

ANNUAL REPORT

OF THE

ATTORNEY GENERAL

TO THE

GOVERNOR OF VIRGINIA

FOR THE

YEAR 1916

RICHMOND:

DAVIS BOTTOM, SUPERINTENDENT PUBLIC PRINTING
1917

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REPORT

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, November 1, 1916.

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

DEAR SIR:

In accordance with section 3205 of the Code of Virginia, I hereby deliver you a report of the state and condition of the several causes in which the Commonwealth is a party pending November 1, 1916. 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, 1916.

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

Very truly yours,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

Cases Decided or Dismissed in the Supreme Court of the United States.

1. *Virginia v. West Virginia*. Petition for writ of execution. (See appendix.)
2. *Virginia v. John Pierpont Morgan*. Recovery of will of Martha Washington. Dismissed. (See appendix.)

Cases Pending in the Supreme Court of the United States.

1. *Dalton Adding Machine Co. v. Commonwealth*. Non-resident corporation doing business in Virginia. In error from the Supreme Court of Appeals of the State of Virginia.
2. *General Railway Signal Company v. Commonwealth of Virginia*, at the relation of the State Corporation Commission. Non-resident corporation doing business in Virginia.
3. *Armour & Co. v. Commonwealth of Virginia*. In error from the Supreme Court of Appeals of Virginia. Merchants' license tax.
4. *Virginia v. West Virginia*. Debt case. (See appendix.)

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

Commonwealth v. Co-operative Supply Co., Inc. Decided in favor of the Commonwealth.

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

1. *Commonwealth v. J. Fred. Kernochan, Committee of Marie Marshall.*
2. *Commonwealth v. Co-operative Supply Co., Inc.* Bankrupt. (Before referee.)
3. *Brooklyn Trust Co., et al., v. David Johnson, County Treasurer, et al.*

Cases Decided in the Supreme Court of Appeals of Virginia.

1. *Robinson v. Commonwealth.* Misdemeanor. From the corporation court of the city of Danville. Affirmed.
2. *Commonwealth v. Barrow.* Misdemeanor. From the circuit court of Brunswick county. Affirmed.
3. *Ella Eddy v. Commonwealth.* Misdemeanor. From the corporation court of the city of Roanoke. Reversed.
4. *Nobie Conway v. Commonwealth.* Murder. From the circuit court of Lancaster county. Reversed.
5. *Commonwealth, ex rel. City of Richmond v. Virginia Railway and Power Co., et als.* Rolling stock tax. From the State Corporation Commission. Affirmed.
6. *Commonwealth, ex rel. City of Richmond v. Chesapeake and Ohio Railway Co., et als.* Rolling stock tax. From the State Corporation Commission. Affirmed.
7. *Commonwealth v. Armour & Company.* License tax. From the circuit court of the city of Richmond. Reversed.
8. *General Railway Signal Co. v. Commonwealth.* License tax. From the State Corporation Commission. Affirmed.
9. *Canter v. Commonwealth.* Murder. From the circuit court of Washington county. Reversed.
10. *Commonwealth v. United Cigarette Machine Co., Ltd.* License tax. From the circuit court of Campbell county. Reversed.
11. *Hotel Richmond Corporation, et als. v. Commonwealth.* License tax. From the hustings court of the city of Richmond. Reversed.
12. *Dalton Adding Machine Co. v. Commonwealth.* License tax. From the State Corporation Commission. Affirmed.
13. *Wm. H. Sands, Examiner of Records, v. C. Lee Moore, Auditor.* Mandamus awarded.
14. *Davis Bottom, Public Printer, et als. v. C. Lee Moore, Auditor.* Mandamus awarded.
15. *James B. Doherty v. C. Lee Moore, Auditor.* Mandamus awarded.
16. *James B. Wood, Superintendent Penitentiary, v. C. Lee Moore, Auditor.* Mandamus awarded.
17. *Jamison v. Commonwealth.* Tax on non-residents. Business of loaning money. Writ of error from circuit court of Page county. Reversed.

18. *Pippin v. Commonwealth*. Homicide. From circuit court of Russell county. Affirmed.
19. *Hansel v. Commonwealth*. Forgery. From the circuit court of Russell county. Reversed and remanded.
20. *Wesley Jones v. Commonwealth*. Felony. From the circuit court of Lancaster county. Error confessed.
21. *Wooden v. Commonwealth*. Assault. From the corporation court of Buena Vista. Reversed.
22. *Williams v. Commonwealth*. Seduction. From the circuit court of Roanoke county. Error confessed.
23. *Bracey v. Commonwealth*. Sale of ardent spirits. Writ of error circuit court Southampton county. Affirmed.

Cases Pending in the Supreme Court of Appeals of Virginia.

1. *Lewis v. Commonwealth*. Larceny. From the hustings court city of Richmond. Writ of error.
2. *Spellman v. Commonwealth*. Larceny. From the circuit court of Princess Anne county.
3. *Tyler v. Commonwealth*. Burglary. From the corporation court of the city of Staunton.
4. *Virginia Blue Ridge Railway v. Kidd, Clerk*. Petition for mandamus.
5. *Commonwealth of Virginia v. Ferries Company*. From the circuit court city of Richmond. Constitutionality of chapter 346, Acts 1912. Appealed.
6. *Main Street Bank, Inc. v. City of Richmond and Commonwealth of Virginia*. Taxation. Writ of error from the hustings court of the city of Richmond.

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

1. *Commonwealth, ex rel. Auditor of Public Accounts v. Gray National Telautograph Co.* Taxation. Judgment for \$5,000. Paid.
2. *Hunter, et al. v. Stuart's Executors*. Demurrer of Commonwealth sustained.
3. *Commonwealth, at the relation of the Auditor of Public Accounts v. Nicholas E. Miller, Treasurer, and the Illinois Surety Company*. Judgment for the Commonwealth.
4. *Ferries Co. v. Commonwealth*. Mandamus awarded.
5. *Durant v. Tinsley*. Taxation of non-residents. Decided against the Commonwealth.
6. *Tredegar Co. v. Commonwealth*. Taxation. Injunction awarded.
7. *Export Leaf Tobacco Co. v. Commonwealth*. Taxation of intangible property. Decided in favor of the Commonwealth.
8. *Thompson v. Commonwealth*.

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, Adm. R. D. Adams.*
5. *Seaboard Air Line Railroad Co. v. State Corporation Commission.*
Taxation.
6. *Commonwealth v. A. D. Phillips, et als. sureties of Adams.*
7. *Commonwealth v. Robertson.*
8. *Commonwealth v. A. M. Bowman, et als.*
9. *County of Westmoreland v. Md. Del. & Va. Ry. Co.*
10. *Smith-Courtney Co. v. Stuart, Governor, et al. Lime Grinding Case.*

IN CHANCERY.

1. *Commonwealth v. P. H. Huffman, et als.*
2. *Commonwealth v. Walter Milan.*
3. *Commonwealth v. Jas. Hilton's Adm.*
4. *Commonwealth v. F. J. Young.*
5. *Commonwealth v. A. A. Chapman.*
6. *Commonwealth v. B. Vandegrift, et als.*
7. *Commonwealth v. Sarah E. French. Creditor's bill.*
8. *Commonwealth v. Illinois Surety Co.*
9. *Twohy v. McIlwaine.*
10. *Commonwealth v. Empire State Surety Co.*
11. *Blue Ridge Overalls Co. v. State Penitentiary.*

Cases Decided in the Hastings Court.

1. *Marion B. Langhorne's Ex. v. Commonwealth and City of Richmond.*
Taxation of money left with corporation not a bank. Decided in favor of the Commonwealth.

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

1. *Woodward v. Commonwealth. Taxation.*
2. *Stephen Putney's Ex. v. Commonwealth. Taxation.*

Cases Pending in the Law and Equity Court of the City of Richmond.

Brooks P. Glinn v. Va. Home and Industrial School for Girls, Inc. Notice of motion on alleged rent contract.

Cases Pending in the Chancery Court City of Richmond.

L. D. Klein v. Blanton and State Board of Education, et al.

Other Cases Pending, Various Courts.

1. *C. Lee Moore, Auditor of Public Accounts, v. Nuckolls & Phipps, Ex. of M. W. Cornett.* Inheritance tax. Circuit court of Grayson county.

2. *Bonsack Machine Co. v. C. Lee Moore, Auditor of Public Accounts, et al.* Motion for correction of erroneous assessments. Circuit court of Roanoke county.

3. *E. L. Hatcher, Adm. of Thomas H. Cooper's Estate, v. Commonwealth of Virginia, et al.* Motion for correction of erroneous assessments. Decided in favor of the Commonwealth.

4. *United Cigarette Machine Co. Ltd. v. Commonwealth of Virginia.* Taxation. Circuit court of Campbell county.

5. *Moran v. Gilmer.* Corporation court city of Charlottesville. Mandamus refused.

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.

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OPINIONS

ACCOUNTANTS—*State Board of Accountancy—Ch. 158, Acts of 1910*—One who holds himself out to the public as being a certified public accountant without having qualified as such under the provisions of ch. 158, Acts 1910, is guilty of a misdemeanor.

RICHMOND, VA., April 3, 1916.

MR. A. LEE RAWLINGS, *Chairman,*
Virginia State Board of Accountancy,
Norfolk, Va.

DEAR SIR:

I have your request for an opinion upon the following state of facts: One J. M. Culbreth, is advertising himself in this State as a "certified public accountant;" that he is not the holder of a certificate from the Virginia State Board of Accountancy, required by chapter 158 of Acts of the General Assembly of Virginia, 1910, but that he is the holder of such a certificate, granted by a similar board in the State of North Carolina. Upon this state of facts you desire to know whether Mr. Culbreth is violating the laws of the State of Virginia.

Section 2 of said act provides, among other things, that a person receiving from the Virginia State Board of Accountancy a certificate of his qualifications to practice as an expert public accountant, shall be known and styled as a certified public accountant; "but no other person, * * * shall assume such title * * *." The act then proceeds to provide for a successful examination as a prerequisite to the issuing of said certificate; and section 4 provides that the board may, in its discretion, waive examination to those who hold a certificate issued under the laws of another State which extends similar privileges to certified public accountants of this State; provided the requirements for said degree in the said State are, in the opinion of the board, equivalent to the requirements in this State. This latter provision, however, I presume has no bearing on the case under consideration, because your inquiry does not say that Mr. Culbreth ever applied to the Virginia board for a waiver of examination.

Section 7 of the said act provides, among the other things, that if any person represent himself to the public as having received the certificate provided for in the act "or if he shall advertise himself as a certified public accountant * * * or otherwise falsely hold himself out as having qualified under this act, without having actually received a certificate from the State Board of Accountancy * * * he shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than one hundred dollars, nor more than five hundred dollars, or imprisoned for not less than one month nor more than six months, or both, in the discretion of the court."

It, therefore, appears that, if the facts in this case have been correctly and fully ascertained, Mr. Culbreth is violating the law.

Yours very truly,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

AGRICULTURE—Seed Inspection Laws—Interstate Commerce—Right of the State to Regulate.—The test as to whether or not a seed inspection law is in violation of the interstate commerce clause of the Constitution, depends upon whether the law in question is a genuine exercise of an acknowledged State power to inspect or whether on the other hand in the guise of an inspection law is really and substantially a regulation of foreign and interstate commerce, which the Constitution has conferred exclusively upon Congress.

Same.—There is no distinction in principal between the right of a State to inspect agricultural seeds shipped into it from another State and the right of the State to inspect cattle, fertilizer and other articles.

Same.—Section 7 of chapter 506 of the Acts of 1916, known as the agricultural seed law, is not a regulation of commerce and does not discriminate against non-resident seedmen, and is manifestly intended and calculated in good faith to protect the agricultural interests of the State and prevent imposition upon the public generally by the sale of noxious weeds and impure seeds.

Same.—Under this statute a non-resident dealer cannot be prosecuted for a violation of the same, but any seed shipped into the State by such dealer which upon inspection do not comply with the provisions of this law may be seized and held by the Commissioner of Agriculture.

RICHMOND, VA., July 5, 1916.

HON. GEORGE W. KOINER,
Commissioner of Agriculture,
Richmond, Va.

DEAR SIR:

Acknowledgment is made of your letter asking for a construction of section 7 of chapter 506, Acts 1916, known as the agricultural seed law, with regard to its effect on interstate shipments of seed and requesting to be advised as to what extent you would be justified in enforcing its provisions. You also say that the matter has been submitted to you by the attorney for the American Seed Trade Association with a request for the holding of the Department of Agriculture as to whether this section affects the case of the sale and delivery of seeds in another State consigned to a Virginia consumer at his cost and risk of transportation.

Section 7 of this law is as follows:

“Agricultural seeds shipped to any point in this State for seeding purposes shall be subject to the provisions and requirements of this act, and transportation companies shall be required to see that all such agricultural seeds carried by them are tagged or labeled as provided herein.”

There have been a number of decisions upon the question of the right of a State under the interstate commerce clause of the Constitution to pass inspection laws, and of course there are a number of elements which enter into this question and which may determine it. However, my opinion is that the test of whether or not a State inspection law is a violation of the interstate commerce clause of the Constitution depends upon whether the law in question is a genuine exercise of an acknowledged State power to inspect or whether on the other hand, in the guise of an inspection law is really and substantially a regulation of foreign and interstate commerce which the Constitution has conferred exclusively upon Congress. I assume that Congress has never attempted to regulate this matter and

can find no federal statute affecting it. To my mind, however, there is no distinction in principle between the right of the State to inspect agricultural seeds shipped into it from another State and the right of a State to inspect cattle, which latter right was upheld in the case of *Asbell v. Kansas*, 209 U. S. 251; *Reed v. Colorado*, 187 U. S. 137.

Nor is there any distinction in principle between the right of a State to inspect agricultural seeds shipped into it from another State and that to inspect fertilizer, which latter right was upheld in the case of *Patapsco Guano Co. v. North Carolina*, 171 U. S. 345.

In *Pabst Brewing Co. v. Crenshaw*, 198 U. S. 17, a statute providing for the inspection of malt liquors after their arrival within the State to which they are shipped was held not to be a regulation of interstate commerce. Other decisions to the same effect are *New Mexico v. Denver, etc., R. R. Co.*, 203 U. S. 38; *Pittsburgh v. Louisiana*, 156 U. S. 590; and numerous cases cited in the note to *Asbell v. Kansas*, *supra*, 14 Am. & Eng. Cas., p. 103.

It follows that I am of the opinion that the agricultural seed law of Virginia is not a regulation of commerce; does not discriminate against non-resident seedsmen and is manifestly intended and calculated in good faith to protect the agricultural interests of the State and prevent imposition upon the public generally by the sale of noxious weeds and impure seeds, and that while manifestly you cannot prosecute a non-resident dealer for a violation of this law you can seize and hold any seed shipped into the State and which upon inspection do not comply with the provisions of this law.

I herewith return for your files the correspondence forwarded me with your letter.

Yours very truly,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

AGRICULTURE—Fertilizers.—Under section 8 of chapter 260 of the Acts of 1914, known as the fertilizer law, a manufacturer of fertilizer cannot register and sell in Virginia established brands of fertilizer if the reduction in the amount of potash in the brands referred to is in fact lowering the grade of fertilizer; therefore, these brands cannot be registered for the year 1916 under their old names.

Same.—The purpose of section 8 of chapter 260 of the Acts of 1914 is to require dealers to maintain the standard of their several brands of fertilizer and in no case to permit a lowering of the standard without such a change of name as would prevent the deception.

Same.—The intent is plain to prevent dealers from so branding their fertilizers as to make the farmer think that he is getting an article superior to that actually furnished by the dealer.

Same.—Whether the addition of the word "revised" after the name of an established brand of fertilizer in which the grade has been lowered, would tend to deceive the public is not a question of law but a question of fact to be decided by the Department of Agriculture.

RICHMOND, VA., *December 31, 1915.*

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

DEAR SIR:

In response to your inquiry of yesterday, as to my construction of section 8 of the fertilizer law, being chapter 260 of Acts 1914, will say that, as I understand it, the question involved grows out of the following state of facts:

The European war has so reduced the amount of potash available for commercial fertilizers in this country that the proportion of potash has had to be reduced in the standard brands of fertilizers sold to Virginia farmers. The dealers are, therefore, asking your department to allow them to register and sell in Virginia their old brands of fertilizer, containing the reduced amount potash, under the names of the old brands followed by the word "revised." Section 8 of the fertilizer law reads as follows:

"The guaranteed analysis of each and every brand of fertilizer, or fertilizer material, must, without exception, remain the same throughout the fiscal year for which it is registered and in no case, even at subsequent registration, shall the grade be lowered."

As I understand it, the reduction of the amount of potash in the brands referred to is in fact lowering the grade of fertilizer. These brands cannot, therefore, be registered for the year 1916 under their old names, and the question is whether the addition of the word "revised" following the old name is in fact a new name so as to permit the dealer to register the same as an entirely new brand.

It is evident from reading the section above-mentioned, as well as from a study of the act of which it is a part, that the purpose of the provision quoted is to require dealers to maintain the standard of their several brands and in no case to permit a lowering of the standard without such a change of name as would prevent deception. In other words, it is the plain intent of the law to prevent dealers from so branding their fertilizers as to make the farmer think he is getting an article superior to that actually furnished by the dealer.

Bearing this purpose of the statute in mind, I feel that your long experience as the head of the Agricultural Department of the State places you in a better position than myself to judge as to whether the use of the word "revised," after the name of the old brand, would tend to deceive the farmer. This, of course, is not a question of law, but a question of fact to be decided by your department. As Commissioner of Agriculture, you are given, in conjunction with the Board of Agriculture and Immigration, wide discretionary powers in the administration of the fertilizer law. If you are doubtful as to whether the use of the word "revised" is proper under the intent of the statute, as interpreted by me, I would respectfully suggest that the question be passed upon by your board, whose experience in the use and purchase of fertilizers would probably be valuable in deciding whether the proposed use of the word "revised" would have a tendency to deceive.

I am returning herewith letter from the Patapsco Guano Company and your proposed resolution, dated December 24th.

Very truly yours,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

AGRICULTURE—*Division of Markets—Ch. 391, Acts 1916, Sec. 7—Appropriations.*—Chapter 391, Acts 1916 carries a valid appropriation out of the general treasury of funds not otherwise appropriated.

