shares of the stock of the South Side Railroad Company with the claim of the State upon an outstanding loan to the latter of \$800,000. This last-mentioned loan (to the South Side Railroad Company) constitutes Item 9, in Class C, and was found by the Master to be of no value; and to this ruling there is no exception. Both that loan and the one, now in question, to the Virginia and Tennessee Railroad Company, were included in the tabulation of the securities transferred but no value was assigned to them. The terms of the sale as the Master well says, "are strongly indicative of an abortive, profitless enterprise." He adds that, "after the lapse of ten years, and the expenditure of approximately \$5,000,000 of new money," it "again met with shipwreck, and the State was able to save as salvage from the wreckage, and that apparently through the grace of the first mortgagees, only the sum of \$500,000 in 1882." In the absence of any satisfactory evidence of value with respect to the stocks thus transferred, the Master in connection with another item of claim to which we shall presently refer gave credit for this realization, discounted as of January 1, 1861, that is, for the sum of \$204,688.42.

Upon this record, it certainly cannot be assumed that the loan to the Virginia and Tennessee Railroad Company was worth par, and in fact West Virginia has claimed on this item not par, but \$886,685, the amount which was subsequently paid in Confederate currency. Apart from this payment, we find no basis whatever for an estimate of value as of January 1, 1861. The payment itself cannot be taken for more than that it was worth in gold and the Master in making his allowance on that basis went as far as the proof justified.

Item 10. Loan to Norfolk and Petersburg Railroad Company.

This is the loan which we have mentioned in connection with the sale in 1870 to the Atlantic, Mississippi and Ohio Railroad Company. At that time it appeared that the unpaid balance was \$163,000. On January 1, 1861, the loan amounted to \$300,000, and West Virginia contends that the face value should be allowed. The doubtful character of the claim is indicated by the fact that in one of West Virginia's exhibits the loan is scheduled with the statement under the head of "Value," January 1, 1861—"No claim—too indeterminate."

As already stated, Virginia held 12,000 shares of the stock of this company; but we have no facts with respect to its condition, property, or operation, which would enable us to assign a value to the stock as of January 1, 1861. No net earnings are shown and for the year preceding March 31, 1861, it appears that the road was operated at a large loss.

On this showing we cannot say that the loan was worth its face. There is, in fact, nothing to support a valuation, save the moneys realized. The sum of \$137,000 was paid in two instalments in 1867 and 1868, and the remainder of \$163,000, with

certain accrued interest, entered into the realization of 1882. The value of the total amount thus obtained, calculated as of January 1, 1861, or \$108,415.45, was allowed. We find no ground for any larger credit.

Item 17. Claim against the United States.

Virginia made advances to the Government in aid of the War of 1812. These apparently were refunded but there remained a question as to interest. Virginia insisted that there was a balance of interest due on July 1, 1814, amounting to \$298,369.74, which she claimed with interest from that date. On the other hand, the United States held bonds of Virginia (which had been purchased by the Government as trustee for certain Indian tribes) amounting to \$581,800, and also held \$13,000 of bonds of the Chesapeake and Ohio Canal Company, guaranteed by Virginia. A settlement was effected under the Act of May 27, 1902 (32 Stat. 235), by which February 11, 1894, was selected as the date of adjustment and the interest was calculated to that date on each side at six per cent. In the case of Virginia's bonds, the interest ran from January 1, 1861. The total claim of Virginia amounted to \$1,723,582.53, and that of the Government (after certain credits of interest received and with the addition of \$16,923.70, which had been paid to the restored State of Virginia) amounted to a total of \$1,723,577.03. The difference on this adjustment was only \$5.50, which was paid to Virginia in cash.

West Virginia asked that there should be allowed, as an asset of the undivided State, the amount of this claim of Virginia against the Government to the extent of the principal with interest to January 1, 1861, that is, \$1,130,821.31—to the end that West Virginia should receive in the final adjustment of its liability a credit of 23½ per cent. of this amount.

The Master noted that the mutual claims of Virginia and the United States had been adjusted as of a selected date (long past) when with interest they practically balanced each other. He concluded that this convenient method of ending the controversy did not necessarily involve a determination of the cash values of the claims upon either side. He decided not to allow West Virginia's claim by virtue of this settlement so far as it involved interest. He found, however, that the bonds of Virginia (\$581,800) which entered into the settlement were embraced in the indebtedness which was to be apportioned. The Master thought, therefore, that as their full face value was included in the aggregate of the debt with respect to which West Virginia was to be charged, an appropriate credit on their account should be made. For this purpose, he took the face of the bonds with the cash item of \$5.50, or \$581,805.50 in all, as received in 1903, and calculated the value of that sum as of January 1, 1861. This amount, to-wit, \$164,584.30, he allowed.

West Virginia excepts, insisting that the sum allowed should have been \$1,130,-821.31.

The proper disposition of this item, it would seem, is to treat the common asset as applied to the redemption of a portion of the common debt. That is, the claim of Virginia against the United States was devoted to the payment of the bonds of Virginia, amounting to \$581,800, which formed a part of the debt to be divided. It is equitable that West Virginia being charged with her established share of the whole debt should be credited with the same share of the reduction thus accomplished. This will properly be effected by including the amount of the face value of these bonds in the total sum, on account of which as equitably applicable to the debt, West Virginia is to receive credit. We find no warrant for the diminution of this allowance through such a calculation as that made by the Master. Virginia's bonds, as has been said, constituted the principal of the Government's claim as it existed on January 1, 1861, and were discharged accordingly. What remained of Virginia's claim against the Government—that is, of the common asset—was exhausted in the payment of the interest subsequently accruing upon the common debt, and if any equity exists with respect thereto, it is one to be adjusted in the disposition of the question of interest.