RICHMOND, VA., *September 21, 1916.*

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

DEAR SIR:

Acknowledgment is made of your letter of the 21st instant, asking for a construction of the provisions of chapter 391, page 669, of the Acts of 1916, establishing a Division of Markets for agricultural products within the Department of Agriculture and Immigration. The act is entitled:

“An act to establish a Division of Markets for agricultural products within the Department of Agriculture and Immigration, providing for the administration of the said division and defining the duties and powers of same.”

Section 7 of the act provides as follows:

“For the purpose of carrying out the provisions of this act, the sum of five thousand dollars is hereby appropriated for the fiscal year ending February twenty-eighth, nineteen hundred and seventeen, and in like manner for each fiscal year thereafter, there is hereby appropriated the sum of five thousand dollars. The expenses incident to carrying out the provisions of this act, shall be paid by the Treasurer of the State out of the appropriation to credit of the commissioner of agriculture and immigration upon warrants drawn upon the Auditor of Public Accounts by the said commissioner, countersigned by the president of the Board of Agriculture and Immigration.”

You desire to be advised whether or not this act appropriates \$5,000 out of the State treasury not otherwise appropriated or whether it requires the expenses of this department to be paid out of moneys collected and paid into the treasury by the Commissioner of Agriculture and Immigration for the use of that department.

The first sentence of section 7 is perfectly clear and specifically appropriates \$5,000 a year to carry out the provisions of this act. The second sentence is not equally clear, but in my opinion the construction which should be given this sentence is that it simply provides the method by which the appropriation made in the first sentence is to be paid out of the public treasury. The second sentence provides that the expenses incident to carrying out the provisions of the act shall be *paid by the Treasurer of the State out of the appropriation to credit of the Commissioner of Agriculture and Immigration*. The appropriation referred to in the second sentence of section 7 is evidently the appropriation provided for in the first sentence of the same section and not an appropriation to be placed to the credit of the commissioner from other sources.

The intention of the legislature to make a specific appropriation for the establishment of a Division of Markets, is plain and I cannot think it was intended to provide an appropriation for this purpose only in event that there was collected and paid into the treasury by the Commissioner of Agriculture sufficient surplus out of which this \$5,000 appropriation was to be paid. Certainly there is nothing in the act to justify such a conclusion.

In reply to your suggestion that the appropriation contained in this act may be in contravention of section 52 of the Constitution which requires that no law shall embrace more than one object which shall be expressed in its title, I refer you to the principle laid down by our Supreme Court of Appeals in the case of *District Road Board v. Stillman*, 117 Va. 201, where it is said that:

"Although the act or statute authorizes many things of a diverse nature to be done the title will be sufficient if the things authorized may be fairly regarded as in furtherance of the object embraced in the title. It is therefore to be liberally construed and treated so as to uphold the law if practicable."

You will note that the title of the act is:

"To establish a Division of Markets * * * providing for the administration of said division." * * *

It is quite plain that the appropriation contained in this act may, in the language of the court above quoted, "be fairly regarded as in furtherance of the object embraced in the title."

An examination of the Journal of both houses of the General Assembly discloses the fact that the act above referred to was passed by the affirmative vote of a majority of all the members elected to each house, the vote being taken by yeas and nays, and the names of the members voting for and against entered on the Journal in strict compliance with section 50 of the Constitution.

I am, therefore, of the opinion that the said act carries a valid appropriation out of the general treasury of funds not otherwise appropriated.

Yours very truly,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

AGRICULTURE—*Nursery Stock—Crop Pest Commission—Quarantine—Section 1790a, Code Va. 1904.*—Under the provisions of section 1790a, Code Va. 1904, the Crop Pest Commission is authorized, if necessary to control, eradicate and prevent dissemination of dangerous pests, to provide quarantine rules and regulations prohibiting any resident of this State from receiving, having in his possession or disposing of Christmas trees and parts of plants shipped from without the State.

RICHMOND, VA., August 12, 1916.

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

DEAR SIR:

Acknowledgment is made of your letter of August 7th to the Attorney General requesting his opinion as to the authority of the Crop Pest Commission to lay a quarantine and to prevent a shipment into this State of various products which do not fall under the general terms of "nursery stock."

I note that your letter further says:

"Some companies in the New England States have made a business of collecting and distributing Christmas trees and parts of plants for use at Christmas time. Owing to the prevalence in the New England States of two very dangerous insect pests, the Crop Pest Commission has deemed it wise to prevent all such shipments if possible, and a quarantine has accordingly been ordered."

While sub-section 2 of section 1790a of the Code 1904 specifically authorizes your board to provide quarantine rules and regulations concerning the sale and transfer of all plants, or parts of plants, commonly known as "nursery stock" of this State it would seem to me that under the general powers of the board as enumerated in section 1 it has the power to prevent the shipment of plants, or parts of plants which will disseminate the dangerous insect pests prevalent in the New England States.

The provisions of the section applicable to the question are as follows:

"The Board of Crop Pest Commissioners shall, at the same time, provide rules and regulations under which the State Entomologist shall proceed to investigate, control, eradicate and prevent the dissemination of the said pests as far as may be possible, and these rules and regulations shall have the full force and effect of law so far as they conform to this act and the general laws of this State and of the United States."

It would seem to me that this provision would authorize your board, if necessary to control, eradicate and prevent the dissemination of dangerous pests, to provide quarantine rules and regulations prohibiting any resident of this State receiving, having in his possession or disposing of the Christmas trees and parts of plants set out in your letter.

Very truly yours,

LESLIE C. GARNETT,
Assistant Attorney General.

AGRICULTURE—*Interstate Commerce—Fertilizer Law—Section 1783d, Code Va. 1904 as amended—Appropriation Bill, Acts 1916, pages 882-7.*—The money collected under the fertilizer law should not be used for the carrying on of experiments with plants and fertilizers as long as it may be advantageously used for the purpose of inspecting fertilizers and informing the farmers as to the result of the same, so that they may protect themselves from deception, since, if in case the law is tested the court can be convinced that the General Assembly has under the guise of imposing inspection fees undertaken to raise revenue for other purposes, the tax will be declared excessive, which will require the lessening of the tax and the necessary reduction of revenue from this source.

RICHMOND, VA., October 9, 1916.

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

DEAR SIR:

Referring to your inquiry of even date, relative to the use of the moneys collected under the fertilizer law, being section 1783d of Virginia Code 1904, as

amended, Acts of 1915, page 190, volume 4 of Code, page 359, I call your attention first to that provision of sub-section 15 of said section, which reads as follows:

"All moneys collected under the provisions of this act shall be paid into the State treasury to the credit of the Department of Agriculture and Immigration and held in a separate fund to be known as the Fertilizer Fund, from which shall be appropriated by the General Assembly such sums as may be required for the carrying out of the provisions of this act to be available as the money may be deposited in the treasury. * * * Any portion of the Fertilizer Fund not otherwise appropriated may be appropriated and disbursed by the Board of Agriculture and Immigration in accordance with the foregoing provisions of this act for the purpose of carrying on experiments with plants and fertilizers and in carrying out the other purposes of this act."

The appropriation act for the current year, found in Acts of 1916, page 882-7, makes the following disposition of "taxes and fees" on fertilizers:

1. Virginia State Horticultural Society, \$1,000, * * *
2. All other expenses of the Board of Agriculture * * * including ten fertilizer inspectors * * *
3. Any excess * * * for advertising resources of Virginia, \$5,000.
4. Should there still be any excess, "the sum shall be appropriated as provided by law."

This latter excess it is contemplated shall be appropriated by your board as provided by sub-section 16 of section 1783d of the Code, above quoted, to-wit, for the purpose of carrying on experiments with plants and fertilizers and in carrying out the other provisions of the act.

In view of the decision of the Supreme Court of the United States in *Patapsco Guano Co. v. Board of Agriculture of North Carolina*, 171 U. S. 191, I think that the use of any considerable part of the moneys collected under the act for purposes other than inspection and the protection of the farmers from deception in fertilizers, renders the law subject to attack on the ground that the tax levied is excessive and, therefore, an unwarranted interference with interstate commerce.

In the case referred to, a similar law of North Carolina was attacked on that ground, and the law was upheld, for the reason stated by the court that the tax charged was not so in excess of what is necessary to pay costs of analysis, salaries of inspectors, cost of tags and other charges as to justify the imputation of bad faith and show that it was not a proper exercise of the police power.

It will be observed that the legislature in its appropriation bill above referred to has already diverted out of the moneys arising from this act \$1,000 to the Virginia Horticultural Society and \$5,000 to advertising the resources of Virginia, and, as I understand it, the question now to be considered by your board is whether you will appropriate further sums out of the fund for the purpose of carrying on experiments with plants and fertilizers. Such an appropriation would, in my opinion, greatly increase the probability of a successful attack upon the law.

The court in the case above stated very strongly intimates that if it was shown that the receipts from such a tax were applied in substantial amounts to purposes other than the inspection of fertilizer that this would justify the imputation of bad faith and change the character of the act and render it subject to the objection that it unduly interfered with interstate commerce.

I should, therefore, strongly advise against the use of this fund for the carrying on of experiments with plants and fertilizers as long as it may be advantageously used for the purpose of inspecting the fertilizers and informing the farmers as to the result of the same, so that they may protect themselves from deception.

I am confident that if in case the law is tested the court can be convinced that the General Assembly has under the guise of imposing inspection fees undertaken to raise revenue for other purposes, that the tax will be declared excessive, which will require the lessening of the tax and the necessary reduction of revenue from this source.

Very truly yours,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

AGRICULTURE—*Crop Pest Law—Section 1790a, Code Va. 1904—Justice of the Peace—Jurisdiction of.*—A violation of sections 38 and 12 of section 1790a constitutes a misdemeanor, which offense may be prosecuted as other misdemeanors under other statutes relating to criminal prosecutions for misdemeanors.

RICHMOND, VA., *September 27, 1916.*

HON. W. J. SCHOENE,
State Entomologist,
Blacksburg, Va.

DEAR SIR:

Acknowledgment is made of your letter of September 23, 1916, in the following terms:

"Will you please inform me what course to pursue to secure prosecution of violations of sections 3, 8 and 12 of the Crop Pest Law (Acts of Assembly, chapter 207, approved May 9, 1903), and if the office of the Attorney General will render assistance in the prosecution."

An examination of sections 3, 8 and 12 of section 1790a of the Code of Virginia (Acts of 1899-1900, page 594, 1902-3-4, page 308) shows that each of the said sections provides that a violation of the same shall constitute a misdemeanor and upon conviction thereof the accused so convicted shall be fined.

Under the provisions of section 4106 of the Code of Virginia, as amended by the Acts of 1910, page 424, the police justices of cities and the justices of the peace of the various counties of the State are given, except when it is otherwise specially provided, exclusive original jurisdiction for the trial of misdemeanor cases occurring within their jurisdiction in their respective magisterial districts. This section also provides that the grand juries sworn in the circuit courts of the counties and the corporation or hustings courts of the corporations are authorized and empowered to present or indict all misdemeanors as were cognizable by grand juries prior to March 5, 1896, and in all cases of misdemeanor in which a presentment or indictment is found by a grand jury, and for a trial of which such justices have exclusive jurisdiction, a copy of such indictment or presentment, together with the name of the witnesses upon whose testimony such indictment or presentment was made, shall be certified and delivered by the clerk

of the court in which it is found to some justice of the district in which such offense was committed, said justice to be designated by the court in its order, and such justice shall forthwith deliver such copy of such indictment or presentment to the sheriff or some constable of his county, or sergeant or policeman of his corporation, which copy shall have the force and effect of a warrant of arrest, and the officer shall thereupon arrest the person or persons so indicted or presented and carry such person or persons before said justice for trial.

Of course, you are familiar with the method of procuring the issuance of a warrant by a justice of the peace. If you prefer to have the persons you desire to prosecute first indicted by the grand jury, you should consult the Commonwealth's attorney, who will advise you in the matter.

In reference to your inquiry as to whether the office of the Attorney General would render assistance in such prosecution, I desire to call your attention to section 3204 of the Code of Virginia, which imposes the court duties required of the Attorney General.

As you will see from this section, the Attorney General is not required to appear in such cases. If you would take the matter up with the Commonwealth's attorney for the county or city in which you desire to institute a prosecution under the act, I am sure that he would be glad to appear and assist you.

Attention is called to the further provision of section 4106 of the Code, as amended, which provides that in the case where indictment or presentment of the accused is made by the grand jury and the indictment or presentment sent to a justice to be tried that the "Commonwealth's attorney for the county or corporation from whose court the said indictment was certified may, in his discretion, appear before the justice of the peace trying the case and represent the Commonwealth in said trial * * *"

Yours very truly,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

AGRICULTURE—*Section 1790a, Code Va. 1904.*—Section 1790a, Code Va. 1904, does not discriminate against non-resident nurseries. This law requires the same inspection and registration and imposes the same fee for certificate of registration upon resident and non-resident nurseries.

Same—Interstate Commerce.—The Virginia Crop Pest Law is not a regulation of commerce; does not discriminate against non-resident nurseries, and is manifestly intended and calculated in good faith to protect the trees, orchards and fruits of the State and prevent imposition upon the public generally by the selling of infested and diseased trees, plants and shrubs.

RICHMOND, VA., May 15, 1916.

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

DEAR SIR:

Acknowledgment is made of your letter of April 28, 1916, enclosing a letter to you from the William P. Stark Nurseries, of Stark City, Missouri, which, as you say, challenges the validity of the Virginia Crop Pest Law, section 1790a, Virginia Code 1904.

From the enclosure, it seems that the Nurseries Company contend that, as they do a strictly mail order business, they could not, under the interstate commerce clause of the United States Constitution, be required to take out a registration certificate and pay the required fee of \$20.00 therefor, in order that their trees might be released and delivered in this State. Their letter says:

"We do a strictly mail order business, having no agents in your State, and the license that you impose upon ex-State nurseries is certainly contrary to the interstate commerce laws of our Constitution, inasmuch as they do not give all parties the same right to sell within your State, is discrimination against ex-State nurseries.

"We have taken this matter up with various States, and invariably when this matter is put to the Attorney Generals, we get the same decision. The last time we had this matter up with Indiana and several other States, and we are not paying a license in any of these States at this time."

The Virginia statute requires an inspection of all nursery stock grown in this State and all nursery stock shipped into the State, and for certificates of registration to be attached to all nursery stock delivered within the State. It further provides for the acceptance of proper certificates from other States on nursery stock shipped into this State, and the issuance, under the rules and regulations of the Commission, by the Virginia authorities of an official tag designating such acceptance, upon which tag such stock may be re-shipped. The statute forbids the delivery of any nursery stock in this State until such certificates shall be issued, and requires the payment of the sum of \$20.00 before the issuance of the required certificate.

From the foregoing, you will see that the Stark Nurseries is mistaken in the contention that the law does not give all parties the same right to sell within the State and is a discrimination against non-resident nurseries. The law, in fact, requires the same inspection and registration, and imposes the same fee for certificates of registration, upon resident and non-resident nurseries.

There are a number of decisions upon the right of the States, under the interstate commerce clause of the United States Constitution, to pass inspection laws and to require registration, and impose fees for inspection and registration; and we think some of them in point. In the case of *Asbell v. Kansas*, 209 U. S. 251, the Supreme Court of the United States upheld the validity of a State statute, prohibiting the importation of cattle into the State which had not been inspected and passed as healthy by the State officials, as not an unwarranted interference with interstate commerce. Mr. Justice Moody, in delivering the opinion of the court, said:

"Cattle, while in the course of transportation from one State to another, and in that respect under the exclusive control of the law of the national government, may at the same time be the conveyance by which disease is brought within the State to which they are destined, and in that respect subject to the power of the State exercised in good faith to protect the health of its own animals and its own people. In the execution of that power the State may enact laws for the inspection of animals coming from other States with the purpose of excluding those which are diseased and admitting those which are healthy. *Reid v. Colorado*, 187 U. S. 137, 23 S. Ct. 92, 47 U. S. (L. Ed.) 108."

In *Patapasco Guano Co. v. North Carolina*, 171 U. S. 345, the court holds that the right to make inspection laws is not granted to Congress, but is reserved

to the States, and upholds an inspection charge of twenty-five cents per ton on commercial fertilizers as a valid exercise of the power of self-protection, commonly called the police power.

In *Pabst Brewing Co. v. Crenshaw*, 198 U. S. 17, a statute providing for the inspection of malt liquors after their arrival within the State to which they are shipped, was held not to be a regulation of interstate commerce.

See, also, *New Mexico v. Denver, &c., Ry. Co.*, 203 U. S. 38; *Pittsburgh v. Louisiana*, 156 U. S. 590.

From the foregoing decisions, the test is whether the statute is a genuine exercise of an acknowledged State power to inspect, or whether, on the other hand, under the guise of an inspection law, it is really and substantially a regulation of foreign or interstate commerce, which the Constitution has conferred exclusively upon Congress.

I am of opinion that the Virginia Crop Pest Law is not a regulation of commerce, does not discriminate against non-resident nurseries, and is manifestly intended and calculated in good faith to protect the trees, orchards and fruits of the State, and prevent imposition upon the public generally by the sale of infested and diseased trees, plants and shrubs.

In fact, I think that we may paraphrase the opinion of Keith, P., in the case of *Norfolk v. Flynn*, 101 Va. 473, 478, where, in considering the right of the city of Norfolk, by ordinance, to require vendors of milk in the city, whether their dairies were located inside or outside of the city, to register for that purpose and pay a registration fee of fifty cents per cow, he said:

"The city of Norfolk says to the dealer: If you appear free from objection, you are relieved by the officer's certificate of all responsibility on that subject. For this examination you must pay. The danger comes from you, and, though it may turn out in your case there is no danger, yet, as you belong to a class from which this kind of injury comes, you must pay for the examination which distinguishes you from others of that class."

The Virginia Crop Pest Law does not, and was not designed to, act beyond the borders of the State, but operates only upon those who undertake to deliver nursery stock within the State of Virginia.

I note that you say in your letter that several of the nursery inspection laws, in certain of our western States, have been declared unconstitutional within the past two years, and the nurserymen, especially the William P. Stark Nurseries, have been very energetic in this matter. I have caused an examination to be made of all the recent decisions on this subject, and have been unable to find any decisions enunciating any doctrine in conflict with the principles promulgated by the court in *Asbell v. Kansas*, *supra*, and the decisions there cited, and in the note following this case in 14 Am. & Eng. Ann. Cases, p. 103.