It follows that upon the item now under consideration there should have been allowed the sum of \$581,800 instead of \$164,584.30, making a difference of \$417, 215.70.

4. *Class C. Item 19. Dividend bond, \$149,984, of the Richmond, Fredericksburg and Potomac Railroad Company.* The Master allowed this item at the face value.

The exception is taken by Virginia and the bondholding creditors upon the ground that the bond was paid in 1863 in Confederate money.

This, however, is not a case where there is resort to the subsequent realization

as evidence of value. On the contrary, the railroad company, as the Master found, was operating at a profit. Its stock (Class B, *supra*.) was valued at 117.43. The bond, upon the evidence, was a good asset at its face on January 1, 1861, and was properly valued as such in the same manner as the loans included in Class C, Items 1 to 4.

5. *Class E. Items 1 to 4, inclusive. Bank stocks.*

The shares embraced in these items and the values fixed by the Master are as follows:

Farmers' Bank of Virginia, 9,626 shares at 102.89.....	\$ 990,419 14
Bank of Virginia, 13,766 shares at 71.49.....	984,131 34
Bank of the Valley, 4,839 shares at 102.6.....	496,481 40
Exchange Bank, 8,755 shares at 102.2.....	894,761 00

In each case the Master took the book value with a deduction of five per cent. The sole exception is by West Virginia, who contends that the full book value should have been allowed.

It is urged that Virginia continued to own the shares and that no process of liquidation was necessary. But the deduction did not proceed upon the view that an actual liquidation was required. The Master's conclusion was based upon the unassailable ground that the book value only represented the amount which, according to the books, could be obtained from the assets upon a liquidation; that hence the book value did not represent the actual net value of the shares; and that this actual value could not be estimated without a proper allowance for the expense of realization. He made this allowance upon a basis sustained by the evidence, and there is no reason for disturbing his finding.

6. *Class F. Securities sold to the Atlantic, Mississippi and Ohio Railroad Company.*

These embraced the stocks to which reference has been made in the discussion of Items 8 and 10 of Class C, *supra*. The Master, as stated, allowed for these—\$204,688.42. West Virginia excepts because the Master did not allow either the book value of \$4,276,044.39 or the sum of \$4,000,000 for which the second mortgage, already mentioned, was given at the time of the sale in 1870. We have commented upon the lack of evidence with respect to the value of the shares of the Virginia and Tennessee Railroad Company and the Norfolk and Petersburg Railroad Company, two of the four companies in question; and also upon the fact that in the case of the third company, the South Side Railroad Company, a loan of \$800,000 outstanding on January 1, 1861, was found by the Master to be of no value and no exception has been taken to the finding. With respect to both the company last mentioned and the remaining company, the Virginia and Kentucky Railroad Company, as well as in the case of the two others, the record discloses no facts with respect to condition, assets and liabilities, and results of operation, which can be deemed to furnish any adequate ground for a conclusion as to actual worth. The schedule of 1870, at the time of the transfer of these stocks to the Atlantic, Mississippi and Ohio Railroad Company simply gives par values and, as has been said, the purchaser of these stocks, and other items, executed therefor a second mortgage for \$4,000,000 payable in annual instalments of \$500,000 each, the first payment being postponed until 1885. We find in this transaction no proper basis for a valuation as of 1861. Notwithstanding the expenditure of large amounts upon the properties, the second mortgage proved to be worthless except for the sum of \$500,000 paid in 1882 on the foreclosure of the first mortgage, and this payment it would seem was not based upon the actual value of the property, but was rather in the nature of a concession to assure a complete title without controversy. There is no warrant in the evidence for any greater allowance than that which the Master gave.

7. *Class G. Stock of the James River and Kanawha Company.*

The State held \$10,400,000, in par value, of this stock, or 91.77 per cent. of the entire capital stock, at a total cost of \$9,547,582.21. The Master allowed as its value \$1,664,333. The exception is by Virginia, and the bondholding creditors, it being insisted that the stock had no value.

The record contains voluminous reports, statistics and testimony, with respect to this historic enterprise, showing the facts as to its development, the property which the company owned, and the course of its business. It would be almost impossible briefly to review these facts, and their recital at length would serve no useful purpose. The capital, as has been said, was mainly supplied by the State

and by January 1, 1861, there had been completed approximately one hundred and ninety-five miles of the canal, from Richmond to Buchanan, with a branch of twenty-two miles to Lexington. There had been no dividends, save one of \$10,042 in 1836. In addition to the original investment in the stock, there had been an increasing indebtedness to the State which amounted in the year 1860 to \$7,560,214.44. As the company was unable to earn sufficient to pay the interest upon this indebtedness, the State under the Act of March 23, 1860, provided for an increase of capital stock and took in satisfaction of its debt (and to make specified provision for floating debt) 74,000 shares in six per cent. preferred stock. Upon the assumption that this exchange had been effected and that the debt of the State had been converted into capital, eliminating the interest charge, it appeared that the net operating revenue in 1860 amounted to \$151,000.14. If computed on the same basis, it appeared that the average annual net operating revenue for seven years, including 1860, would have been \$115,554.21, and for twenty-five years, \$111,800. It seems, however, that there were certain outstanding bonds amounting to \$199,000 upon which the company was liable, and that to get the net earnings, exclusive of any return to the State, it would be necessary to deduct the annual interest upon this sum, that is, \$11,940. The Master concluded that upon the evidence the only basis for computation of value was to take the average net returns for twenty-five years (\$111,800), deducting this interest (\$11,940), or \$99,860. Capitalizing these earnings at six per cent. the value of the property was fixed at the sum above stated, to-wit, \$1,664,333. The Master thought that this estimate was a liberal one in view of the fact that the computation did not make allowance for depreciation, and of the diminished returns of the succeeding years. But the basis chosen seemed to be the only one upon which he could reach a reasonable conclusion. In view of the property shown to have been owned by the company, and the evidence as to the results of operation, we think that the exception of Virginia and the bondholding creditors cannot be sustained and that the Master's appraisal should be accepted.

That West Virginia, after this painstaking investigation, was not dissatisfied with the result is apparently the fact that in filing its exceptions to the Master's report, it took no exception to his finding as to this item. In its brief, however, in discussion Virginia's exception, West Virginia states that it "now excepts" to the Master's finding because of his failure to allow \$2,516,666 instead of \$1,664,333. While this might not be regarded as a formal exception which should receive consideration, we should not be disposed to ignore it if it had merit, but should consider the objection in the same untechnical spirit in which the controversy has been dealt with from the beginning. But we do not think that the exception is well taken. The suggested value is reached by capitalizing the net operating revenue of a single year, that is, by taking the return for 1860 at the amount above stated, \$151,000.14, which on a six per cent. basis would give a value of \$2,516,666. This, however, makes no allowance for the interest charge of \$11,940; and, further, we think it would be wholly unjustifiable in the light of the history of this company to capitalize upon the return of one year. It is objected, however, that the Master reached his result by taking the average net returns for a period of twenty-five years which included the early years of the undertaking, but if we take the net returns of seven years preceding September 30, 1860, as shown by the exhibit prepared by West Virginia's accountant, or \$115,554.21, and deduct the interest charge of \$11,940, there remains \$103,614.21 as the annual net profit, exclusive of any return to the State. This sum capitalized at six per cent. would show a value of \$1,726,903, a sum very slightly in excess of the Master's estimate. Having regard to the absence of allowance for depreciation, it cannot be said that West Virginia is entitled to have the estimate increased.

8. *Class G. Stock of the Manassas Gap Railroad Company.*

Virginia owned \$2,105,000 of this stock in par value, out of a total of \$3,322,164.67. The Master found no evidence upon which he could assign a value to this stock, and West Virginia excepts insisting that it should have been estimated to be worth par.

In the supplemental answer, a value was placed upon the stock at 25 per cent. of the par value in view of the lapse of time and the lack of clear evidence as to actual value. Even this, however, cannot be regarded as more than a conjecture. It was shown before the Master that the road had been operated as far as Mt. Jackson and was in course of construction to Harrisonburg, but no satisfactory data were furnished as to the condition of property, liabilities, earnings, etc., upon which any finding of

value could properly be made. It is, therefore, suggested that in the absence of proof to the contrary the stock should be presumed to be worth par, but, as already stated, no such assumption is justified. There was a failure of proof as to this item and the Master properly disallowed it.

9. Under her general exception, West Virginia raises two further objections which affect the credits to be allowed.

(1) It appeared that certain counties in West Virginia, after the organization of the State, paid taxes, fines, etc., to Virginia amounting to \$180,264.45. Credit for this was asked by West Virginia, but was refused by the Master. He found that the circumstances under which this amount was assessed were "involved in a great deal of doubt and uncertainty." It appeared that a balance could not fairly be struck with respect to the sums thus paid without taking into consideration the expenses of the actual government of the counties in question for the maintenance of which it was raised. As the Master says: "The amount" (of these expenses) "however was not known. It may have been more, it may have been less than the amount paid in taxes." The record does not furnish any ground for the allowance of this item.

(2) The Master concluded that if West Virginia were credited with her proportionate share of the assets which have been valued, she should be charged with the moneys and securities which she received from the Restored Government of Virginia, to-wit, \$170,771.46 in money, and \$370,696.30 in securities, making a total of \$541,467.76. West Virginia makes no objection to the charge of the securities, but excepts to the ruling as to the money. There seems to be no doubt that the money was in fact received from the Restored Government of Virginia, and that it was money belonging to Virginia which was turned over to the new State. It would seem to be clearly equitable that, if the credits in question are allowed, this charge should be made.

10. The further exception is taken by the bondholding creditors (not by Virginia) to the failure of the Master to hold that Virginia was entitled to apply the assets, thus valued, to various obligations not embraced in the principal debt which, as heretofore determined, is to be apportioned. The contention thus urged is but a repetition in another form of the arguments which have already been considered in reaching the conclusion that these assets should be regarded as specifically dedicated to the discharge of the indebtedness to be apportioned, and that West Virginia in assuming an equitable proportion of that indebtedness was entitled to a credit accordingly. The exception cannot be sustained.

All the exceptions relating to the credits in question have now been considered.

The values as thus ascertained are:

Class A.....	\$ 819,250 03
Class B.....	323,167 36
Class C.....	
Allowed by Master.....	\$ 7,352,594 65
Increase in Item 17.....	417,215 70
	<hr/>
	7,769,810 35
Class D.....	345,554 80
Class E.....	3,802,357 48
Class F.....	204,688 42
Class G.....	1,664,333 00
	<hr/>
Total.....	\$14,929,161 44
	<hr/>
Credit to West Virginia of 23½ per cent. of \$14,929,161.44.....	\$ 3,508,352 94
Less money and securities received by West Virginia from Restored Government of Virginia as found by Master.....	541,467 76
	<hr/>
Net credit to West Virginia.....	\$ 2,966,885 18

This would give as West Virginia's equitable proportion of the principal debt the sum of \$4,215,622.28, as follows:

23½ per cent. of principal debt (\$30,563,861.56) to be apportioned. \$ 7,182,507 46

Deduct credit to West Virginia, as above..... 2,966,885 18

West Virginia's share of principal debt..... \$ 4,215,622 28

Interest. There remains the question of West Virginia's liability for interest.

This liability is contested upon the grounds that the claim of Virginia has been unliquidated and indefinite, that interest is not recoverable as damages save on default in the payment of an amount which is certain or susceptible of ascertainment, that there was no promise on the part of West Virginia to pay interest, that unearned interest was not a part of the debt of which she agreed to assume an equitable proportion, and that in the absence of an express promise interest is not to be charged against a sovereign State.