Very truly yours,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

ANIMALS—Contagious Diseases—Glanders—Section 1599a, Code of Va.—If in the opinion of the State Live Stock Sanitary Board, the destruction of an animal affected with Glanders is necessary to prevent the spread of this disease among the domestic animals of the State, it would seem that this board has authority to have the animal killed.

RICHMOND, VA., October 6, 1916.

DR. J. G. FERNEYHOUGH,
State Veterinarian,
Richmond, Va.

DEAR SIR:

Acknowledgment is made of your letter of October 4th, asking for my opinion as to whether or not you as State Veterinarian have the authority to cause horses and mules to be killed after their blood test has proven them to be affected with Glanders. You state the Glanders is one of the oldest and most contagious diseases affecting horses and mules, and is also communicable to man, and that the only safe way to prevent its spread is to destroy the affected animal, and bury or burn it.

I find no direct authorization in the law for the State Live Stock Sanitary Board to kill animals affected with diseases, but section 1599a of the Code provides that the board shall have the right to maintain and enforce quarantine laws and *other regulations necessary to prevent the spread among domestic animals of this State* of any malignant, contagious, or infectious disease found to exist among live stock. If, therefore, in the opinion of the State Live Stock Sanitary Board the destruction of the animal affected with Glanders is necessary to prevent its spread among the domestic animals of the State, it would seem that this board has such authority.

Very truly yours,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

APPROPRIATIONS, PUBLIC—*Congressional High Schools—Reversion of Unexpended Appropriations.*—All unexpended appropriations for dormitories for district high schools in the treasury April 1, 1916, reverted to and became part of the general fund of the Commonwealth, and there is no warrant in law for the Auditor of Public Accounts to pay out any portion thereof for the purpose of erecting dormitories at congressional district high schools.

RICHMOND, VA., August 23, 1916.

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

DEAR SIR:

Acknowledgment is made of the letter of the Secretary to the Governor of August 22d, to the Attorney General requesting an opinion on the following state of facts contained in a letter from Mr. Wm. A. Anderson, of Lebanon, Virginia:

"In 1914, the General Assembly in Acts 1914, p. 339, appropriated \$40,000.00 for the purpose of erecting a dormitory at each Agricultural High School. The amount of \$4,000.00 to be used at each school provided the locality raised a like amount. Not over four of the ten agricultural high schools availed themselves of the \$4,000.00, therefore there is of course a balance in the treasury. We did not avail ourselves of the amount due us, and we want you to ask Attorney General Pollard for an opinion as to whether we could now secure \$4,000.00 provided we raised a like amount."

By reference to the general appropriation bill of 1914, Acts 1914, p. 339, you will observe that there was appropriated for dormitories to each congressional district high school \$2,000.00 but that the total appropriation for this purpose was only \$15,000.00. The appropriation having been reduced in conference, it seems, from \$20,000.00 to \$15,000.00. Under an opinion rendered the State Board of Education by this office on June 17, 1914, report of the Attorney General, 1914, p. 87, it was held that the proper construction of this law was that the \$2,000.00 was a clerical error and that the real appropriation for dormitories at congressional district high schools was \$1,500.00, each conditioned upon the district raising like amount.

Mr. Anderson therefore is mistaken in saying that \$40,000.00 was appropriated for these high schools. The total appropriation being \$30,000.00 and the appropriation for each school being \$1,500.00 a year or a total of \$30,000.00. However, this is written for your information, in order that the facts may be set right but it is immaterial to the decision of the question propounded in Mr. Anderson's letter.

The last sentence of section 1 of the appropriation bill found in Acts 1914, p. 364, is as follows:

"All of the appropriations herein made for the fiscal year ending February twenty-eight, nineteen hundred and sixteen, unexpended at the close of business, April first, nineteen hundred and sixteen, shall revert to and become a part of the general fund of the Commonwealth, and shall not thereafter be paid by the Auditor of Public Accounts, and the same shall be charged off upon the books of his office."

I am of the opinion therefore, that all of the unexpended appropriations for dormitories for district high schools in the treasury, April 1, 1916, reverted to and became a part of the general fund of the Commonwealth and that there is no warrant in law for the Auditor of Public Accounts to pay out any portion thereof for the purpose of erecting dormitories at congressional district high schools.

I enclose a copy of the opinion in order that you may forward the same to Mr. Anderson if necessary.

Very truly yours,

LESLIE C. GARNETT,

Assistant Attorney General.

ASSESSORS OF LANDS—*Compensation—section 445, Code of Va., 1904, as amended.*—Under the provisions of section 445 of the Va. Code, 1904, as amended, the land assessor in making such changes or corrections in the books on file with the clerk so as to conform to the orders of the local board of review is executing a duty imposed upon him in pursuance of statute, and is, therefore, entitled to receive from the State \$2.00 for each day "necessarily employed in the execution of his duties" as provided for by section 446 of the Code of Va., 1904, as amended.

Same—Section 443, Code of Va., 1904.—The provisions of section 443 of the Code of Va., 1904, as amended, which requires the assessor to deliver his assessments on or before June 1st, has no bearing upon the claim of an assessor for compensation for the time necessarily employed in the execution of the duties of the assessor as contemplated by section 446 of the Code of Va., 1904, as amended.

RICHMOND, VA., *December 29, 1915.*

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

DEAR SIR:

You have asked me to advise you whether you are authorized to pay an assessor of lands in the city of Charlottesville a claim for \$20.00 for ten days' services rendered by him after October 1, 1915, "in making necessary changes in his land books under the direction of the local board of review."

Section 446, Va. Code, 1904, as amended Acts 1915, p. 137, fixes the compensation of assessors at \$4.00 for each day they may "necessarily be employed in the execution of the duties" of their office, and provides that \$2.00 of this amount shall be paid out of the State treasury and the remainder out of the local treasury.

Section 445, Va. Code, 1904, as amended Acts 1915, p. 123, provides that the changes in assessments made by the local board of review may be certified to the assessor "that he may correct the books on file with the clerk so as to conform" to the orders of the local board of review. In this case, therefore, the assessor in making such changes on the books filed with the clerk was executing a duty imposed upon him in pursuance of statute and is therefore entitled to receive from the State \$2.00 for each day "necessarily employed in the execution of his duties" as provided by section 446, above quoted.

I note that you have refused to pay this claim because the service was rendered after October 1, 1915, basing your refusal on the provisions of sec. 443, Va. Code, 1904, as amended by Acts 1915, p. 35, which requires the assessor to deliver his assessments on or before June 1st, allowing the judge, however, in cities of the size of Charlottesville, for good cause shown, to "extend the time for making returns of such assessments" to such time as may be deemed expedient, not beyond October 1st next succeeding. I am of the opinion that this latter provision has no bearing upon the claim under consideration because the compensation here claimed is not for any extension of "time for making returns of such assessments" as provided in sec. 443, but is for time "necessarily employed in the execution of the duties" of the assessor as contemplated by sec. 446. The original duty of the assessors (as the law stood before recent amendments) was to make and deliver to the proper officers three copies of their assessments and this duty, in cities the size of Charlottesville, must in any event be completed on or before October 1st; but under sec. 445, as amended, a new duty is placed upon the assessor, that is, making changes ordered by the local board of review on the assessors' books on file with the clerk. For this new duty compensation is provided by sec. 446, as amended, and that compensation is for time "necessarily employed in the execution of duties" whether such duties be performed before or after October 1st.

I am, therefore, of the opinion that the assessor is entitled to the amount of his claim, provided, of course, that the services performed were in making changes on that copy of his assessments on file with the clerk, and in pursuance of orders of the Local Board of Review.

Yours very truly,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

AUDITOR OF PUBLIC ACCOUNTS—*Compromise of claims in favor the Commonwealth—Power of the Auditor of Public Accounts—sec. 702a, Code Va., 1904.*—The Auditor of Public Accounts, with the advice of the Attorney General is authorized by section 702a of the Code of Va., 1904, to adjust and settle upon equitable principles without regard to strict legal rules, accounts or claims in favor of the Commonwealth, provided, first, it is a doubtful or disputed account or claim, and, second, it has been standing on the books of the office of the Auditor of Public Accounts for not less than two years.

RICHMOND, VA., March 14, 1916.

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

DEAR SIR:

You have referred to this office correspondence between yourself and Mr. A. H. Light, in regard to the case of the *Commonwealth v. F. S. Kirkpatrick*. I take it that this case was the result of our opinion rendered to you on August 16, 1915, found in report of the Attorney General for 1915, p. 154.

The question which seems to be raised by Mr. Kirkpatrick's letters is expressed in his letter of January 27, 1916, as follows:

"On what basis will the Commonwealth settle this controversy?"

I take it that this is an offer looking to a compromise, and the question which is involved is whether you have authority to compromise such a claim as the one here in question. This would seem to depend upon the correct construction of section 702a, Va. Code, 1904, which provides as follows:

"The Auditor of Public Accounts, with the advice of the Attorney General, may adjust and settle upon equitable principles, without regard to strict legal rules, any doubtful or disputed account or claim in favor of the Commonwealth which may have been standing on the books of his office not less than two years, and may, with like advice, dismiss any proceedings instituted by him; provided, however, that before such adjustment or settlement can in any wise affect the rights of the Commonwealth it shall be approved and endorsed by the Attorney General and shall then be submitted to the supervision of the judge of the circuit court of the city of Richmond, accompanied by a written statement signed by said Auditor of the facts and reasons which, in his opinion, render such adjustment or settlement just and proper, and when the said judge endorses the same with his written approval, signed in his official character, it shall be considered and treated as valid and binding."

The questions which are raised under this statute, as applied to the case here being considered, may be stated as follows: (1) Is this a doubtful or disputed account or claim; and (2) has it been standing on the books of your office for not less than two years?

I am not advised, from the correspondence submitted to me, what would be the answer to either one of these questions; but am sure that, in the light of the circumstances which are known to you, both of these questions may be decided by you, and that you will then be able to advise Mr. Light as to whether you will make an offer of compromise to Mr. Kirkpatrick or receive one from him.

Very truly yours,

CHRISTOPHER B. GARNETT,
Assistant Attorney General.

AUTOMOBILES—Licenses—Ch. 522, Acts 1916.—On licenses which were issued for machines prior to June 17, 1916, the Secretary of the Commonwealth is neither authorized nor required to furnish a number plate in addition to the one theretofore issued by him, but on licenses issued on or after June 17, 1916, he is required to issue number plates in duplicate.

Same—Number of plates to be carried by machines.—No number plate is required for the front of the machine, the license for which was taken out prior to 17th day of June, 1916.

Same—Chauffeurs.—No chauffeur's license is required of automobile mechanics and workmen, who, incident to their duties, sometimes deliver automobiles, which have been repaired, to customers, and use the streets and highways in testing their work.

Same—Chauffeurs.—Drummers and Salesmen.—Salesmen or drummers using automobiles of employers and operating the same as incidental to their duties as salesmen are not required to secure a chauffeur's license before operating the same.

Same—Chauffeurs—Laborers and mechanics.—If it is part of the duty of an employee to run an automobile truck it is necessary for him to procure a chauffeur's license.

Same—Licenses—Dealers.—Every owner of an automobile is required to take out a license before he can operate his machine on the public highways in Virginia, and, therefore, the owner of any automobile has no right to operate the same under a dealer's or other person's license.

Same—Dealers' Licenses—Agents.—In order for a sub-agent to escape the necessity of taking out a dealer's license the contract of purchase must be made between the purchaser and licensed dealer, and the licensed dealer must look to the purchasers and not to the sub-agent for payment.

Same—Demonstration car used by sub-agents.—If a demonstration car used by a sub-agent belongs to a licensed dealer no additional license can be required to operate it. If it is the property of the person operating it and not the property of a licensed dealer, an owner's license must be obtained.

Same—Secretary of the Commonwealth—Expense incident to issuing automobile licenses.—Extra help employed by the Secretary of the Commonwealth in order to send out automobile licenses on time are part of the necessary expenses incident to paying the cost of mailing these licenses; therefore the Automobile Fund should bear the expense.

Same—Secretary of the Commonwealth.—Printed matter used by the Secretary of the Commonwealth in connection with automobile licenses that should be paid for by the Department of Public Printing.

Same.—What printed matter should be paid for by the Secretary of the Commonwealth out of the fees arising from the Automobile Fund.

Same—Cities and Towns—Rights of to license.—A town council of a Virginia town has authority to impose a license tax on the owner of a private automobile.

Same—Taxes.—The license required by section 3b of chapter 522, Acts 1916 is for the operation of machines and not for their sale, so that the provisions of section 3b are not intended to be in lieu of the provisions of section 19-1-2, and a person who complies with the provision of section 3b is not thereby exonerated from complying with the provisions of section 19-1-2.

Same.—Any person who keeps a garage for the sale of automobiles is required to comply with section 19-1-2, chapter 522, Acts 1916, and if he desires

to operate a machine on the roads of the Commonwealth he is required to comply with the terms of section 3b. If, however, a dealer in automobiles desires to keep a place or house for their sale he would not be required to comply with the provisions of section 3b and if he sold automobiles without displaying them in garages or places of sale he would not be compelled to comply with the provisions of section 19-1-2.

Same—Licenses.—The owner of two automobiles cannot operate them under one license, but must obtain separate licenses for each of his cars.

RICHMOND, VA., August 18, 1916.

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

DEAR SIR:

You have referred to this office for opinion thereon a number of questions relating to the construction of the Automobile Laws of this State which I have decided to embody in one letter.

The first question relates to the construction of section 4a, chapter 326, Acts 1916, as amended, by Acts of 1916, chapter 522 which section provides as follows:

"Number plates in duplicate must also be delivered to the applicant by the Secretary of the Commonwealth, upon which the number assigned must be painted in Arabic numerals not less than four inches in height, followed by the letters 'VA' and in figures the year for which issued, and such plates must always be in evidence upon the front and rear of the machine."

As this act did not go into effect until June 17, 1916, you desire to know whether, when licenses have been issued prior to that date, you are authorized or required to issue an additional number plate since the old law only required the issuance of one such plate.

Upon an examination of the act in question, it will be noted that section 2 requires that every owner of a machine, on or before the first day of January in each year, shall be licensed "by making application to the Secretary of the Commonwealth for a certificate of registration and license to operate.

Section 3-a provides for the issuance of a certificate of registration and license, and that the license shall be attached in an accessible place.

Section 3-b makes provision in like manner for dealers license.

Section 3-d provides that the certificate of registration and license is for the year terminating December 31st.

It will thus be noted that application is to be made to the Secretary of the Commonwealth, and that the applicant is to be given the number plates as required by section 4-a.

From an examination of these provisions, it seems to be contemplated that the number plates are to be given at the time that the application is made. It will also be noticed that there is no provision requiring that machines must carry two number plates, but that the only provision is that "such plates must always be in evidence upon the front and rear of the machine."

I am, therefore, of the opinion that on licenses which have been issued for machines prior to June 17, 1916, you are neither authorized nor required to issue a number plate in addition to the one heretofore issued by you, but that on all licenses issued on and after June 17, 1916, you are required to issue number plates in duplicate.

I might also remark that it follows, from what I have said above, that no number plate is required for the front of a machine the license for which has been taken out prior to the 17th of June of this year.

Second. You have requested an opinion as to whom are to be construed as chauffeurs and required to take out a license under section 3-c of the automobile law. I presume that the question you have asked with reference to chauffeur's license was propounded by Mr. F. M. Chichester, Fredericksburg, Virginia, who writes me that he has seen you on the subject and that you are of the opinion no chauffeur's license is required of automobile mechanics and workmen who as an incident to their duties sometimes deliver automobiles, which have been repaired, to customers and use the streets and highways in testing their work. I concur in this view expressed by you. See section 3-c, Automobile Law, Acts 1916, p. 940.

Third. I have been asked to construe section 3-c of the Act approved March 24, 1916, relating to the running of automobiles in a case of this character. The A. B. Bakery Company, of Richmond, Virginia, operates ten licensed automobiles for the sale of their products. These vehicles are operated by salesmen who sell the same and receive therefor a stipulated salary and commission. The question is, are these salesmen operators of such vehicles for pay so as to require them to secure a chauffeur's license? (b) You have also asked the question, would a city drummer using the automobile of his employer and operating the same on the highways in the prosecution in his work be deemed an operator of such vehicle as would require him to secure a similar license.

Section 3-c of chapter 522 of the Acts of 1916 so far as is material to this inquiry reads as follows:

"Any person, other than the owner of a machine which has been registered and licensed to be operated in this State, who shall operate machines for pay, before he shall operate a machine in this State shall first take out a chauffeur's license to operate automobiles in this State except that a member of a family or servant regularly employed for other purposes of a licensed owner of a machine, who is otherwise qualified, may operate such machine without paying additional license. The applicant shall make application to the Secretary of the Commonwealth, which application shall give the name of the applicant, his residence, postoffice address, age and experience in operating automobiles, and shall be sworn to before some officer authorized to administer oaths. There shall be appended to such application a statement, by two reputable citizens, that the applicant is a fit person and is competent to operate an automobile.

On the payment of two dollars and fifty cents, the Secretary of the Commonwealth shall issue to such applicant, a license and badge, which license and badge shall be carried by the chauffeur at all times while operating an automobile, the badge to be plainly in evidence upon the lapel of the chauffeur's coat or on the front part of the chauffeur's cap. The license to be in the form following:

This is to certify that , whose residence is and postoffice address is has this day been duly licensed according to law to operate or drive automobiles over the roads of this State for the year
Given under my hand this, the day of ,
nineteen

.....,
Secretary of Commonwealth.

I am of the opinion that salesmen or drummers using automobiles of employers and operating the same as incidental to their duty as salesmen are not required to secure a chauffeur's license before operating the same.

Fourth. I have been asked whether section 3-c of chapter 522 of the Acts of 1916 applies only to private chauffeurs or whether it applies also to laborers employed by a merchant to do any work which he is called on to do which includes running an automobile truck.

Of course, the question you have asked is one of fact as every person other than the owner who operates a machine for pay must take out a chauffeur's license. I do not think that the fact that the chauffeur who runs an automobile truck is at the same time a laborer, performing any work a merchant may call upon him to do, in any way affects the question. If a part of his duty is to run an automobile truck I think that it is necessary for him to procure a chauffeur's license.