All the questions thus raised may be resolved by the determination of the fair intendment of the contract itself. If liability for interest is within the scope of the agreement no objection can lie on the ground of uncertainty in amount, as the promise attaches to the amount found to be payable. In this view, also, no question would be involved as to an award of interest by way of damages as distinguished from a recovery by virtue of the terms of the undertaking. Nor can it be deemed in derogation of the sovereignty of the State that she should be charged with interest if her agreement properly construed so provides. The fundamental question is, what does the contract mean?

This subject has been discussed elaborately—from every possible point of view—in the comprehensive arguments which have been presented, but the considerations which must be deemed to be controlling are clearly defined and may be succinctly stated.

The subject matter of the contract was a "public debt." That debt consisted of outstanding bonds. Some of these were redeemable at pleasure; but for the most part they were unmaturing and had many years to run. These bonds provided for the payment of interest as well as principal; they were interest-bearing obligations. It is true that on January 1, 1861, there was interest due and unpaid, and apparently there were also some matured bonds; but these amounted to but a small fraction of the "public debt." The debt to which the parties referred—as it existed prior to and on January 1, 1861—was not a debt in the sense of a specific sum then due and payable, but manifestly was the liability evidenced by the outstanding obligations of which the promised interest was an integral part.

This being the subject matter of the agreement, its express words have a clear significance. It was provided that West Virginia should "*assume*" her equitable proportion of the public debt. This was not an undertaking simply to pay a percentage of principal. West Virginia was to take upon herself a just share of the public burden represented by the bonds, and we cannot regard this provision as subject to an unexpressed limitation that interest should be excluded. A contract to assume an interest-bearing debt means the taking over of the liability for interest as well as principal. And the same is true *pro tanto* of the assumption of an "equitable proportion" of the debt. Both parties unquestionably contemplated that interest would accrue upon these bonds. They were making provision for payment and not looking to default. Certainly, Virginia was not expected to bear the burden of the interest accruing on the share to be taken by West Virginia. The very purpose of the contract was to secure—as between these parties—Virginia's exoneration with respect to that share. As it was plainly not the intention either that the bondholders should go without interest as to the proportion assumed by West Virginia, or that there should be left with Virginia the entire burden of meeting the interest on the outstanding bonds while the principal was apportioned, it must follow that the assumption of an equitable share by West Virginia related to the liability for both principal and interest. We cannot read the contract otherwise.

Nor do we think that in the construction of the provision of the constitution of West Virginia (Art. VIII, sec. 8), which defines her engagement, the second clause can be ignored. After stating that an "equitable proportion" of the public debt shall be assumed by West Virginia, it is provided that "the legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof, by a sinking fund sufficient to pay the accruing interest, and redeem the principal within thirty-four years." If there could otherwise be any doubt as to what was embraced in the contract of assumption, this provision would dissipate it. It is true, as we have said, that this direction to the legislature did not undo the contract by making "the representative and mouthpiece of one of the parties the sole tribunal for its enforcement." But it throws a clear light upon what the parties had in mind. The "accruing interest" had not escaped their attention. And it was because the payment of accruing interest was an essential part of the obligation to be assumed in

the division of the "public debt," that the legislature was enjoined to establish an adequate fund by which the assumed liability in its full scope would be discharged.

The lapse of time has not changed the substance of the agreement. It is not necessary to review the history of the intervening years or to pass upon the contentions of the parties with respect to responsibility for delay. The contract is still to be interpreted according to its true intent, although altered conditions may have varied the form of fulfillment. It is urged that there are equities to be considered, but we can find none which go so far as to destroy the claim. On the contrary, there is no escape from the conclusion that there was a contract duty on the part of West Virginia to provide for accruing interest as a part of the equitable proportion assumed, and that it would be highly inequitable as between the two States that Virginia as to her share should bear interest charges for these fifty years while West Virginia on her part should simply pay a percentage of principal reduced by the credits which have been allowed.

While liability for interest exists, there is still the question as to the rate at which interest should be allowed. Virginia, it appears, has not paid upon her estimated share the rate which was reserved in the bonds. This fact, we think, raises an equity demanding recognition. In fixing West Virginia's share of the principal, we took into account the fact that Virginia, by the consent of the creditors, had reduced her own share below the amount which it would have been upon the basis we found to be correct, and we gave appropriate credit to West Virginia on account of this difference. 220 U. S. p. 35. And it would not be proper to hold West Virginia to the rate of interest specified in the bonds when Virginia as to her share has made arrangement with the creditors for a lower rate. The provision that the share of West Virginia shall be an equitable proportion is the dominating principle of the award, and while Virginia as we have held is entitled to enforce the contract, in the due performance of which her honor and credit are concerned, her action with respect to her own estimated share must be taken into consideration.

In 1866, the General Assembly of Virginia provided for the funding of unpaid interest, on bonds issued prior to April 17, 1861, in bonds bearing the same rate of interest. It appears in the evidence that the bonds issued under this act for unpaid interest amounted to \$6,576,913.60. It is also stated on behalf of Virginia that there was paid in cash from January 1, 1861, to December 31, 1871, on account of interest, the aggregate sum of \$7,094,103.61, making a total of \$13,671,017.21. Of these cash payments, \$4,519,065.04 were paid in Confederate currency between January 1, 1861, and April 1, 1865, the equivalent of which in gold is stated to be \$2,261,358.91, making the total money payments for interest during this period on a gold basis equal to \$4,836,397.48.