Fifth. I have been asked the question as to whether the owner of an automobile has the right to run his machine under the dealers' license, if so, for how long a period?

I am of the opinion that every owner of an automobile is required to take out a license before he can operate his machine on the public highways of Virginia. The following provisions of chapter 522 of the Acts of 1916 clearly show this intent. Section 2, requires the owner before he shall commence to operate his machine to register and obtain a license to operate the same. Section 5 of the same act forbids any dealer, owner, or chauffeur to operate a car without first obtaining a license to operate the same and each day's use without the license is made a separate offense. Section 7 of the same act makes it unlawful for any person to attach or use a number plate or certificate or license on a machine for which it was not issued.

Sixth. I have been asked for an opinion as to the construction of the Automobile Law as to dealers on the following points:

- (1) Whether or not persons claiming to be sub-agents of licensed dealers can sell cars under the license of the dealer with whom they contract, or whether such sub-agents shall be required to take out a dealer's license.
- (2) Whether such sub-agents can run a car for demonstration purposes on the dealer's license, or be required to take out an owner's license on the demonstration car.

As to the first proposition, while I can find no precedent construing the law, a careful consideration thereof leads me to the conclusion that the right to impose a license tax as a dealer upon a person claiming to be a sub-agent of the licensed dealer, will depend entirely upon the contract between the licensed dealer and the person claiming to be his sub-agent. It cannot be questioned, I think, that the licensed dealer has the right to employ, on salary or commission, other parties to sell for him under his license, or that several parties can form a copartnership to sell cars under a dealer's license. On the other hand, it seems to be equally clear that where the licensed dealer, with a fixed place of business as contemplated in the law in one town or city, delivers cars in another territory to a so-called sub-agent, looking alone to the sub-agent for payment thereof, or requiring the so-called sub-agent to pay upon delivery to him, and the sub-agent then goes out to find a purchaser, the said sub-agent then comes within the law as a dealer and should be required to take out a dealer's license. In other words, in order for the sub-agent to escape the necessity of taking out a dealer's license,

the contract of purchase must be made between the purchaser and the licensed dealer, and the licensed dealer must look to the purchaser and not the sub-agent for payment.

The second proposition is governed by like principles. If the demonstration car belongs to the licensed dealer, no additional license can be required, to operate it. If it is the property of the person operating it and not the property of the licensed dealer, an owner's license must be obtained.

Seventh. I have been asked for a construction of section 19 of the Automobile Law involving the following question:

In sending out the automobile licenses in the month of December, 1913, and January and February, 1914, your office was flooded with applications, and in order to send out these licenses it became necessary for you to employ extra help. The question involved is whether you are authorized by section 19 to pay for the expense of extra clerical assistance out of the automobile fund, or whether you must pay for the same out of your contingent fund.

Section 19 aforesaid, so far as it applies to the question herein considered, provides 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 the cost of mailing same, shall be paid into the State treasury," etc.

The tax bill it may be noted in passing contains an appropriation to the Secretary of the Commonwealth for the contingent expenses of his office. The question involved here is whether the expenses for the extra clerical force employed by you can be construed as a part of the "necessary expenses incident to the cost of purchasing number plates and paying the cost of mailing same." If it can be considered as a part of said expense, then clearly you would be entitled to have the same paid out of the automobile fund. In your letter, you state as follows:

"This extra help was used for no other purpose than that of mailing out the automobile licenses and plates."

This being true, it seems to me inevitable to conclude that it was a part of the necessary expense incident to paying the cost of mailing these licenses; and consequently, it is my opinion that the automobile fund should bear this expense.

I note in the letter of the Auditor, sent with your letter, that the reason why he did not feel authorized to pass the account was because he did not think that the act authorized you to employ extra clerical assistance. While the act may not in terms authorize the employment of clerical assistance, still the act does in terms authorize the payment of the necessary expenses of mailing these licenses and plates; and as the law requires that every owner of a machine should, on or before the first day of January of each year, before he commences to operate his machine, register and obtain a license, and makes it unlawful to run a machine along the streets or highways without complying with the terms of the act and denounces the penalty therefore, it would clearly seem within the power of the Secretary of the Commonwealth to incur extra expense in mailing out said licenses, and that the law contemplated that the expense thereof should be paid out of the automobile fund.

If the Secretary of the Commonwealth was not authorized to employ clerical assistance, it is perfectly clear that long delays would probably have resulted in sending out the licenses and number plates.

Eighth. I have been asked for an opinion as to what printing should be paid for out of the funds appropriated to the Department of Public Printing 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, pp. pages 305-10. 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.

Mr. Atkinson 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," etc. 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," etc., 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 the Public Printer 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 * * *."

Ninth. I have been further requested to inform you whether the town council of a town in Virginia has any authority to impose a license tax on the owner of a private automobile. Section 1042 of the Code, so far as applicable to this case provides as follows:

"In addition to the State tax on any license, the council of a city or town may, when anything for which a license is so required is to be done within the city or town, impose a tax for the privilege of doing the same and require a license to be obtained therefor."

You will observe, therefore, that a town council is authorized to impose a license for anything that is to be done within the town provided there is a State license required for the same thing. The act approved March 17, 1910, licensing and regulating the running of automobiles, etc. (Va. Tax Laws, 1914, p. 112) provides it shall be unlawful for any person to operate or run or drive an automobile, etc., or any vehicle of any kind, the motive power which shall be electricity, steam, gasoline or any other power except animal power, except and until such person shall comply with the provisions of the act and register and obtain a license to operate the same vehicle. Thus you will see that the State does require a license for operating an automobile.

Applying section 1042 to the aforesaid act, it would seem that a town council may impose a tax for the privilege of operating such vehicles for the reason that the State imposes a tax thereon. It must be noted, however, that there are some limitations to this power. In *White Oak Coal Co. v. Manchester*, 109 Va. 749, the court laid down the following proposition,—that the highways of the Commonwealth, whether urban or rural, belong pre-eminently to the public and the legislature had absolute dominion over them, and while the control of streets is commonly designated to the municipality in which they are located in such measure as the legislature sees fit to bestow, still the use of them remains in the public at large, subject only to such limitations as the municipalities are authorized by law to impose. Accordingly, the court held that it was a reasonable exercise of such charter powers to lay a license tax upon vehicle of residents thereof and upon persons residing outside of the corporate limits who employ their automobiles in furtherance of business and occupations carried on within the town, but that to levy such a tax on vehicles of non-residents whose business or pleasure casually carries them into or through the municipality, would be in derogation of their reserved right to use the highways of the Commonwealth and would impose intolerable burdens upon the public and lead to absurd results. Consequently, it would seem that a town in Virginia may levy a license tax on automobiles of said town and upon persons outside the corporate limits who employ their automobiles and vehicles in furtherance of business and occupations

carried on within the municipalities, but that such town cannot levy such a tax on the automobiles of non-residents whose business or pleasure casually carried them into or through the municipality.

Tenth. I have been asked the further question, whether the payment of a local license imposed by the board of supervisors of a county would relieve the holder of the same from paying the State license. I have no hesitancy in saying that no local license paid by a resident or non-resident can relieve him from the payment of the State license. Of course, you know that under section 10, chapter 522 of the Acts of 1916, non-residents are allowed to use the roads of the State under certain circumstances for limited periods.

Eleventh. There has also been referred to this office an order of the circuit court of Rockbridge county, entered November 10, 1915, in the matter of application by James E. Heck to be relieved of certain taxes.

It seems from the attested copy of the order aforesaid that said James E. Heck was engaged in business as a merchant in the town of Lexington, Virginia, and, in addition to the business of a merchant, he bought and sold automobiles; that on the 1st of May, 1915, when he applied for a license to carry on the business of a merchant, he gave in his returns as purchases for the preceding year \$15,000.00 and that this sum included \$13,500.00 purchase price of automobiles, and that the amount of purchases other than automobiles was \$1,500.00. It also appears that said Heck, in addition to the tax on merchant's license, paid the sum of \$25.00 as a keeper of a garage under section 19½ of the Automobile Law, Acts 1910, chapter 326, p. 503 (Supplement 1910, p. 965), and that he has also paid to the Secretary of the Commonwealth the sum of \$50.00 under section 113 of the aforesaid Automobile Law. The court entered an order in the proceeding requiring that the said James E. Heck be refunded the sum of \$26.00, paid as taxes as a merchant, and the sum of \$25.00 for keeping a garage.

The question which you desire me to solve is whether the Auditor should request the Commonwealth's Attorney to file a petition for a re-hearing under section 573 of the Code.

The grounds upon which the court acted in exonerating the petitioner are not clearly set out in the order, but it would seem to be clear that, in so far as the court exonerated this party from paying a license tax as a merchant upon his sales and also exonerated him from paying a garage tax, there was error. It would seem to be proper, in a case of this kind, to exonerate a merchant from paying a tax on automobiles sold by him if he had the license required by sections 19½ and 20 of the License Law. Those sections, so far as applicable here, read as follows:

"19½. That every person who shall keep a garage for the hire, storage or sale of automobiles, in the country and in towns of less than two thousand inhabitants, shall pay the sum of fifteen dollars, and an additional sum of fifty cents for the storage capacity in excess of five of the vehicles hereinafter defined, and in towns of two thousand inhabitants and over, he shall pay twenty-five dollars, and an additional tax of fifty cents for the storage capacity over five of each of the vehicles hereinafter mentioned, and in cities he shall pay a tax of one hundred dollars, and one dollar additional for each for the storage capacity of each vehicle over five."

"20. A garage, as used within the terms of this act, shall mean a place of storage for hire or a place where there is kept for hire any automobile, locomobile or any vehicle of any kind, the motive power of which shall be electricity, steam, gas, gasoline or any other motive power except animals, whether such automobile, locomobile, or vehicle is kept therein permanently or temporarily."

It is true that the definition of a garage in section 20 does not correspond exactly to the license requirements in section 19½, but it is also true that it is perfectly clear that under section 19½ every person who shall keep a garage for the sale of automobiles is required to pay a license tax therefor. Under the clear provisions of section 19½, it does not seem possible that the court could exonerate Heck from paying a license tax simply because the definition of a garage in the next section does not in terms include a place for the sale of automobiles.

Now, section 3-b requires dealers in automobiles to take out a license therefor and pay the sum of \$50.00 to the Secretary of the Commonwealth. It is to be noted, however, that by the terms of the statute the license is simply "to operate machines to be sold by him in this State," and is not a license fee which is required for the sale of machines. All of the funds collected for licenses under the Automobile Law constitutes a special fund to be expended in the permanent improvement of the main highways of the State; it is clear, from the terms of section 3-b, that the license required thereby is for the operation of machines and not for their sale, so that the provisions of section 3-b are not intended to be in lieu of the provisions of section 19½, and a person who complies with the provisions of section 3-b is not thereby exonerated from complying with the provisions of section 19½.

It is to be noted that these are co-ordinate sections of the same law, and any person who keeps a garage for the sale of automobiles would be required to comply with section 19½; and if he also desires to operate a machine on the roads of the Commonwealth he would be compelled to comply with the terms of section 3-b. On the other hand, if a dealer in automobiles desires to keep a place or house for their sale, without operation, he would not be required to comply with the provisions of section 3-b, and if he sold automobiles without displaying them in garages or in a place of sale, he would not be compelled to comply with the provisions of section 19½.

It is not clear from the order whether the said Heck kept a place for the sale of automobiles. If he did keep a place for the sale of the automobiles, then his compliance with section 3-b would not relieve him from the payment of the license tax under section 19½.

It would seem, therefore, that there is error in the order aforesaid, and I would recommend that the Auditor direct the Commonwealth's Attorney, of Rockbridge county, to file a petition asking for a re-hearing in the case.

Twelfth. I have been asked for an opinion on the following question:

"Has a person a right to operate two automobiles on one license provided he only uses one at a time, transferring the license from one to the other according to the one used?" The automobiles in question you inform me are a Ford and a Reo.

I am clearly of the opinion that the owner of two automobiles cannot operate them under one license but must obtain separate license for each of the cars. My reasons for so holding are these:

Section 2 of chapter 522 of Acts 1916, provides that every owner of a machine on or before the 1st day of June of each year, or before he shall commence to operate his machine, shall register and obtain a license to operate the same by making application to the Secretary of the Commonwealth for a certificate of registration and license to operate. It is further provided that among

other things the application must contain the name, factory number, if any, fixed by its maker and a brief description showing the style of machine, source of power, number of cylinders, and the horse-power.

Section 3-a of the act provides that the Secretary of the Commonwealth shall issue a certificate of registration and license giving the machine in question a number which shall distinguish it, which certificate of registration and license shall be firmly attached to the machine in an easily accessible place. This section further provides the form of such certificate and license in which form it is necessary to set out the factory number, horse-power, color of body and color of gear of the said car and the license further reads that such owner "is hereby licensed to operate his machine in the State of Virginia under the registration and license number for the year"

Section 4 of said act provides that the Secretary of the Commonwealth shall deliver to the applicant, number plates in duplicate, upon which the number assigned must be painted and that such plates must always be in evidence upon the front and rear of the machine. The last paragraph of section 5 of the act provides that after the first day of February in each year, every dealer, owner or chauffeur, who shall operate an automobile or motorcycle over the roads or streets of the State without first obtaining from the Secretary of the Commonwealth a license to operate the same and display the license as provided by the law, shall be guilty of a misdemeanor.

The last paragraph of section 7 of this act reads as follows:

"It shall be unlawful for any person to attach or use a number plate or certificate or license on a machine for which it was not issued."

Very truly yours,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

AUTOMOBILES—*Licenses—Chapter 522, Acts 1916.*—Section 3-b, chapter 522, Acts 1916, seems to place the license tax on the manufacturer's agent or dealer and not on the place of business; therefore, the manufacturer's agent or dealer is entitled to maintain more than one place of business on the license issued him under section 3-b of chapter 522, Acts 1916. If, however, the two establishments are not under the exclusive ownership of the person licensed, a separate license for each place is required.

RICHMOND, VA., *October 25, 1916.*

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

DEAR SIR:

Acknowledgment is made of your communication of August 30, 1916, in which you request an opinion on the following state of facts:

"I enclose, herewith, a letter from Mr. James E. Heck, of Lexington, Va. Mr. Heck has been called upon by the Commonwealth's Attorney of Rockbridge county to pay the dealers' automobile tax of \$50.00 to conduct two separate places of business, one in the name of James E. Heck, agent for Ford and Hudson cars, and the other in the name of the Rockbridge

Motor Company, handling Chevrolet cars. As I understand it, the separation of the two businesses is due to the fact that a Ford agent cannot handle certain machines along with the Ford and retain the Ford agency, and for that reason has separated his business, both being conducted in the same town of Lexington. Please be kind enough to let me have your opinion whether or not he should be required to pay a separate license on each place of business. The same will be appreciated."

The law which governs this question is found in sub-section 3-b of chapter 522 of the Acts of 1916, which reads as follows:

"Every manufacturer, agent, or dealer in automobiles, locomobiles, motorcycles or motor bicycles, or other vehicles of like kind, on or before the first day of January in each year or before he commences to operate machines to be sold by him, shall make application to the Secretary of the Commonwealth for a dealer's certificate of registration and license. The application shall state the make of the machines handled by the manufacturer, agent, or dealer, and the probable number that will be disposed of during that year, and on the payment of the fee of fifty dollars, the Secretary of the Commonwealth shall issue to such dealer a certificate of registration and license in form as follows:

"This is to certify that whose residence is and place of business is is a dealer in make of machines, and is hereby licensed to operate machines to be sold by him in this State for the year under registration and license number

"Given under my hand this, the day of nineteen

.....
"Secretary of the Commonwealth."

This section seems to place the license tax on the manufacturer's agent or dealer and not on the place of business; therefore, I am of the opinion that the manufacturer's agent or dealer is entitled to maintain more than one place of business on the license issued him under section 3-b of chapter 522 of the Acts of 1916. If, however, the two establishments are not under the exclusive ownership of the licensed person, I am of the opinion that separate license would be required.

Yours very truly,

LESLIE C. GARNETT,
Assistant Attorney General.

AUTOMOBILE LICENSES—Chapter 522, Acts 1916.—The license prescribed by chapter 522, Acts 1916, must be paid on machines owned by a church.

RICHMOND, VA., October 10, 1916.

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

DEAR SIR:

Acknowledgment is made of your communication of September 27, 1916, and enclosed letter of Rev. Harry L. Walton, in which an opinion is requested as to whether a church is required to pay the license tax prescribed by chapter 522 of

the Acts of 1916 on an automobile owned by the church and used exclusively for church purposes. So much of section 2 of chapter 522 of the Acts of 1916 as applies to this case reads as follows:

"Every owner of a machine on or before the first day of January in each year, or before he shall commence to operate his machine, shall register and obtain a license to operate the same."

This section clearly requires all owners of automobiles to obtain a license before operating the same, and unless there is some exception in the case of an automobile owned by a church, a license for such machine is required.

The law exempting church property from taxation is found in sub-section (b) and sub-section (d) of section 183 of the Constitution of Virginia, 1902, which reads as follows:

"(b) Buildings, with the land they actually occupy, and the furniture and furnishings therein lawfully owned and held by churches or religious bodies, and wholly and exclusively used for religious worship, or for the residence of the minister of any such church or religious body, together with the additional adjacent land reasonably necessary for the convenient use of any such building.

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

As to the personal property owned by a church which is exempted from taxation, only such property as is specified in sub-section (b) and sub-section (c) of section 488 of the Code, appears to be exempt. These portions of section 488 of the Code of Virginia, 1904, read as follows:

"(b) The furniture and furnishings of buildings, lawfully owned and held by churches or religious bodies, and wholly and exclusively used for religious worship or for the residence of the ministers of any such church or religious body.

"(c) The furniture, furnishings, books, and instruments contained in buildings wholly devoted to educational purposes, belonging to, and actually and exclusively used by churches, public libraries, incorporated colleges, academies, industrial schools, seminaries, or other incorporated institutions

of learning, including the Virginia Historical Society, which are not corporations having shares of stock or otherwise owned by individuals or other corporations; and also the permanent endowment funds held by such libraries and educational institutions, directly or in trust and not invested in real estate; provided, that such libraries and educational institutions are not conducted for profit of any person or persons, natural or corporate, directly or under any guise or pretense whatsoever. But the exemption mentioned in this sub-section shall not apply to any industrial school, individual or corporate, not the property of the State, which does work for compensation or manufactures and sells articles in the community in which such school is located; provided, that nothing herein contained shall restrict any such school from doing work for or selling its own products or any other articles to any of its students or employees."