By the Act of March 30, 1871, Virginia, assuming that the equitable share of West Virginia was about one-third, made provision for the issue of new bonds which, as the bill in the present case sets forth, were to be "for two-thirds of the principal, and for two-thirds of the past due interest, and also for two-thirds of the interest on that accrued interest," which accrued interest to the extent above mentioned had been funded in bonds issued after the War. The new bonds were to bear interest at the same rate as the old bonds—for the most part, six per cent. For the remaining one-third, there was to be issued upon the surrender of the old bond, a certificate of even date with the new bond setting forth amount which was not funded, that payment with interest would be provided for in accordance with such settlement as should be made between Virginia and West Virginia, and that the old bonds so far as unfunded were held "in trust for the holder or his assignees." Under this act as was said in *Hartman v. Greenhow*, 102 U. S. 672, 679, "a large number of the creditors of the State, holding bonds amounting, including interest thereon, to about thirty millions of dollars, surrendered them and took new bonds with interest coupons annexed for two-thirds of their amount and certificates for the balance." It should be added that it appears that there were certain bonds aggregating \$864,842.03 in principal, which were held by educational institutions in Virginia, for which Virginia issued new bonds in full without deducting one-third for West Virginia's share. It is testified that upon these last-mentioned bonds six per cent. interest has been paid continuously.

As it appeared that even under the measure of 1871 Virginia had assumed a heavier burden than she felt able to bear, other plans were attempted for the settlement of the State debt. By the Act of March 28, 1879, the effort was made to accomplish a refunding upon the basis of fifty per cent. of accrued interest and one

hundred per cent. of principal (of Virginia's estimated share) in new bonds payable in forty years (and redeemable after ten years) with interest at three per cent. for ten years, four per cent. for twenty years, and five per cent. for ten years. Under this statute, the two-thirds' basis was maintained and those making the exchange, in cases where certificates for the remaining one-third had not already been issued, were to receive certificates like those authorized by the Act of 1871.

While there was a refunding to some extent upon this basis, the legislation of 1879 very largely failed to accomplish its purpose, and another attempt was made under the Act of February 14, 1882. By this, the outstanding bonds were divided into classes. For those which had been issued under the Act of 1871, new bonds were authorized on the basis of fifty-three per cent. of principal and one hundred per cent. of accrued interest. The act recited that the net revenues of the State did not warrant the assumption of a larger rate of interest than three per cent. upon the full amount of Virginia's equitable share of the old debt as the same was ascertained and formally declared by an account set forth in the preamble—an account stated on the two-thirds' basis. The new bonds were for fifty years (redeemable after July 1, 1900) with interest at three per cent. until paid.

As shown by the account contained in this act, the payments in money from January 1, 1861, to July 1, 1871, for interest, amounted to \$7,256,723.66.* In this account, the entire amount thus paid was credited against the two-thirds of the accrued interest (or interest on two-thirds of the principal) which Virginia had estimated to be her equitable share. The interest on this share exceeded these payments. It also appeared that between 1863 and 1871 bonds had been redeemed to the amount of \$3,710,449.67 and this amount was credited against Virginia's two-thirds of principal. The statement of account was made for the purpose of explaining and justifying the attempted readjustment.

The plan of 1882 proved abortive. New bonds to a considerable amount were issued under its provisions, but the bondholders for the most part refused to accede to its terms and apparently there were outstanding on February 20, 1892 (unfunded under the Act of 1882) about \$28,000,000 of principal and interest (to July 1, 1891), that is, as representing Virginia's assumed proportion. On that date an act was passed by the General Assembly which provided for the refunding of these bonds on the basis of nineteen-twenty-eighths of the principal and accrued interest (as of July 1, 1891) in new bonds bearing two per cent. interest for ten years and three per cent. until paid. The bonds were to be for one hundred years, and were redeemable after July 1, 1906. The refunding was carefully limited to the two-thirds' basis and certificates were to be issued for the remaining one-third similar to those above described. In 1894 provision was made for further time for an exchange on the stated basis, which however was not to be extended beyond the end of the year. There were additional bonds, said to amount to over \$2,400,000, held by educational corporations, which were refunded under a statute passed February 23, 1892, in new obligations for their full amount of principal and interest.

Under this legislation the refunding was accomplished. Virginia alleges in her bill that "at length a final and satisfactory settlement of the portion of the debt of the original State which Virginia should assume and pay was definitely concluded by the Act of February 20, 1892."

In the light of this financial history, we come to the consideration of Virginia's payments. It is stated on behalf of Virginia that the amount of interest paid by her from January 1, 1861, to September 30, 1913, (the latest date to which the calculation has been made) amounted to \$41,071,219.02. Taking Virginia's share of principal at the amount assumed by her, as computed in our former decision (220 U. S. p. 35), that is, \$22,598,049.21 (an amount somewhat less than her true proportion of the total debt of January 1, 1861), the total interest paid as above stated, would be the equivalent of simple interest upon that principal at a rate somewhat less than three and one-half per cent.

But these payments on account of interest did not include bonds that had been retired, and Virginia's exhibit shows that in addition to these payments she had "paid off and retired" (down to September 30, 1913) bonds amounting to \$12,141,591.49; and that, further, her new bonds issued for the portion of the old debt, funded and assumed by her, and outstanding on September 30, 1913, amounted to \$24,645,-

*Of this total, the sum of \$3,662,434.55 is stated as having been paid from January 1, 1861, to July 1, 1863, and the amount paid from July 1, 1863, to July 1, 1871, is given as \$3,594,289.11.

075.23. These items including the item of interest first mentioned make a total of \$77,857,885.74. We have in this aggregate the amounts paid by Virginia on account of the old debt to the date mentioned. If from this total we deduct the amount of Virginia's assumed share of principal, as above computed (\$22,598,049.21), the remainder would be \$55,259,836.53; or, if all payments of interest were put on a gold basis, \$53,002,130.40. If we treat this entire sum as applicable to interest—and to interest upon Virginia's assumed share alone—it would be the equivalent of simple interest upon the principal stated, from January 1, 1861, to September 30, 1913, at a rate a little less than four and one-half per cent.