It will, therefore, be seen that no exemption is made for automobiles owned by churches, and I am of the opinion that the license tax prescribed by chapter 522 of the Acts of 1916 must be paid on such machines.

Yours very truly,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

BANKS AND BANKING—Directors—Eligibility—Sections 1165 and 1166, Code of Virginia 1904, as amended.—Under section 1165, Code of Virginia 1904, as amended, every director in a bank must own at least \$100 of the stock of his bank, and the director who ceases to be such owner or who becomes otherwise disqualified vacates his office.

Same.—Section 1166, Code of Virginia 1904, as amended, requires a director to take an oath:

1. That he will perform his duty as directed,
2. That he is the owner of the required amount of stock,
3. That the same is not pledged, etc.,
4. In case of re-election or re-appointment that such stock was not pledged during his previous term.

Same.—For failure to take such oath no penalty is placed upon the director, but upon the bank only.

Same.—The proper construction of section 1165, Code of Virginia 1904, as amended, makes taking of the prescribed oath a prerequisite to service as a director. It in effect prohibits such services until the oath is taken.

Same.—The offending director cannot serve from one term into another without interruption. His inability to take the prescribed oath creates a vacancy, but such vacancy may be filled by the election of the offending director if the appointive power sees fit to choose him, and he is then not required to make an oath that he did not pledge his stock during his first term because his choice to fill the vacancy is not a re-election or re-appointment in the sense in which the terms are used in the statute.

Same.—Suggested amendments to section 1165 and 1166, Code of Virginia 1904, as amended.

RICHMOND, VA., September 28, 1916.

C. C. BARKSDALE, Esq.,
Chief Bank Examiner,
Richmond, Va.

DEAR SIR:

Acknowledgment is made of your request for my opinion on the following questions as stated by you:

"Is a man eligible to serve as director of a State bank who has been a director for a number of years and was recently re-elected as such director at a regular meeting of the stockholders of said bank, but who is unable to make oath to the fact that during his previous term as director he was the owner of \$100.00 par value of the stock in the bank, which stock was not hypothecated or in any way pledged as security at any time.

"Or, in other words, if a man's stock is not hypothecated at the time of his re-election, but *was* hypothecated during his previous term, is he eligible to serve as director? Or, in your opinion, he is ineligible, can he qualify himself to be a director?"

Section 1165, Va. Code 1904, provides:

"Every director of a bank or banking institution must own, in his own right, at least one hundred dollars at par value of the capital stock of the bank or banking institution of which he is a director. Any director who ceases to be the owner of one hundred dollars of the capital stock, or becomes in any other means disqualified, shall thereby vacate his office."

Section 1166, Va. Code 1904, amended 1912, page 636, provides:

"Each director of a bank or banking institution, chartered under the laws of this State and doing business therein, when appointed or elected shall take an oath, so far as the duty devolves upon him, that he will diligently and honestly administer the affairs of such bank, and that he is the owner, in good faith in his own right, of at least one hundred dollars at par value of the capital stock of said bank, and that the same is not hypothecated or in any way pledged as security for any loan or debt, and, in case of re-election or re-appointment, that such stock was not hypothecated or in any way pledged as security for any loan or debt during his previous term. Such oath, subscribed by the director making oath and certified by the officer before whom it is taken, shall be transmitted by the cashier of said bank to the State Corporation Commission to be filed and preserved in the office of said commission. Any bank which fails for thirty days after the election of any director to file with the State Corporation Commission an oath duly executed by said director may be subject in the discretion of the commissioner to a fine of not less than twenty-five nor more than one hundred dollars, to be imposed and judgment entered therefor by the State Corporation Commission, and shall be enforced by its process."

The analysis of the two foregoing sections so far as it affects the questions propounded may be briefly set forth as follows:

Section 1165 provides:

1. That every director must own at least \$100 of the stock of his bank.
2. That a director who ceases to be such owner or who becomes in any other means disqualified shall thereby vacate his office.

It should here be noted that no other means of disqualification are prescribed by statute so far as the vacation of an existing term is concerned.

Section 1166 provides that the oath to be taken by the director when appointed or elected shall be:

1. That he will perform his duty as a director.
2. That he is the owner of the required amount of stock.
3. That the same is not pledged, etc., and
4. In case of *re-election* or *re-appointment* that such stock was not pledged during his previous term.

Note that the director's office is not vacated when he pledges his stock, but only when he ceases to be its owner. Note, also, that the statute does not in terms prohibit one from acting as director of the bank before taking the oath. And note, further, that no penalty is imposed on the director for failure to take the required oath, but that the bank is made liable for failure to file said director's oath within thirty days after his election.

It may, therefore, be argued that the provision requiring the oath is merely directory and that a director may serve without taking the oath, but such a construction should, if possible, be avoided, because it would defeat the legislative intent. Furthermore, the bank is subject to a fine for not filing the director's oath with the Corporation Commission, and the bank could not file the oath until it is made by the director. It is hardly conceivable that the legislature intended to punish the bank for not filing the oath without at the same time rendering mandatory the making of the oath.

I am, therefore, of the opinion the proper construction of the statute makes the taking of the prescribed oath a prerequisite to service as a director and that it in effect prohibits such service until the oath is taken. Such a construction seems to be the only one which will give any effect to the provision requiring the oath.

The public is vitally interested in the faithful performance of the important duties devolving upon bank directors, and I think it was the intention of the General Assembly to make the same kind of requirement of the bank directors which is made of public officials who must always before entering upon their duties take the oath prescribed by law.

Having reached the conclusion that a director before entering upon service must take the oath and that one who will not or cannot take the same cannot legally serve as director, it follows that a director who did not leave unpledged \$100 of his stock during his previous term cannot serve in pursuance of re-election or re-appointment. It will be observed, however, that the oath to the effect that the stock was not pledged during the previous term is required only of those who are *re-elected* or *re-appointed*, and your second question as to how a director so disqualified may make himself again eligible, depends upon the construction placed on the words *re-elected* or *re-appointed*. If a director pledges all of his stock and is re-elected or re-appointed he cannot serve in pursuance of such re-election or re-appointment, but the important question is—how long does his disqualification last? There are three answers which may be given to the question:

1. Either he is forever ineligible, or,
2. He is ineligible during the succeeding term, or,
3. Some interruption, however short, in the continuance of his service will satisfy the statute.

It could hardly be contended that the legislature intended to disqualify forever one who might through inadvertence have pledged his stock. Such a construction would be harsh in the extreme, and cannot fairly be said to have been in the contemplation of the General Assembly, but we are forced to such a construction unless the words re-elected or re-appointed are taken to mean the selection of a person to continue from one term to another without interruption. I am of the opinion that it is in such a sense that the words are here used.

If a man ceases to be a director and is afterwards elected again he is not re-elected within the meaning of the statute, and, therefore, cannot be required to take the oath that he did not pledge his stock during his previous term.

There is certainly nothing in the statute to justify the conclusion that the offending director's disqualification is fixed at one term. He is either disqualified forever or the statute is satisfied upon his disqualification for any period, however short. The statute admits of no middle ground.

My conclusion, therefore, is that the offending director cannot serve from one term into another without interruption, that his inability to take the prescribed oath creates a vacancy, that such vacancy may be filled by the election of the offending director, if the appointive power sees fit to choose him, and that he is then not required to make the oath that he did not pledge his stock during his previous term, because his choice to fill the vacancy is not a re-election or re-appointment in the sense in which the terms are used in the statute. The only disadvantage, therefore, to which the offending director is put is that he must run the risk of not being chosen by the appointive power to fill the vacancy.

It must be admitted that these statutes are difficult of construction and that there are serious objections to any construction which may be adopted. The sections are very inaptly drawn and lead to some very curious results. For instance, a director who owns \$100 of the stock of his bank and who borrows an amount equal to its value may continue his term as director, but if before his re-election he pays off his loan and purchases \$10,000 additional stock in his bank, which is also unpledged at the time of his re-election, his office is vacated. In other words, while his interest in the bank is entirely covered by a loan, he is permitted to serve as director, while afterwards if he becomes substantially interested in the bank he is prohibited from serving as a director—a result entirely contrary to the purpose of the statute, yet in strict accordance with its letter.

Troublesome questions may arise under this statute unless its defects are corrected, and, knowing that your department is interested in perfecting the bank statutes, I am taking the liberty of appending to this letter suggested amendments, which, if you think wise, you may forward to the revisors of the Code, or have them offered at the next session of the General Assembly.

Very truly yours,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

SUGGESTED AMENDMENTS TO SECTIONS 1165 AND 1166 OF THE CODE OF VIRGINIA.

Section 1165—Directors Must Be Stockholders.—Every director of a bank or banking institution must own, in his own right, *unhypothecated and unpledged*, at least one hundred dollars at par value of the capital stock of the bank or banking institution of which he is a director. Any director who ceases to be the

owner of one hundred dollars of the capital stock *unhypothecated and unpledged*, or becomes in any other means disqualified, shall thereby vacate his office, *and any director who hypothecates or in any way pledges his stock as security for any loan or debt, shall be ineligible to serve as director for one year next succeeding the end of the term in which said stock was pledged or hypothecated.*

Section 1166—Oath of Directors.—No person elected or appointed director of a bank or banking institution, chartered under the laws of this State and doing business therein, shall serve as such until he shall have taken an oath, so far as the duty devolves upon him, that he will diligently and honestly administer the affairs of such bank, and that he is the owner, in good faith in his own right, of at least one hundred dollars at par value of the capital stock of said bank, and that the same is not hypothecated or in any way pledged as security for any loan or debt, and, in case of re-election or re-appointment, that such stock was not hypothecated or in any way pledged as security for any loan or debt during his previous term. Such oath, subscribed by the director making oath and certified by the officer before whom it is taken, shall be transmitted by the cashier of said bank to the State Corporation Commission to be filed and preserved in the office of said commission. Any bank which fails for thirty days after the election of any director to file with the State Corporation Commission an oath duly executed by said director may be subject in the discretion of the commission to a fine of not less than twenty-five nor more than one hundred dollars, to be imposed and judgment entered therefor by the State Corporation Commission, and shall be enforced by its process.

BUILDINGS, PUBLIC—Fire Escapes—State Buildings.—Section 1067a of the Code as amended does not require the State of Virginia to erect fire escapes on its buildings.

Same—Statutes—Construction.—The buildings mentioned in section 1067a of the Code of Virginia, as amended, which provides that owners of all office buildings over three stories in height or buildings where as many as fifteen persons are employed, lodged, entertained or instructed above the second story of such building shall erect and maintain in good condition fire escapes, does not apply to public buildings owned by the State of Virginia. It is not to be presumed, in the absence of express enactment of the legislature, that it is intended to place upon the State a duty, and much less that it was intended to impose upon the State a fine to be paid by the State.

Same—Statutes—Fines Imposed by Section 1067a, Code of Virginia 1904, as Amended.—The fine provided for in section 1067a of the Code as amended is placed upon the owner of the buildings mentioned in that section alone and not upon any agent.

RICHMOND, VA., June 24, 1916.

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

DEAR SIR:

I have your letter of June 22d, in which you inform me that the Commissioner of Labor has notified the Superintendent of Grounds and Buildings that he is of opinion that chapter 514 of Acts of the General Assembly of Virginia,

1916, requires the placing of fire escapes on the Capitol Building and on the State Library Building, and that the said commissioner has requested that such fire escapes be erected. You ask my opinion as to whether the law referred to requires the erection of said fire escapes.

The statute which the commissioner cites is an amendment to section 1067a of Virginia Code 1904, and provides that the owners of every factory, workshop, mill or place where the manufacture of goods is carried on, hotel, school building, college, hospital, orphan asylum, mercantile establishment and office building over three stories in height, or where as many as fifteen persons are employed, lodged, entertained or instructed above the second story of such building * * * shall provide for the safe exit of the occupants thereof, in case of fire, by the erection, construction or maintenance in good condition of fire escapes of the most improved modern design.

The statute also provides that the character and design of the fire escapes in cities and towns shall be selected by the council thereof, and, in counties, by the board of supervisors, but that if such councils or boards of supervisors fail, prior to July 1st of this year, to make such selection, the Commissioner of Labor, after sixty days' notice * * * shall proceed to prescribe and publish regulations concerning the erection, character and design of adequate fire escapes for such city, town or county.

The statute further provides that any owner or owners of such buildings violating the provisions of the act shall be deemed guilty of a misdemeanor, and, upon conviction thereof, fined not less than \$25.00 nor more than \$100.00 for each month they fail to provide such fire escapes.

While it is true that both the Capitol and Library Buildings may be called "office buildings," in as much as a part of each building is used for office purposes, yet I think it apparent from the context that the General Assembly, in passing the statute, did not have in contemplation either of said buildings. In the first place, it requires the owner of the building to have the fire escapes erected, and imposes a fine upon the owner for failing to do so. In this case the State is the owner of the buildings. And, while it might be argued that the State ought to set an example to its citizens by placing fire escapes on its own buildings, yet, according to an established rule of construction, it cannot be presumed, in the absence of express enactment, that it intended to place upon itself a duty, and, much less, that it intended to impose upon itself a fine to be paid to itself. The fine cannot be imposed on any officer of the State, for the statute places it upon the owner alone.

Without at this time passing upon the question as to whether you may not require the erection of such fire escapes under the powers of control and direction over the Superintendent of Grounds and Buildings vested in you under section 288 of the Code (as amended), I here express the opinion that, for reasons above given, the erection of said fire escapes cannot be compelled under chapter 514 of Acts 1916.

Yours very truly,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

CITIES AND TOWNS—Constitutional Law.—A provision of a bill which provides that the portion of an appropriation therein made may be used to pay "such indebtedness as may be incurred in the administration of the affairs of the community by the administrative board of an incorporated town, violates the provisions of section 185 of the Constitution, which provides that the State shall not assume any indebtedness of any county, city or town nor lend its credit to the same.

Same—Loans by the State—Constitutional law.—The Constitution of Virginia does not in terms prohibit the loaning of money to counties, cities and towns but provides that the State shall not "lend its credit" to the same, and while it is difficult to point out from the standpoint of public policy the difference between lending a credit in a limited amount and lending money in a limited amount yet it is clear that the letter of the Constitution does not prohibit loans of money by the State to counties, cities and towns.

RICHMOND, VA., February 4, 1916.

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

DEAR SIR:

Referring to your request of this morning for my opinion as to the constitutionality of Senate Bill 88, appropriating the sum of \$50,000.00 for the proper administration of public affairs at Hopewell, Virginia, will say that the bill shows on its face that it contemplates the passage of two other bills,—one providing for the temporary government of Hopewell and the other providing for its incorporation. I am informed that the bill as amended by the Senate provides for the loan of \$50,000.00, which sum is to be re-paid, without interest, by the city after its incorporation. The bill, therefore, constitutes one of three companion bills, the validity of each depending more or less upon the passage and constitutionality of the others. I think it is, therefore, apparent that none of the bills should be approved until the passage of all is assured.

Referring to the constitutionality of the measure, I call your attention to the provision of section 185 of the Constitution which provides, among other things, that the State "shall not assume any indebtedness of any county, city or town, nor lend its credit to the same." One provision of the bill provides that a portion of the appropriation may be used to pay "such indebtedness as may be incurred in the administration of the affairs of the community by the administrative board," (that is to say, the board administering the temporary government which expires by limitation upon the proposed incorporation of the city on July 1st.) The indebtedness incurred by the temporary government in the meanwhile is not strictly within the language of the Constitution, because such indebtedness is not that of a county, city or town, yet it must be admitted that the assumption of an indebtedness of any governmental agency comes within the spirit of the inhibition of the Constitution. I would suggest that the word "indebtedness" used in section 3 be changed to the word "expenses" for reasons apparent from the above.

Under the act the appropriation is to constitute a loan to the city when incorporated. You will observe that the Constitution does not in terms prohibit the lending of money to counties, cities and towns, but provides that the State shall not "lend its credit" to the same; and while it is difficult to point out, from the standpoint of public policy, the difference between lending a credit in a

limited amount and lending money in a limited amount, yet I think it is clear that the letter of the Constitution does not prohibit loans of money to counties, cities and towns.

Confirming what I have already said to you in person, I believe the courts will be liberal in the construction of the several acts concerning Hopewell, to the end that orderly and efficient government may be set up speedily to meet the most unprecedented conditions there prevailing. The makers of the Constitution evidently did not contemplate that a city of more than 10,000 population would spring up within a few months, and consequently no provision was made for such condition. It is obvious that the health and general welfare of the people of the community must be protected by some form of government, and that the present county government is not suited to meet such conditions, yet the residents of Hopewell have not resided there sufficiently long to have acquired the right of franchise under the Constitution. The situation, therefore, calls for extraordinary and unusual legislation, which if not upheld would be an admission of the State's impotence to provide for the health and general welfare of a large community within her borders. These general considerations lead me to the belief that the courts would be slow to declare unconstitutional any reasonable measures devised to meet the emergency. If, therefore, Senate Bill 88 is necessary to that end, I believe that the courts will uphold the same.

Very truly yours,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

CITIES AND TOWNS.—The city of Charlottesville became a city of the first class *ipso facto*, as of the date of the proclamation to that effect by the Governor, which was August 1, 1916.

RICHMOND, VA., September 7, 1916.

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

DEAR SIR:

Acknowledgment is made of a letter of the secretary to the Governor, addressed to the Attorney General of Virginia, in which he says:

"The Governor requests that you please advise this office the date on which Charlottesville became a city of the first-class."

It appears from a copy of a proclamation of the Governor made in pursuance of the provisions of section 2, of chapter 32, of the Acts of 1906, providing for the transition of municipalities from the grade of cities of the second-class to the grade of cities of the first-class, that the proclamation proclaiming the city of Charlottesville to be a city of the first-class under the Constitution and laws of this Commonwealth was made by the Governor on the first day of August, 1916.

Section 1 of chapter 32 of the Acts of 1906 provides as follows:

"Be it enacted by the General Assembly of Virginia, Whenever any city of the second-class first attains a population of ten thousand inhabitants or more, as shown by any legal census heretofore or hereafter taken, such city shall be deemed to have become, *ipso facto*, a city of the first-class as of the date of the proclamation of that fact by the Governor as provided for in section 2 of this act."

I am, therefore, of the opinion that the city of Charlottesville became a city of the first-class, *ipso facto*, as of the date of the proclamation to that effect by the Governor, which was August 1, 1916.

Very truly yours,

LESLIE C. GARNETT,

Assistant Attorney General.

COMMONWEALTH ATTORNEYS—Attorneys for the Commonwealth—Fees—Sections 3527, 3528, Code of Va. 1904, as amended—*Nolle prosequi*—A Commonwealth's attorney is not entitled to fees out of the public treasury in cases of misdemeanor in which a *nolle prosequi* has been entered.

Same.—Attorneys for the Commonwealth earn no lawful fees either in a felony case or misdemeanor case unless there is a trial, and the entering of a *nolle prosequi* at any stage of the proceedings in a court of record does not constitute a trial.

Same.—Since the lawful fees of a Commonwealth's attorney in a misdemeanor case depend upon his prosecuting such a case in a court of record, where he is unwilling to prosecute by entering a *nolle prosequi*, he has no claim upon the public treasury for any fee. It is always perfectly clear that in the case of a felony in which he enters a *nolle prosequi* the Commonwealth's attorney is entitled to no fee.

Same—Fees of attorney for the Commonwealth.—Section 3528, Code of Va. 1904, as amended; sec. 3528, Code Va. 1904, as amended, enumerates the lawful fees to which Commonwealth's attorney are entitled unless specifically provided by some other statute. These are the only instances in which Commonwealth's attorney can claim any fees from the public treasury.

RICHMOND, VA., June 8, 1916.

HON. C. LEE MOORE,

Auditor of Public Accounts,

Richmond, Va.

DEAR SIR:

Acknowledgment is made of your request for a construction of secs. 3527 and 3528 of the Code of Virginia with reference to the fees of Commonwealth's attorneys, and of the letter of W. C. Bibb, Esq., Commonwealth's attorney of Louisa county, Va., transmitting to you two accounts, to-wit:

“(1) Commonwealth v. Thompson, indicted for misdemeanor—	
non-support— <i>nolle prosequi</i> entered	\$ 5 00
Commonwealth v. Walton, indicted for misdemeanor—obstructing	
public highway— <i>nolle prosequi</i> entered	5 00
Commonwealth v. Curtis Jones, appeal warrant for unlawful tres-	
pass— <i>nolle prosequi</i> entered	5 00
	<hr/>
	\$15 00
(2) Commonwealth v. Morris, warrant for felony investigated	
and sent to grand jury. Grand jury failed to indict	
(one-half fee)	5 00

It is claimed by the Commonwealth's attorney that under sec. 3527, Pollard's Code 1910, he is entitled to a fee for prosecuting a misdemeanor even though he enters a *nolle prosequi*, and that, therefore, the \$15.00 claim above set out, should

be allowed. As to the \$5.00 claim, the Commonwealth's attorney contends that under sec. 3527 of Pollard's Code 1910, a Commonwealth's attorney who attends upon an investigation, before a justice of the peace, of a person charged with felony, is entitled to one-half of the \$10.00 fee provided for in sec. 3528 for the prosecution of a felony in a court of record.

As to the right of a Commonwealth's attorney to fees in cases of misdemeanor in which he has entered a *nolle prosequi* in a court of record, I find that the present Attorney General has already passed upon this proposition, and has held that such an officer is not entitled to fees in cases of misdemeanor in which a *nolle prosequi* has been entered. This opinion was given to N. G. Payne, Esq., Commonwealth's attorney, Madison, Va., in letters bearing date April 1, 1914 and April 13, 1914, and found on pp. 21 and 22 of the report of the Attorney General for 1914.

In order, however, that this matter may be set at rest so far as this office is concerned, I shall endeavor to analyze the two sections of the Code referred to and to give more fully the reasons why this office adheres to the opinion of the Attorney General as rendered above.

By reference to the Code of Virginia, 1904, it will be seen that the law then was that where a *nolle prosequi* is entered or judgment arrested in a misdemeanor trial, one-half of the lawful fees of the officers therein set out; "except a jailer who shall be paid in full, shall likewise be paid when certified," etc. The law, as amended by Acts 1908, Pollard's Supp., 1910, provides that where a *nolle prosequi* is entered or judgment arrested "one-half of the lawful fees of the justice and other officers, except the attorney for the Commonwealth for prosecuting the case in a court of record, and jailer, both of whom shall be paid in full, shall likewise be paid when certified," etc. It will be noted that in the original law, and in the law as amended, the provision is for the payment of one-half of the *lawful fees* of these officers. The *lawful fees* of Commonwealth's attorneys are prescribed and limited by sec. 3528 of the Code, as amended by Acts 1912, as follows:

"For each trial of a felony case in any circuit or corporation court, for each person tried	\$10 00
Where two or more persons are jointly indicted and jointly tried, for one of the persons tried	10 00
For each of the other persons so jointly indicted and jointly tried	5 00
For every case of misdemeanor tried in any circuit or corporation court, (except prosecutions for violations of the revenue law and for offenses under sec. 3815 and the sections following to 3833, inc.)	5 00

From the above quotation from the statute it is perfectly obvious, it seems to me, that the attorney for the Commonwealth earns no lawful fee either in a felony case or in a misdemeanor case unless there shall be a trial, and the entering of a *nolle prosequi* at any stage of the proceedings in a court of record, does not constitute a trial. By reference again to sec. 3527, it will be noted that it is provided that in every *prosecution* for a misdemeanor the officers enumerated are entitled to one-half fees, except the attorney for the Commonwealth for *prosecuting* the case in a court of record shall be paid in full. The entering of a *nolle prosequi* in a misdemeanor case is *not prosecuting* the case under the statute; but, on the contrary, is a solemn declaration of record that the Common-

wealth's attorney is *unwilling to prosecute* the case. It would seem perfectly clear, therefore, that since his lawful fees in misdemeanor cases depend upon his prosecuting them in a court of record, and he is unwilling to prosecute by entering a *nolle prosequi*, he can have no claim upon the public treasury for any fee. It is perfectly clear also that in the case of a felony in which he enters a *nolle prosequi*, the Commonwealth's attorney is entitled to no fee. Before sec. 3527 of the Code was amended by the Acts of 1908, Commonwealth's attorneys, who prosecuted misdemeanor cases in a court of record, could only be paid out of the public treasury one-half of the lawful fee allowed by section 3528 of the Code, or \$2.50. The purpose and sole effect of the amendment provided by Acts of 1908, page 604, so far as Commonwealth's attorneys' fees are concerned, was to provide that in cases prosecuted (not in cases in which the Commonwealth's attorney was unwilling to prosecute) the Commonwealth's attorney was entitled to full fees out of the public treasury.

With reference to the second bill for \$5.00 rendered by the Commonwealth's attorney for investigating a felony before a justice of the peace, I think it perfectly clear from what has been heretofore said herein, and from the provisions of sec. 4089 of the Code, which provides that no fee paid an attorney for the Commonwealth shall be payable out of the State treasury unless it be expressly provided, that there is no warrant in law for paying Commonwealth's attorneys for attending preliminary investigation of a felony before a justice of the peace. Section 3528 of the Code, as above set out, enumerates the lawful fees to which a Commonwealth's attorney is entitled; and, unless specifically provided by some other statute, these are the only instances in which a Commonwealth's attorney can claim any fees from the public treasury. It is nowhere provided by this section that a Commonwealth's attorney shall be entitled to a fee for investigating a felony before a justice. If sec. 3528 of the Code had provided that for every investigation of a felony attended by a Commonwealth's attorney before a justice's court he should be entitled to a certain fee, then it would follow that under sec. 3527 of the Code he would be one of the "other officers" therein mentioned who would be entitled to one-half of that certain fee if paid out of the public treasury just as the sheriff, who is allowed a certain fee for arrests, would in such a case be paid one-half of that certain fee out of the public treasury under this section.

It follows, therefore, from the above, that the Commonwealth's attorney, of Louisa county, is not entitled to any fee in the misdemeanor cases in the circuit court of that county in which he entered a *nolle prosequi*; nor is he entitled to any fee for attending an investigation of the felony before a justice of the peace in that county.

Yours very truly,

LESLIE C. GARNETT,

Assistant Attorney General.

COMMONWEALTH'S ATTORNEYS — *Game Laws — Duties of Commonwealth's attorney—sec. 3988, Code Va. 1904.*—It is the duty of attorneys for the Commonwealth in the various counties to prosecute in the circuit court misdemeanor cases arising out of prosecutions for violations of the game laws.

RICHMOND, VA., September 9, 1916.

HON. JOHN S. PARSONS,
Commissioner of Game and Inland Fisheries,
Richmond, Va.

DEAR SIR:

Acknowledgment is made of your communication of September 9, 1916, in which you request the Attorney General to advise you as to whether or not the attorneys for the Commonwealth in the several counties of the State are required to prosecute offenses under the game laws when tried on appeal from the decision of the justice of the peace in the circuit court.

In the necessary absence from the city of the Attorney General and the Assistant Attorney General, I am writing you this opinion which you will not treat as official, however, until passed upon by the Attorney General or his assistant.

Section 3988 of the Code reads as follows:

"Every commissioner of the revenue, sheriff, constable, or other officer shall give information of the violation of any penal law to the attorney for the Commonwealth, who shall forthwith institute and prosecute all necessary and proper proceedings in such case, whether in the name of the Commonwealth or of a county or corporation, and may in such case issue or cause to be issued a summons for any witness he may deem material to give evidence before the court or grand jury. It shall, however, be unlawful for any attorney for the Commonwealth to go before any grand jury during their deliberations except when duly sworn to testify as a witness, but he may advise the foreman of the grand jury or any member or members thereof in relation to the discharge of their duties."

It will be observed that the attorney for the Commonwealth is required by this section to prosecute all necessary and proper proceedings in penal cases. There appears to be no doubt as to the fact that those portions of the game law which prescribe fines for violation thereof are penal laws. Such laws are defined as follows in 6 Words and Phrases 5269.

"Penal laws, strictly and properly are those imposing punishment for an offense, committed against the State, which by the English and American Constitutions the Executive of the State has the right to pardon. Statutes giving a private action against a wrong doer are some times spoken of as penal in their nature but in such cases neither the liability imposed nor the remedy given is strictly penal." *Huntington v. Attrill*, 146 U. S. 657, and other cases cited.

"A penal statute is defined to be one which imposes a forfeiture or penalty for transgressing its provisions, or for doing a thing prohibited." *Woolverton v. Taylor*, 23 N. E. 1007, 1008, 132 Ill. 197, 22 Am. St. Rep. 521.

"Penal statutes are statutes imposing penalties for some violation of public right." *Kilton v. Providence Tool Co.*, 48 Atl. 1039, 1041, 22 R. I. 605.

"Penal statutes are those by which punishments are imposed for transgression of a law." *Hall v. Norfolk & W. R. Co.*, 28 S. E. 754, 756, 44 W. Va. 36, 41 L. R. A. 669, 67 Am. St. Rep. 757.

"The term 'penal laws' is more generally used to indicate a law which imposes a fine for its breach, but in a strict sense a penalty is the punishment and retribution of crime. Shakespeare speaks of 'the penalty for the forfeit of my bond,' and Milton speaks of 'penal fire and the penalty of death,' and our statute prescribes 'an oath under the pains and penalties of perjury.'" *Drew v. Russel*, 47 Vt. 250, 253.

"The term 'penal law' is more generally used to indicate a law which imposes a fine for its breach. A statute in which the penalty is imprisonment is not strictly a penal statute." *Drew v. Russel*, 47 Vt. 250, 252."

It would, therefore, seem to be the duty of attorneys for the Commonwealth in the various counties to prosecute in the circuit court misdemeanor cases arising out of prosecutions for violation of the game laws.

Yours very truly,

LEON M. BAZILE,
Law Assistant.

CONSTITUTIONAL LAW—*Roads and highways—Turnpikes—Tolls—Public service Corporations—Section 10, Chapter 10, act concerning public service corporations—House Bill 150, General Assembly 1916—Public officers.*—An amendment to section 10, chapter 10, of the act concerning public service corporations which section provides for the fees which may be received on turnpikes), which provides that no fees shall be demanded of any sheriff of the county or his deputy or of any constable or State road officer for traveling over such turnpike in discharge of official duties does not violate any provision of the Constitution.

RICHMOND, VA., *February 29, 1916.*

HON. H. F. BYRD,
Senate Chamber,
Richmond, Va.

DEAR SIR:

As a sub-committee from the Senate, you have requested this office to give you an opinion on the constitutionality of an amendment proposed to House Bill 150, which amends and re-enacts section 10 of chapter 10 of the act concerning public service corporations, which section provides for the tolls which may be received on turnpikes. The amendment in question on which you desire our opinion as to its constitutionality reads as follows:

“And provided further that no toll shall be demanded of the sheriff of any county or his deputy, or of any constable or State road officer for traveling over any such turnpike in the discharge of his official duties.”

I have not been able to find in this State any case which bears on the question, nor have I found any case anywhere which is directly in point; but I have made an extensive examination of pertinent authorities elsewhere which lead me to believe that the provisions of the amendment aforesaid are not unconstitutional.

Thus in 38 Cyc., at p. 394, we find the following language:

“The benefit of charter or statutory provisions conferring exemption from all or half toll upon certain classes of persons, vehicles, or vehicles carrying certain burdens is available only to persons within their meaning. Hence it is necessary for a person claiming exemption to show that the statutory exoneration is applicable and that he is within one of the named classes, such as * * * police constables * * * officers, soldiers and volunteers on duty, and carts or carriages employed in royal service.”

The above quotation, and the authorities cited therein, are sufficient to show that charter or statutory provisions may exempt constables and persons in the employment of the State. Of course, these citations do not touch upon the question of the constitutionality of such a provision, but at least they lead to the *prima facie* presumption that the provisions are valid and not in violation of the Constitutions of the States to which reference is given in the foot-notes of Cyc.

The doctrine is thus stated in 27 Am. & Eng. Ency. of Law, 1st ed., at p. 338:

"Exemption from toll is usually created by special statute and is granted for various reasons," citing a long list of cases.

In 1 Elliott on Roads and Streets, 3d ed., sec. 103, and foot-notes thereto, the doctrine is stated as follows:

"Many cases illustrative of the right to claim exemptions under statutes may be found in the books."

And in the foot-notes, we find cases of statutes exempting "scholars going to or returning from school," and a statement that "persons carrying the mail under contract are not exempt in the absence of legislative enactment."

These citations are sufficient to show, I think, that the legislature has power to make exemptions in a statute regulating tolls of turnpike companies. Nor does section 161 of the Constitution affect the validity of the amendment above, for the effect of that section is to prevent transmission or transportation companies from granting to a member of the legislature, or to any State, county, district or municipal officer, except members of the State Corporation Commission, any frank or free pass or free transportation, etc.; and transportation and transmission companies do not include turnpike companies.

Section 4 of the Bill of Rights provides that:

"No man or set of men is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services."

If it be conceded that the amendment here proposed is a granting of exclusive or separate emoluments or privileges from the community, it is to be noted that the grant is only in consideration of public services, to-wit, while the officers are in the discharge of their official duties.

A careful consideration of many suggested provisions of the Constitution has failed to disclose any provision that, in my opinion, makes the amendment unconstitutional.

My search, of course, has been limited because of the limited amount of time at my disposal, and I cannot say definitely that the provision is constitutional, but can merely say that, so far as my consideration of the question and my search of the Constitution is concerned, I find no objection to the constitutionality of the amendment.

Respectfully submitted,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

CORPORATIONS—*Merger—Chapter 19, Acts 1899-1900—Constitution of Virginia, Article 12—section 1105-b (2) (c) as amended.*—Where two corporations attempt to merge and consolidate it is necessary that the steps taken in pursuance thereof comply with the provisions of the statutes with reference to the consolidation of corporations which have been enacted in pursuance of article 12 of the Constitution.

RICHMOND, VA., November 19, 1915.

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

DEAR SIR:

In the absence of the Attorney General, I am replying to your letter of November 16th, in which you submit to this office articles of merger and consolidation of the Seaboard Air Line Railway, a Virginia corporation, with the Carolina, Atlantic & Western Railway, a foreign railroad corporation under the name of Seaboard Air Line Railway Company.

You state in your letter that the articles of merger and consolidation have been presented to you as Secretary of the Commonwealth without first presenting them to the State Corporation Commission; and you also state that the corporation "is attempting to follow the provisions of paragraph 2 (a) of an act authorizing the Richmond, Petersburg & Carolina Railroad Company, as successor of the Virginia & Carolina Railroad Company, to exercise the franchises, powers and privileges of the Virginia & Carolina Railroad Company, to change its name, and to possess and exercise general powers, and authorizing leases, purchases, as well as of consolidation between it and other railroad or transportation companies, approved January 12, 1900." (Acts 1899-1900, ch. 19, p. 27).

The first question which you put to us under the above facts, is whether or not the corporation has done all that is required of it under the laws of this Commonwealth in this merger and consolidation.

Although you do not state it to be a fact, I take it for granted that the Seaboard Air Line Railway Company is the successor of the Richmond, Petersburg & Carolina Railway Company, which was chartered by the Acts of 1899-1900, ch. 19, p. 27 aforesaid.

After a careful consideration of article 12 of the Constitution of 1902, and of the statutes carrying the same into force, and especially of section 1105b (2) (e), Supplement 1910, p. 147, I am clearly of the opinion that "this corporation has not done all that is required of it under the laws of the Commonwealth of Virginia in the matter of this merger and consolidation," but that it is necessary for this corporation to comply with the statutes with reference to the consolidation of corporations which have been enacted in pursuance of article 12 of the Constitution.

My decision on this question renders it unnecessary to answer your second question, to-wit, as to the charter fee which is to be paid in such a case as this.

A copy of this letter will be sent to Hon. R. R. Prentis, Chairman State Corporation Commission.