It is manifestly impracticable, and it would not be equitable, to apply rates of interest in the present determination which would follow the details of Virginia's financial arrangements. The amounts included in the total of Virginia's payments represent large sums paid as interest upon interest. West Virginia's equitable proportion should not be increased by a rate based upon successive allowances of compound interest.

But in the light of the facts that have been recited a fair basis of adjustment may be fixed.

It will be observed that the amount of the new bonds shown by Virginia's statement to be outstanding on September 30, 1913, was slightly in excess of her assumed share of principal as computed. That is, Virginia through the successful operation of the Act of 1892 (which provided for a refunding as of July 1, 1891), taken with what had been effected under the Act of 1882, placed an amount substantially equal to her assumed share of principal upon a permanent basis of three per cent. There appears to be an exception in the case of certain securities, but their amount is relatively small. Virginia's creditors may have been induced to accept this adjustment, and the low rate it involved, by reason of the inclusion of unpaid interest in fixing the principal of the new bonds. But, on the other hand, the total of the principal and interest then outstanding was largely reduced in the refunding, and the rate of interest upon the new bonds under the Act of 1892 for the first ten years was made two per cent. The reduction, and the ten years' rate, may well be regarded as offsetting the advantage derived from including in the face of the new obligations whatever excess there may have been over the assumed share of Virginia as computed.

Taking all the facts into consideration, we reach the conclusion that in fixing the equitable proportion of West Virginia, her part of the principal should be put on a three per cent. basis, as of July 1, 1891; that is, that interest should run at that rate from that time. For the preceding period, from January 1, 1861, to July 1, 1891, there is greater difficulty. In recognition of the amounts paid by Virginia upon her share, but also having in mind the payments of compound interest attributable to her own exigency, the nearest approach to complete justice will be had by allowing interest at four per cent.

i This, we are satisfied, will adequately recognize and enforce the equities of both States.

Upon this basis, West Virginia's share of the debt will be:

Principal, after allowing credits as stated.....	\$ 4,215,622 28
Interest,	
January 1, 1861, to July 1, 1891, at four per	
cent.....	\$ 5,143,059 18
July 1, 1891, to July 1, 1915, at three per cent.	3,035,248 04
	<hr/>
	8,178,307 22
	<hr/>
	\$12,393,929 50
	<hr/>

For convenience the calculation of interest has been made to July 1, 1915. In the decree the calculation will be at three per cent. per annum from July 1, 1891, to the date of entry. The decree will also provide for interest at the rate of five per cent. per annum upon the amount awarded, until paid.

Costs to be equally divided between the States.

True copy.

Test:

Clerk Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 2 Original—October, 1915.

COMMONWEALTH OF VIRGINIA
v.
 STATE OF WEST VIRGINIA.

This cause coming on to be heard on the pleadings and proofs; the reports of the Special Master and the exceptions of the parties thereto and was argued by counsel.

On consideration whereof the court finds that the defendant's share of the debt of the complainant is as follows:

Principal, after allowing credits as stated.....	\$ 4,215,622 28
Interest from January 1, 1861, to July 1, 1891, 4 per cent. per annum.	5,143,059 18
Interest from July 1, 1891, to July 1, 1915, 3 per cent. per annum..	3,035,248 04

Making a total of interest of \$8,178,307.22, which added to the principal sum, makes a total of \$12,393,929.50.

It is, therefore, now here ordered, adjudged and decreed by this court that the complainant, Commonwealth of Virginia, recover of and from the defendant, State of West Virginia, the sum of \$12,393,929.50, with interest thereon from July 1, 1915, until paid at the rate of 5 per cent. per annum.

It is further ordered, adjudged and decreed that each party pay one-half of the costs.

Per MR. JUSTICE HUGHES.

June 14, 1915.

Form of Official Bond with Corporate Surety.

Approved by the Attorney General under the following statutes:

Virginia Code 1904, section 177.

Virginia Code 1904, section 179a.

Virginia Code 1904, section 179b.

Virginia Code 1904, section 223.

Virginia Code 1904, section 224.

Virginia Code 1904, section 225.

Virginia Code 1904, section 226.

Virginia Code 1904, section 228.

Virginia Code 1904, section 1286c.

Acts 1906, ch. 112 (as amended), Virginia Code, vol. 3, p. 630, and biennial 1912, p. 189.

KNOW ALL MEN BY THESE PRESENTS, That we _____

_____, principal, and _____, a corporation duly incorporated under the laws of _____, surety, are held and firmly bound unto the Commonwealth of Virginia in the just and full sum of _____ dollars (\$ _____), to the payment whereof well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents; and as to this bond we hereby severally waive our homestead exemption and any claim, right or privilege to discharge any liability arising hereunder to the Commonwealth or by virtue of said office, post or trust for which this bond is given, with coupons detached from bonds of the Commonwealth of Virginia.

The condition of the above obligation is such that whereas the above bound _____, has been duly _____ by _____, to the office, post or trust of _____, for the term commencing on the _____ day of _____, 19_____, and continuing for _____ years and afterward until his successor shall have qualified according to law.

Now, if the said _____ shall faithfully discharge the duties of his office, post or trust as _____ aforesaid, then the above obligation is to be void, otherwise to remain in full force and virtue.

In testimony whereof the said _____, principal, hereto sets his hand and seal, and the said _____, surety, by _____, its _____, has caused its corporate name and seal to be hereunto annexed, the same to be attested by the signature of _____, its

_____, this the _____
day of _____, 19____.

(SEAL)

By _____

Attest:

ACKNOWLEDGEMENT OF PRINCIPAL.