Very truly yours,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

COSTS—Arrest—Arrest and conviction of criminals—Costs and expenses incident thereto.—An individual may be reimbursed for voluntary expenditures of money to bring about the arrest and conviction of criminals, first on order of the Governor out of the civil contingent fund (and whether the reimbursement be made in any particular case as a matter of policy is solely within the discretion of the Governor), or, second, reimbursement may be made out of the criminal

fund by direction of the Governor provided the Auditor first lays the claim before the Governor with an expression of opinion on the Auditor's part that the claim ought to be paid, and, in the latter case the question whether such reimbursement should be made is a matter of policy within the discretion of the Governor who may reject such claim or order the same or any part thereof to be paid.

RICHMOND, VA., August 17, 1916.

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

DEAR SIR:

I have your request for my advice as to whether the Governor has any authority to reimburse individuals for the voluntary expenditure of money to bring about the arrest and conviction of criminals.

There are two funds out of which such reimbursement may be lawfully made, and whether in the particular case now before you such reimbursement should in fact be made is not a question of law but one of executive policy as will be seen from the statutes hereinafter quoted. The two funds out of which the claim may be paid are the Civil Contingent Fund and the Criminal Fund. The Civil Contingent Fund is entirely under the control of the Governor, the only limitation upon him being that all expenditures from said fund must be "of a public or official nature." (Acts 1916, p. 894.) The Criminal Fund, so far as it affects the case under consideration, is under the control of the Auditor and the Governor, as set out in the statute hereinafter cited.

The provisions with reference to the expenditure of the Civil Contingent Fund may be found in Va. Code 1904, sec. 218, which provides as follows:

"Out of the sum annually appropriated as a civil contingent fund, there may be paid all expenses in the execution of any law for which there is no special appropriation, and any other sums which the Governor may deem necessary or proper. No payment shall be made out of the said contingent fund except upon the order of the Governor directed to the Auditor of Public Accounts."

And in the appropriation act for the current year, where it is provided:

"Civil contingent fund,—\$10,000.00, which shall include expenditures by the executive of a public or official nature, or so much thereof as may be necessary." (Acts 1916, p. 894.)

The provisions governing the expenditures of the Criminal Fund, so far as they affect the case now under consideration, may be found Va. Code 1904, sec. 767, which is here quoted, so far as applicable:

"For services rendered or expenses incurred in the arrest of a criminal or about a criminal prosecution for which no other appropriation is made by law * * * it shall be lawful for the said Auditor within three years after the claim might have been presented, if he be of the opinion that such claim ought to be paid, to lay the same before the Governor and so much thereof shall be paid as the Governor may direct."

The Criminal Fund is provided for by an appropriation of \$380,000.00. (Acts 1916, p. 895.) It will be observed that payment out of this latter fund can be made only upon the initiative of the Auditor. (Report of Attorney General Anderson, 1906, p. 30.)

My conclusions therefore are:

First: That such reimbursement may be lawfully made upon the order of the Governor out of the Civil Contingent Fund; and whether reimbursement should in fact be made in any particular case is a matter of policy solely within the discretion of the Governor; or

Second: That such reimbursement may be lawfully made out of the Criminal Fund by direction of the Governor; provided, the Auditor first lay the claim before the Governor with an expression of opinion on the Auditor's part that the claim ought to be paid. And here again, the question whether such reimbursement should in fact be made is a matter of policy within the discretion of the Governor, who may reject such claim or order the same or any part thereof to be paid.

Yours very truly,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

COSTS—Arresting escaped prisoners—Crimes—Section 4084—Code Va. 1904—Jail breaking—Costs and expenses of arresting persons charged with crime.—The necessary expense of arresting a person charged with crime or a person convicted for the crime and escaped from jail are payable out of the public treasury, as provided in section 4084, Code Va. 1904.

Same—Reimbursement of sheriff or other officer—Section 3753, Code Va. 1904.—If the prisoner breaks jail through the negligence of the sheriff or other officer such officer is liable for punishment by confinement in jail or a fine as provided by section 3754 Code Va. 1904, and in such a case an officer negligently suffering a prisoner to escape from his custody could not have a claim upon the State for any expenses which may be forced to incur in order to recapture the prisoner. The question to be determined by the court in certifying the amount as provided for in section 4084 is whether or not the escape in any given case was due to the negligence of the officer in question.

Same—Payment by the Auditor.—If the judge of the circuit court of a county certifies that the expenditure of the sheriff of that county in the recapture of a prisoner whether convicted of or charged with the crime was a necessary expense incident to the recapture of the prisoner who had escaped from jail by reason of negligence of the officer, the Auditor is authorized to pay the amount out of the public treasury.

RICHMOND, VA., June 16, 1916.

HON. C. LEE MOORE,

Auditor of Public Accounts,

Richmond, Va.

DEAR SIR:

Mr. C. W. Purks, sheriff, King George county, has written a letter to this office with regard to the payment of expenses for the capture of a prisoner who escaped from the jail of his county, as follows: "Wm. Tate broke jail here on May 11th, and I spent \$12.79 in telephone and telegraph, ferriage, etc. Is there any law for me to get this money back as I do not think I should lose it?" This

letter was referred to you and was returned by you with the request that you be given an official opinion of the Attorney General's office with regard thereto.

Section 4083 of the Code provides that when in a criminal case an officer renders any service for which no specific compensation is provided, the court in such case may allow what it deems reasonable, such allowance to be paid out of the treasury on the certificate of the court stating the nature of the services.

Section 4084 of the Code provides as follows:

"Any other expense incident to a proceeding in a criminal case, which is payable out of the treasury otherwise than under the preceding section * * *, shall be certified by said last mentioned court, where it is not otherwise provided."

This section also provides that with this certificate shall be transmitted to you the vouchers on which it is made. It cannot be questioned, I think, that the necessary expenses of arresting a person charged with crime, or a person convicted of a crime and escaped from jail, are *payable out of the treasury* as provided in section 4084. To hold otherwise would greatly retard, if not altogether impede the arrest of alleged or convicted criminals. To contend that the sheriffs are responsible out of their own pockets for the necessary costs incidental to an arrest or capture of criminals, would be to hold out an inducement to those officers to be exceedingly lax in the execution of the laws and would materially impair the administration of justice.

Of course if a prisoner breaks jail through the negligence of the sheriff, or other officer, such officer is liable to punishment by confinement in jail not exceeding six months or a fine of not less than fifty nor more than five hundred dollars, as provided by section 3753 of the Code, and in such case an officer negligently suffering a prisoner to escape from his custody could not have a claim upon the State for any expense which he might be forced to incur in order to re-capture the prisoner. The question of whether the escape in any given case was due to the negligence of the officer, is a question for the court to determine in certifying the amount as provided in section 4084.

It is my opinion, therefore, that if the judge of the circuit court of King George county will certify that the expenditure of the sheriff of that county of \$12.79 in the re-capture of Wm. Tate, whether the prisoner was convicted of or charged with a crime, was a necessary expense incident to the re-capture of the prisoner who had not escaped from prison by reason of the negligence of the officer, you would be authorized in paying the amount out of the treasury.

Yours very truly,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

COSTS—Criminal Prosecutions—Witnesses—Sections 3536 of the Code of Va. 1904, and 4083 of the Code of Va. 1904.—The expenses incurred by a sheriff or his deputies in trying to catch a very important witness in a murder case, comes within the provisions of section 4083 of the Code which permits payment in a criminal case of an officer for any other service rendered by him for which no specific compensation is provided when allowed by the court. This is not a pro-

ceeding against the witness for disobedience of the process of the court but was a service rendered by the officer in a criminal case for which no specific compensation is provided, or a service rendered by an officer for which no specific compensation is provided, and, therefore, does not come within the meaning of section 3536 of the Code of Va. 1904.

RICHMOND, VA., May 23, 1916.

HON. C. LEE MOORE,

Auditor of Public Accounts,

Richmond, Va.

DEAR SIR:

Acknowledgment is made of your request of today, enclosing a letter from Hon. R. R. Ruff, Commonwealth's attorney for Rockbridge county, who says that the sheriff of Rockbridge county had put in his last account an item of \$4.90 which had been spent by one of his deputies in trying to catch a very important witness in a murder case, this expenditure being made at the instance of the Commonwealth's attorney after a conversation with the judge of the court over long distance 'phone. Upon this statement of facts, you desire to know whether section 3536 of the Code, providing that "no officer shall be entitled to payment out of the treasury for services rendered in a proceeding against any person for disobedience of the process of a court," prohibited the allowance of this account.

From the letter of the Commonwealth's attorney, it appears that this was not a proceeding against the witness for disobedience of the process of the court, but was a service by the officer in a criminal case, for which no specific compensation is provided, or is, perhaps, a service rendered by an officer for which no specific compensation is provided. I think that this comes within the provisions of section 4083 of the Code, the latter part of which provides that:

"When in a criminal case an officer renders any other service, for which no specific compensation is provided, the court in which such case is, may allow therefor what it deems reasonable, and such allowance shall be paid out of the treasury on the certificate of the court stating the nature of the service."

Very truly yours,

LESLIE C. GARNETT,

Assistant Attorney General.

COSTS—Criminal prosecution—Criminal law—Costs of criminal prosecution—Section 4087 of the Code of Va. 1904.—Where a person accused of crime has been tried and convicted in the circuit court from which judgment a writ of error is obtained, and the conviction reversed by the court of appeals, and the cause remanded for trial to the circuit court, at which new trial the accused is convicted of a lesser offense, under section 4087 of the Code the defendant is liable for all the costs of both prosecutions except the cost on appeal. This section requires the clerk in every criminal case in which the accused is convicted to make up and certify a statement of all the expenses incident to the prosecution.

Words and Phrases.—"All the expenses incident to the prosecution" includes the expenses of both trials where an accused has been convicted which conviction is reversed and a new trial awarded, on which second trial the accused is again convicted, though of a lesser crime than that for which he was originally convicted.

RICHMOND, VA., December 23, 1915.

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

DEAR SIR:

You have referred to this office a letter of Mr. C. W. Eastman, clerk, Middlesex county, dated December 14, 1915, in which he states that, in the case of *Commonwealth v. Hallie Rawley*, the defendant was found guilty of murder and sentenced to five years in the penitentiary, but that upon appeal the case was reversed and the defendant granted a new trial; that upon the new trial, Hallie Rawley was found guilty of manslaughter and fined \$250.00; and the question arises whether in taxing the costs the defendant should be charged with the costs of the first trial and the second trial, or whether he should only be charged with the costs of the second trial.

Under section 4087 of the Code, it would seem that the defendant would be liable for all the costs in both cases, except the cost on appeal, for that section requires the clerk of the court, in every criminal case in which the accused is convicted, to make up and certify a statement of all the expenses incident to the prosecution; and further provides that the execution for the amount of such expenses shall be issued and proceeded with.

"All the expenses incident to the prosecution" would certainly include the expenses of both trials, and I am informed by Mr. S. P. Waddill, clerk of the circuit court of Henrico county, that it has been the custom in his court to make up a statement of the whole costs in both cases where the circumstances are such as indicated above in the Hallie Rawley case.

Very truly yours,

CHRISTOPHER B. GARNETT,
Assistant Attorney General.

COSTS—Probation Officers—Compensation—Ch. 350, Acts 1914, sec. 5 thereof; sec. 4083, Code of Va. 1904.—Under the provisions of section 5 of chapter 350, Acts 1914, and of section 4083, Code Va. 1904, the Auditor is justified in reimbursing the sheriff from the public treasury for expenses incurred by him as probation officer under chapter 350, Acts 1914, if the court makes the proper certificate.

RICHMOND, VA., March 30, 1916.

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

DEAR SIR:

Referring to letter of S. W. Lee, sheriff, Emporia, Va., making inquiries as to how he might recover certain expenses incurred by him as probation officer, ch. 350, Acts 1914, p. 696, provides, in section 5 thereof, as follows:

"No probation officer shall receive any compensation for his services from the treasury of the State, except when traveling by order of the court, judge, or justice having jurisdiction of the case or child involved, when he shall, upon the certificate of such judge or justice, be paid the actual expenses incurred by him in carrying out said order."

In addition, section 4083 of the Code provides as follows:

“When in a criminal case an officer renders any other service, for which no specific compensation is provided, the court in which such case is, may allow therefor what it deems reasonable, and such allowances shall be paid out of the treasury on the certificate of the court stating the nature of the service.”

Under these two provisions, it would seem that the matter might be brought to the attention of the court, and if the court were to make the proper certificate you would be justified in paying whatever the court would order.

Very truly yours,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

COSTS—Payment of money out of Treasury Sections 3513, 3556, Code Va. 1904.—Unless the statutes of Virginia expressly provide for the payment of claims out of the treasury, the Auditor should decline to pay the same.

Same—Fees of clerk copying record for Commonwealth.—A clerk of a court is not entitled to compensation out of the public treasury for copying a record in a Commonwealth case.

RICHMOND, VA., September 29, 1916.

HON. C. LEE MOORE,

Auditor of Public Accounts,

Richmond, Va.

DEAR SIR:

Acknowledgment is made of your communication of September 29, 1916, in which you enclose copy of a statement against the Commonwealth, filed by the executors of W. T. Sledge, deceased, clerk of the circuit court of Brunswick county, for \$7.00 for copying transcript of record in the case of *Commonwealth v. Barrow*, with the request that you be advised whether this claim should be paid.

It appears that this case was an action of debt brought by the Commonwealth against Barrow, which case was lost in the circuit court of Brunswick county, and from which decision the Commonwealth obtained a writ of error. On the hearing before the court of appeals the judgment of the lower court was affirmed.

Section 3556 of the Code reads as follows:

“In no case, civil or criminal, except where otherwise specially provided, shall there be a judgment for costs against the Commonwealth.” Va. Code, vol. 2, p. 1897.

Section 3513 of the Code of 1904, which is found in the same chapter of the Code that contains the sections providing for the compensation of clerks in such cases, read as follows:

“No clerk, sheriff, or sergeant shall receive payment out of the treasury for any services rendered in cases of the Commonwealth, except where it is allowed by this or some other chapter.” Va. Code, vol. 2, p. 1882.

As there appears to be no section of the Code providing for the payment of such claims out of the treasury, I am of the opinion that you should decline the payment of this claim.

Very truly yours,

LESLIE C. GARNETT,

Assistant Attorney General.

*COSTS—Witness Fees—Milage—Payment out of the treasury—*A witness is entitled to mileage only for the distance actually travelled by him. Therefore a witness who is required to attend court under *subpoena* for more than one day but who makes only one trip in going from his home to the court-house and return is entitled only to mileage for the distance actually travelled.

Same.—If the witness returns home each night he is entitled to mileage for the distance travelled by him each day over five miles going and returning to the place of trial.

RICHMOND, VA., *October 17, 1916.*

HON. C. LEE MOORE,

Auditor of Public Accounts,

Richmond, Va.

DEAR SIR:

Acknowledgment is made of your communication of October 16, 1916, in which you request a ruling on the following statement of facts:

"A witness attends court under a summons as a witness for the Commonwealth in a felony case. He lives twenty-five miles from the court-house and, therefore, necessarily travels forty miles over five miles in coming to court and returning home. He attends court as a witness in the case three successive days and remains at the court-house during the three days without returning home, making only one round trip from home to court-house and return. Is the witness entitled to mileage for forty miles only, or is he entitled to mileage for each day—120 miles? If he returned home each night is he entitled to mileage for each day or only for one trip?"

The questions propounded are governed by the provisions of section 3549 of the Va. Code of 1904, which reads as follows, amended Acts of 1908, p. 383:

"A person attending as a witness under a summons shall have fifty cents for each day's attendance and four cents per mile for each mile beyond ten miles necessarily travelled to the place of attendance and the same for returning, besides the tolls at the bridges and ferries which he crosses or turnpike gates he may pass. On his oath an entry of the sum he is entitled to and for what and by what party it is to be paid shall be made when the attendance is before either house or a committee of the General Assembly by the clerk of such house or committee, and in other cases by the clerk of the court in which the case is or the person before whom the witness attended, except that where the attendance was on behalf of the Commonwealth before a court or justice the entry shall be made upon the minutes of the court in which the case is or to whose clerk the certificates mentioned in section seven hundred and eighteen of the Code are transmitted. A witness summoned to attend in several cases may have the entry made against either of the parties by whom he is summoned, but no witness shall be allowed for his attendance in more than one case at the same time."

And by the provisions of section 3534 of the Code of Virginia, 1904, as amended, which reads as follows:

"All witnesses summoned for the Commonwealth shall be entitled to receive for each day's attendance fifty cents, all necessary ferriage and tolls, and five cents per mile over five miles going and returning to place of trial or before grand jury. All allowances to witnesses summoned on behalf of the Commonwealth shall be paid by the treasurer of the county or corporation in which the trial is had or before grand jury so summoned, and the amount so paid by such treasurer shall be refunded to him out of the State treasury, on a certificate of the clerk of county, city or town in which the trial was had or before grand jury so summoned.

"This act shall be in force from and after July one, nineteen hundred and eight."

As it is expressly stated in these sections that the mileage provided for is allowed for the distance necessarily travelled to the place of attendance and the same for returning, besides the tolls at bridges and ferries which he crosses or turnpike gates he may pass, it would appear that the statute contemplates the payment of mileage to a witness only for the distance actually travelled in excess of ten miles.

In view of this and of the well-established rule that money cannot be paid out of the treasury except under express authority of the law, I am of the opinion that the witness should receive mileage only for the distance actually travelled by him in excess of ten miles, or in this particular case, for forty miles.

In reply to your second question, I am of the opinion that if the witness returns home each night that he is entitled to mileage for the distance travelled by him each day over five miles going and returning to the place of trial.

Very truly yours,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

COURTS—*Supreme Court of Appeals—Criminal cases before Court of Appeals.*

RICHMOND, VA., *September 4, 1916.*

HON. GEORGE COSSON,

Attorney General,

State of Iowa,

Des Moines, Ia.

DEAR SIR:

Acknowledgment is made of your letter of August 23, 1916, addressed to the several Attorneys General of the United States. In your letter you request this office to advise you the number of criminal cases appealed during the period covered by the last report made by this office to the Governor of Virginia and the number of reversals, also whether Virginia has a law similar to the law of Wisconsin which provides in substance that no case shall be reversed or a new trial granted unless upon the whole record the substantial rights of the defendant have been prejudiced.