STATE OF VIRGINIA,

_____, of _____, to-wit:

I, _____, a notary public in and
for the _____ aforesaid, in the State of Virginia, do certify
that _____, whose name is signed
to the above bond, bearing date on the _____ day of
_____, 19____, personally appeared before me in my
_____ aforesaid, and acknowledged the same.

I further certify that my term of office expires on the _____
day of _____, 19_____.

Given under my hand this _____ day of _____,
19_____.

Notary Public.

AFFIDAVIT AND ACKNOWLEDGMENT OF SURETY.

STATE OF _____,

_____, of _____, to-wit:

I, _____, a notary public in and for the
_____ aforesaid, in the State aforesaid, do certify that
_____, personally appeared before me in my _____
_____ aforesaid and made oath that he is _____
_____ of _____; that
he is duly authorized to execute the foregoing bond by virtue of a certain power
of attorney of said company, dated _____,
and recorded in the clerk's office of the _____ of the
_____, in deed book No. _____,
page _____; that said power of attorney has not been revoked; that
the said company has complied with all the requirements of law regulating the ad-
mission of such companies to transact business in the State of Virginia; that the
said company holds the certificate of the Commissioner of Insurance authorizing
it to do business in the State of Virginia; that it has a paid-up cash capital of not
less than \$250,000; that the paid-up capital, plus the surplus and undivided profits
of said company, is \$ _____; that the penalty of the foregoing bond
is not in excess of twenty per centum of said sum; that the said company is not by
said bond incurring in the aggregate, on behalf or on account of the principal named
in said bond, a liability for an amount larger than one-fifth of its paid-up capital,
plus its surplus and undivided profits; that the said company is solvent and fully
able to meet promptly all of its obligations, and the said _____

_____thereupon, in the name and on behalf of the said company, acknowledged the foregoing writing as its act and deed.

My term of office expires on the _____ day of _____, 19_____.

Given under my hand this _____ day of _____, 19_____.

Notary Public.

CERTIFICATE OF ATTORNEY GENERAL.

I have examined the foregoing bond and find the same to be in proper form and to have been legally executed.

Given under my hand this _____ day of _____, 19_____.

Attorney General of Virginia.

APPROVAL OF GOVERNOR.

Having instituted inquiry through such agencies as are at my command as to the solvency of the obligers in the above bond, and having taken the opinion of the Attorney General thereon, and being now satisfied as to the solvency and credit of the obligers and the efficiency of the bond in all respects, I do hereby approve and accept the same as sufficient.

Given under my hand this _____ day of _____, 19_____.

Governor of Virginia.

Form of Depository Bond with Individual Surety

Approved by the Attorney General.

KNOW ALL MEN BY THESE PRESENTS, That we, _____ principal

_____, sureties,
are held and firmly bound unto the Commonwealth of Virginia in the just and full
sum of _____ dollars,
to the payment whereof well and truly to be made unto the said Commonwealth, we
bind ourselves, our successors and assigns, our heirs and administrators, jointly and
severally, firmly by these presents; and we waive the benefit of our homestead ex-
emption as to this obligation; and also waive any claim, right or privilege to dis-
charge any liability arising under this bond or by virtue of the trust hereinafter re-
cited, in any currency, funds, counter-claims or offsets other than legal tender cur-
rency of the United States.

Sealed with our seals this _____ day of _____,
191_____.

The condition of the above obligation is such that whereas the General Assembly
of Virginia has designated the said principal as one of the depositories in which the
moneys to be paid into the public treasury of the State shall be deposited; and where-
as the law requires such depositories or banks to procure some persons, other than
the bank, in its behalf to enter into a bond conditioned according to law; now if
the said principal shall faithfully account for and pay over, when, and as required,
whatever amount is now on deposit in said bank to the credit of the Commonwealth,
and such other sums as may hereafter be deposited in said bank on behalf of the
Commonwealth, and shall pay the State not less than two and one-half per centum
per annum on daily balances, and that said bank shall faithfully discharge all of the
duties and obligations pertaining to it as such depository, then this obligation to be
void, otherwise to remain in full force and virtue.

In testimony whereof, the said principal has caused these presents to be signed
by _____, its president, and its corporate
seal to be hereunto affixed, and attested to by _____,
its cashier, and the said sureties have hereunto affixed their signatures and seals.

_____, (SEAL)
_____, (SEAL)
_____, (SEAL)
_____, (SEAL)
_____, (SEAL)
_____, (SEAL)
_____, (SEAL)

AFFIDAVIT AND ACKNOWLEDGMENT OF DEPOSITORY

STATE OF VIRGINIA,

_____, to-wit:

I, _____, a notary public in and for the _____
 _____ and State aforesaid, do certify that _____
 _____ and _____

whose names are signed as president and cashier, respectively, of the _____
 _____ to the foregoing writing, bearing date
 on the _____ day of _____, 191____,
 personally appeared before me this day in my said _____,
 and in the name of and on behalf of the said bank, acknowledged said writing as
 its act and deed, and made oath before me, in my said _____
 that they are president and cashier of the said bank, respectively; that the seal
 affixed to the said writing is its true corporate seal; that the same has been affixed
 thereto by due authority; that the paid-up unimpaired capital of the said bank is
 \$ _____ and its surplus and undivided profits are \$ _____.

My commission expires _____, 191_____.

Given under my hand this _____ day of _____,
 191_____.

Notary Public.

AFFIDAVIT AND ACKNOWLEDGMENT OF SURETIES

STATE OF VIRGINIA,

_____, to-wit:

I, _____, a _____ for
 the State and _____ aforesaid, do certify that _____

whose names are signed to the foregoing bond, dated _____,
 191____, personally came before me in my said _____ and
 acknowledged the same, and made oath in due form, that they were respectively
 worth, over and above their respective debts, liabilities, and homestead exemption,
 at least the following sums, viz.:

the said _____	the sum of \$ _____;
the said _____	the sum of \$ _____;
the said _____	the sum of \$ _____;
the said _____	the sum of \$ _____;
the said _____	the sum of \$ _____;
the said _____	the sum of \$ _____;
the said _____	the sum of \$ _____;

My commission expires _____, 191_____.

Given under my hand this, the _____ day of _____,
 191_____.

Notary Public.

CERTIFICATE OF ATTORNEY GENERAL.

This is to certify that the depository named in the within bond is one of the State depositories designated by law, to-wit: by Section 753 of the Code of Virginia (as amended), and that I have examined the foregoing bond tendered by said depository and am of the opinion that the said bond is in proper form and legally executed, both by the principal and sureties.

Given under my hand this _____ day of _____,
191_____.

Attorney General of Virginia.

APPROVAL OF GOVERNOR.

Having instituted inquiry through such agencies as are at my command as to the solvency of the obligors in the foregoing bond, and having taken the opinion of the Attorney General thereon, and being now satisfied as to the solvency and credit of the obligors and the efficiency of the bond in all respects, I do hereby approve and accept the same as sufficient.

Given under my hand this _____ day of _____,
191_____.

Governor.

Form of Depository Bond with Corporate Surety.

Approved by the Attorney General.

KNOW ALL MEN BY THESE PRESENTS, That we, _____ principal, and the _____ surety, are held and firmly bound unto the Commonwealth of Virginia in the just and full sum of _____, to the payment whereof well and truly to be made unto the said Commonwealth, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents; and we waive any claim, right or privilege to discharge any liability arising under this bond or by virtue of the trust hereinafter recited, in any currency, funds, counter-claims or offsets other than legal tender currency of the United States.

Sealed with our seals this the _____ day of _____, 191_____.

The condition of the above obligation is such that whereas the General Assembly of Virginia has designated the said principal as one of the depositories in which the moneys to be paid into the public treasury of the State shall be deposited; and whereas the law requires such depositories or banks to procure some persons other than the bank, in its behalf, to enter into a bond conditioned according to law; now, if the said principal shall faithfully account for and pay over, when and as required, whatever amount is now on deposit in said bank to the credit of the Commonwealth, and such other sums as may hereafter be deposited in said bank on behalf of the Commonwealth, and shall pay the State not less than two and one-half per centum per annum on daily balances, and that said bank shall faithfully discharge all of the duties and obligations pertaining to it as such depository, then this obligation to be void, otherwise to remain in full force and virtue.

In testimony whereof, the said principal and the said surety have caused their respective corporate seals to be hereunto affixed, and the said principal has caused these presents to be signed by _____, its president, and its seal attested by _____, its cashier, and the said surety has caused these presents to be signed by _____, its duly authorized attorney in fact, or by _____, its president, and its seal attested by _____, its secretary.

AFFIDAVIT AND ACKNOWLEDGMENT OF DEPOSITORY

STATE OF VIRGINIA,

_____, of _____, to-wit:
 I, _____, a notary public in and for the _____ and State aforesaid, do certify that _____, and _____, whose names are signed as president and cashier, respectively, of the _____, to the foregoing writing, bearing date on the _____ day of _____, 191_____, personally ap-

peared before me this day, in my said _____, and, in the name of and on behalf of the said bank, acknowledged said writing as its act and deed, and made oath before me, in my said _____, that they are president and cashier of the said bank, respectively; that the seal affixed to the said writing is its true corporate seal; that the same has been affixed thereto by due authority; that the paid-up unimpaired capital of the said bank is \$ _____, and that its surplus and undivided profits are \$ _____.

My term of office expires _____, 191____.

Given under my hand this _____ day of _____, 191____.

Notary Public.

AFFIDAVIT AND ACKNOWLEDGMENT OF SURETY.

STATE OF _____,

City of _____, to-wit:

This day personally appeared before me, _____, a notary public in and for the city and State aforesaid _____, who made oath before me, in my said city, that he is _____ of the _____; that he is duly authorized to execute the foregoing bond by virtue of a certain power of attorney of said company, dated _____, and recorded in the clerk's office of the _____ of the _____, in deed book No. _____, page _____; that said power of attorney has not been revoked; that the said company has complied with all the requirements of law regulating the admission of such companies to transact business in this State; that the said company holds the certificate of the Commissioner of Insurance authorizing it to do business in this State; that it has a paid-up cash capital of not less than \$250,000; that the paid-up capital, plus the surplus and undivided profits of said company, is \$ _____; that the penalty of the foregoing bond is not in excess of twenty per centum of said sum; that the said company is not by said bond incurring in the aggregate, on behalf or on account of the principal named in said bond, a liability for an amount larger than one-fifth of its paid-up capital, plus its surplus and undivided profits; that the said company is solvent and fully able to meet promptly all of its obligations, and the said _____ thereupon, in the name and on behalf of the said company, acknowledged the foregoing writing as its act and deed.

My term of office expires _____, 191____.

Given under my hand this _____ day of _____, 191____.

Notary Public.

CERTIFICATE OF ATTORNEY GENERAL.

This is to certify that the depository named in the within bond is one of the State depositories designated by law, to-wit: by Section 753 of the Code of Virginia (as amended), and that I have examined the foregoing bond tendered by said depository and am of the opinion that the said bond is in proper form and legally executed, both by the principal and sureties.

Given under my hand this _____ day of _____,
191____.

Attorney General of Virginia.

APPROVAL OF GOVERNOR.

Having instituted inquiry through such agencies as are at my command as to the solvency of the obligors in the foregoing bond, and having taken the opinion of the Attorney General thereon, and being now satisfied as to the solvency and credit of the obligors and the efficiency of the bond in all respects, I do hereby approve and accept the same as sufficient.

Given under my hand this _____ day of _____,
191____.

Governor of Virginia.

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