I am inclosing you, under separate cover, a copy of the report of the Attorney General to the Governor of Virginia for the year 1915. You will find on pages 8 and 9 thereof a list of the cases decided in the Supreme Court of Appeals of Virginia between November 1, 1914, and November 1, 1915. You will there see

that seven criminal cases were disposed of by the court of appeals of this State during that period. Of this number four were reversed, error was confessed in one and in two the judgment of the lower court, convicting the accused, was sustained.

Information obtained from the Secretary of the Court of Appeals reveals the fact that from January 1, 1915, to December 31st of that year twenty-eight writs of error were applied for in criminal cases. In twenty of these cases writs of error were refused, and the remaining eight writs of error were granted. Of the twenty cases in which writs of error were refused two were applied for by the Commonwealth, they being cases in which the revenue or liquor laws were involved. Of the eight cases in which writs of error were granted, one was applied for by the Commonwealth.

In reply to your second question, we have no statute similar to the Wisconsin law. The Supreme Court of Appeals of this State, however, has a rule which is substantially the same. In *Hanger v. Commonwealth*, 107 Va. 872, it was held that where it plainly appears that the verdict of the jury could not have been other than it was, the court of appeals would not consider the ruling of the trial court in granting or refusing instructions. In so holding, the court of appeals used the following language:

"As we view the case, it is needless to consider the instructions given or refused, since it appears plainly from the evidence that no other verdict could have been rendered thereon than that rendered by the jury."

Very truly yours,

LEON M. BAZILE,
Law Assistant.

ELECTIONS Primaries—Fees of Candidates—Disposition thereof—Chapter 305, Acts 1914, sec. 24a.—Fees paid by candidates in a primary under the provisions of section 24a of chapter 305 of the Acts 1914 should be deposited as a special fund on interest certificates bearing the greatest rate obtainable by the Auditor, he holding the certificates subject to the future action of the General Assembly or a court of competent jurisdiction.

Same.—While there is no provision of the law authorizing the Auditor to take any special depository bond in such cases, as a matter of precaution fees so collected should be deposited only in those institutions designated as State depositories by section 753 of the Code of Va. 1904, as amended.

RICHMOND, VA., April 10, 1916.

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

DEAR SIR:

Yours of even date received. You refer me to that provision of section 24a of chapter 305, Acts 1914, known as the Primary Election Act, which provision reads as follows:

"(a) Candidates for United States senators, for representatives in Congress, and for all State offices shall pay such fee to the Auditor of Public Accounts of Virginia."

You ask whether fees thus paid shall be covered by you into the State treasury; and if not to be so covered, whether you are authorized to deposit such payments in a bank, State or National, to the credit of the Auditor of Public Accounts for safe-keeping, without taking from such depository bond to secure the custody of the payments so deposited.

The same question arose under the primary Act of 1912, (Acts 1912, p. 611) containing the same provision above-quoted except that it provided that the fee should be paid to the Treasurer of Virginia instead of to the Auditor of Public Accounts. My predecessor in office, the Hon. Samuel W. Williams, addressed a letter to the Hon. A. W. Harman, Jr., Treasurer of the State, under date of September 16, 1912 (see Report of Attorney General, 1913, p. 99), in which he advised the Treasurer to deposit said fees on interest certificates bearing the greatest rate obtainable, and to hold the certificates subject to the future action of the General Assembly or some court of competent jurisdiction. The Treasurer, in pursuance of said advice, deposited the fees so received in the Planters National Bank, of Richmond, to the credit of Special Primary Election Fund, and upon interest at the rate of three per cent. per annum, and reported the same in his annual report for the fiscal year ending September 30, 1913, under the heading "Special Primary Election Fund on Deposit at Planters National Bank, Richmond, Va."

The General Assembly of 1914 passed an act (ch. 168, p. 274) recognizing the action of the Treasurer in the premises and providing for the disbursement of the fund thus on deposit.

In view of the precedent thus set and recognized by the General Assembly, I advise you to proceed in the same manner.

I can find no provision of the law authorizing you to take any special depository bond in such cases; but, as a matter of precaution, I would suggest that the fees thus collected be deposited only in those institutions designated as State depositories by section 753 of the Code as amended.

Very truly yours,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

ELECTIONS—*Primaries—Fees of candidates—Chapter 305, Acts 1914, Section 24a—Repeals by implication chapter 307, Acts 1912.*—Chapter 305, Acts 1914, repealed those provisions of chapter 307 of the Acts 1912 not re-enacted.

Same—Fees deposited by candidates with the Auditor—Return thereof.—Under the provisions of chapter 305, Acts 1914, the Auditor has no authority to return to candidates who have been declared the nominees of the party without opposition, the fees deposited by them in accordance with the provisions of chapter 305, Acts 1914.

RICHMOND, VA., August 21, 1916.

HON. C. LEE MOORE,

Auditor of Public Accounts,

Richmond, Va.

DEAR SIR:

Acknowledgment is made of the receipt of your communication requesting a construction of section 24-a, chapter 305, of the Acts of 1914.

The question to be determined is whether the fees paid to the Auditor by candidates for nomination in a primary election under the provisions of section 24-a of chapter 305 of the Acts of 1914 are to be returned to the candidate paying the fee where he is declared by the proper authorities to be the candidate of his party without the holding of the primary for the office for which he is a candidate.

By chapter 307 of the Acts of 1912 the legislature enacted a law entitled, "An act to establish and regulate the holding of primary elections; to pay expenses of the same; to secure the regularity and purity of the same, and to prevent and punish any corrupt practices in connection therewith." By section 11 of the act it was provided that every candidate for any office at any primary, before he filed his declaration of candidacy as therein provided, should pay a fee equal to five per centum of one year's salary attached to the office for which he was a candidate. This fee was to be paid by certain candidates to the State treasurer and by other candidates to the county or city treasurers. This section concluded:

"Provided, that if only one person shall file a declaration of candidacy for any office and is declared by the proper committee to be the candidate of his party, without the holding of a primary for the office for which he is a candidate, the treasurer to whom the said fee has been paid shall refund said fee to said person."

In 1914 the legislature enacted a statute, found as chapter 305 of the Acts of 1914, which is entitled:

"An act to amend and re-enact an act entitled an act to establish and regulate the holding of primary elections; to pay expenses of same; to secure the regularity and purity of the same, and to prevent and punish any corrupt practices in connection therewith, approved March 14, 1912."

This latter act in substance re-enacts and incorporates with many new and additional provisions the provisions of the Act of 1912, but not all of the provisions of the latter act.

The provisions of section 11 of the Act of 1912 are found with some changes in section 24-a of the Act of 1914. The fee required to be paid by candidates is reduced from five to two per centum of one year's salary attached to the office for which he is a candidate; candidates who receive no salary are required to pay a fee of one dollar; those candidates who were required to pay their fee to the State Treasurer are now required to pay the same to the Auditor; in cases where the fee is paid by candidates for district offices of more than one county the fee shall be equally divided between the counties comprising such district and paid to the respective treasurers thereof.

One of the most important, and certainly the most significant feature of this section (24-a) of the Act of 1914, is that it wholly omits the provision contained in section 11 of the Act of 1912, providing for the return of the fee to a candidate when he was declared by the proper committee to be the candidate of his party without the holding of a primary for the office for which he was a candidate.

It should be further noted that the Act of 1914 in its concluding section provides:

"All acts and parts of acts in conflict with the provisions of this act are hereby expressly repealed."

With this statement of the facts before me, the answer to the question heretofore set out seems, though harsh in its application to the particular case, to be free from all doubt.

The rule governing the general construction of statutes was laid down by Burks, J., in *Hogan v. Guigon*, 29 Gratt. 705, 709, where it is said:

"The repeal of a statute by implication is not favored by the courts, for ordinarily where a repeal is intended by the legislature it is declared in express terms. The presumption is always against the intention to repeal where express terms are not used. Hence the rule, as laid down by Chief Justice Marshall, that a repeal by implication ought not to be presumed unless from the repugnance of the provisions the inference be necessary and unavoidable. *Harford v. U. S.*, 8 Cranch 109, and the like rule by Judge Story, who in considering whether a later statute repeals a former one, says that the inquiry is, whether it (the former statute) is repealed by necessary implication. We say by necessary implication, for it is not sufficient to establish that subsequent laws cover some or even all the cases provided for by it; for they may be merely affirmative, or cumulative, or auxiliary. But there must be a positive repugnancy between the provisions of the new laws and those of the old; and even then the old law is repealed by implication only *pro tanto* to the extent of the repugnancy. *Wood v. U. S.*, 16 Pet. 342, 363."

The court further held that:

"The general clause concluding the act there under consideration, 'that all acts and parts of acts inconsistent with this act are hereby repealed,' is usual where the act of which it forms a part covers the subject matter of other acts or parts of other acts, and the intention is not to repeal the latter wholly, but only so far as they are inconsistent with the last act. It indicates a partial repeal only and an intention to preserve portions of former acts relative to the same subject matter. Such a clause, says Mr. Justice Strong, is an express limitation of the extent to which it was intended former acts should cease to be operative: namely, only so far as they are inconsistent with the new act. It is quite inadmissible to engraft upon this express declaration of legislative intent an implication of more extensive repeal. * * *"

But said the court in so holding:

"There may be acts plainly intended to embrace and include the whole legislation on the subjects to which they refer, and to be substituted wholly for former acts on the same subjects. In such cases the provisions of the former laws on the same subject, although not expressly embraced in the subsequent acts are repealed by implication. Such were the cases of *Fox's Admrs. v. Commonwealth*, 16 Gratt. 1, and *U. S. v. Tynen*, 11 Wall. 88."

The question involved here falls squarely within the provisions of the last stated rule.

The conclusion reached by the court in *Fox's Admrs. v. Commonwealth*, 16 Gratt. 1, 11, et seq., is also in point. The facts in that case are briefly as follows:

In the early portion of the history of the Commonwealth it had been the custom for the legislature to pass a tax bill at each session embracing all the taxes imposed for the current year. When the Code was revised (1847-8) the revisors proposed a change of this practice, and recommended a scheme involving

the enactment of a tax bill intended to be a part of the Code, and, therefore, of a more permanent nature than the tax laws theretofore enacted. This scheme was adopted and, with the Code of 1849, went into effect July 1, 1850. This law was amended from time to time, and at the session of 1853-4 an act was passed entitled, "An act imposing taxes for the support of government which contained a tax on collateral inheritances and an express repeal of the tax law embraced in the Code." This act the court held was a complete tax law.

"At the session of 1855-6," to quote the words of the court, "an act was passed entitled, 'An act imposing taxes for the support of government,' the commencement and first seven sections of which seem to have been literally copied from the Act of 1853-4 (except that the amount of the taxes is very much increased in the Act of 1855-6) and many other sections of the two acts bear a close resemblance; showing that the later act was penned with the former before the draftsman, though in many respects the two acts differ, both in form and substance. The point of difference most material to the present inquiry is, that the Act of 1855-6 wholly omits the tax on collateral inheritances, while it literally copies, except as to amount of taxes, the section which next precedes and that which next follows the section imposing a tax on collateral inheritances in the Act of 1853-4. * * *" The Act of 1855-6, however, contained no express repeal of former acts. The question before the court for determination was:

Whether the section of the Act of 1853-4 imposing a tax on collateral inheritances was repealed by implication by the Act of 1855-6, which contained no such section.

The court speaking through Moncure, J., said, page 8:

"The latter act contains no repealing clause or words, and, therefore, it repeals nothing expressly. If it repeals any other law or part of a law, it only does so by implication. * * *"

The learned judge then reviews and sets forth at length the various rules by which statutes are to be construed and the legislative intent determined. The rule with which we are most concerned is thus set forth (page 11), being a quotation from the opinion of the court in *Bartlett v. King*, 12 Mass. 537, 545:

"A subsequent statute revising the whole subject matter of a former one, and evidently intended as a substitute for it, although it contains no express words to that effect, must, on the principles of the law, as well as in reason and common sense, operate to repeal the former * * *."

Continuing, the court said (page 12):

"* * * Both could well stand together, if such were the intention of the legislature, and such, in an ordinary case would be presumed to be the intention of the legislature. But if, in this case, the later act revised the whole subject matter of the former and was clearly intended to prescribe the only rule that should govern on the subject; in other words, if it was clearly intended to be a complete tax law, embracing all the taxes in existence for the support of government after its passage, then, as a whole, it is plainly repugnant to the former act and every part of it, and as much repealed as if it had been done in express terms. The question, and the only question, therefore, is: Was the Act of 1855-6 intended to be a complete tax law?"

"This question depends upon the character of the act itself, the nature of the subject, the course of prior legislation upon it, and all the surrounding circumstances."

"That the act had the form and all the features of a perfect tax law; a title appropriate to such a law; that it was minute in its details, embracing

several subjects not embraced in any former law, and omitted very few contained in the next preceding law; that the nature of the subject seemed to render it proper that a general tax law should be passed at every session of the legislature; the course of previous legislation; that convenience dictates that all taxes imposed for the support of government should be embraced in one act, so as to be seen at one view instead of being sought for in different and scattered acts; that the latter act embraced unchanged provisions of the former law were all circumstances, said the court, which impelled it to hold that the Act of 1855-6 was intended to be a complete tax law and, therefore, a repeal of the former law.

“* * * Having embraced in the Act of 1855-6 almost all the other subjects embraced in the Act of 1853-4, would they not have embraced this subject, also, if they had intended to continue the tax, especially when it could so easily have been done * * *?”

“On the other hand, if we suppose they intended to discontinue the tax, we at once see an adequate motive for omitting the subject in the Act of 1855-6. For, although that may not have been the most regular mode of discontinuing the tax, it was at least a natural one. The legislature being engaged in framing a complete tax law, it naturally occurred to them that any existing tax omitted in that law would thereby of necessity be discontinued * * * conceding it to be a complete tax law, it was necessarily repugnant to, and without any repealing clause *ipso facto* repealed, all former tax laws.”

Tested by the rule laid down in *Fox v. Commonwealth*, supra, there can be no question as to the legislature intending chapter 305 of the Acts of 1914 to embrace the whole legislation on the subject to which it refers, and to be wholly substituted for all former statutes on the same subject. *Vansant v. Commonwealth*, 108 Va. 135; *Somer's Case*, 97 Va. 759, 761.

In the latter case it is stated:

“* * * It is necessarily implied that what is left out is no longer in force.”

Practically all of the provisions of the Act of 1912 are embraced in the Act of 1914, some with and some without change; other provisions have been added which make the Act of 1914 a more complete piece of legislation on the subject of primary elections than was the law of 1912, embracing, as I have said, a majority of the provisions of the Act of 1912 and many additional sections which round out with greater detail the subject of this act. It is for all purposes a complete law on the subject of primary elections and must be construed as having repealed by implication the Act of 1912.

Under the decision of the court in *Somer's Case*, supra, no other result could be reached. The Act of 1914, as the act in question there, providing in the enacting clause that the prior law is “amended and re-enacted so as to read as follows,” after which the provisions of the Act of 1914 are set out. This, it was held in that case, rendered it “manifest” that the latter act “was intended to be a repeal of all parts and provisions of the statutes amended which were omitted from it.”

It would appear from the act that the purpose of section 24-a of chapter 305, Acts of 1914, was to require the candidate in the primary to pay a fee for the privilege of being a candidate for party nomination under the rules and provisions of the primary act.

At the very out-set it should be noted that the act provides that every candidate for any office at any primary shall before he files his declaration of candidacy, as provided by the act, pay the prescribed fee. Therefore, the payment of the fee is prerequisite to one becoming a candidate in a primary election. Opposition or no opposition, one must pay this fee or he is not allowed to file his declaration of candidacy.

"A receipt for the payment of said fee must accompany and be attached to said declaration of candidacy; otherwise the same shall not be received or filed." Section 24a.

Equally significant is the fact that the Act of 1914 reduces the fee from five to two per centum of the first year's salary of salaried officers and by requiring candidates for non-salaried offices to pay a fee of one dollar, which latter fee was not required by the Act of 1912, made the application of the fee provision uniform in principle to all candidates for office in a primary election.

It cannot be contended that the fee required of candidates is for the purpose of bearing any expense of the primary since no part of the expense of the primary is borne by the State, but by the locality in which the primary is held, as the fee required to be paid by candidates for State and Federal offices are required to be paid to the State, this, it seems to me, is conclusive that the fee is a license required for the privilege of being a candidate in a primary election.

In addition to the above reasons, a very strong indication of the intent of the legislature to make the prescribed fee a charge or license for the privilege of becoming a candidate in a primary election is the well settled rule of law that:

"When a statute is revised and a provision contained in it omitted in the new statute, the inference to be drawn from such a course of legislation would be that a change in the law was intended to be made." *Combined Saw, etc., Co. v. Flournoy, Secretary*, 88 Va. 1029, 1034.

The fact that the Act of 1914 provides that the fees of candidates for certain offices shall be paid to the Auditor of Public Accounts of Virginia, while the Act of 1912 provides for the payment of such fees to the Treasurer of Virginia does not show a contrary intent on the part of the legislature. All candidates for offices other than State and Federal offices are required to pay the prescribed fee to the treasurer of the county or city in which they reside.

As a part of the history of the primary law, it may be interesting to note that the Treasurer of Virginia, in pursuance of an expressed provision of section 11 of the original Primary Act of 1912 (which provision was omitted from the Act of 1914), returned the entrance fee to all candidates who were declared by the proper committee to be the candidate of their party without the holding of a primary. This left in the treasurer's hands the fees paid by the candidates running for the contested offices and also the fees paid by those candidates who intended to run in the primary, but after the payment of their fees withdraw their candidacy. At the following session of the General Assembly an act was passed reciting that a certain sum had been paid to the Treasurer of the Commonwealth on this account and that there was no provision made in the statute for paying the sum out and directing the Treasurer to return the fees of those candidates whose names did not appear on the official ballot (that is, those who withdrew before the primary) and to distribute the balance to the fund of the

counties and cities in proportion to the number of voting precincts in each. This, however, was a *special act* dealing only with the funds then in the Treasurer's hands. Acts 1914, page 274.

It is quite probable that the next General Assembly may pass an act authorizing you to return the fees now demanded by those candidates who had no opposition and were declared nominated without primaries, but in the absence of such authority it is clear that you have no right to accede to the demand no matter how just you may think the demand to be. No authority need be cited for the proposition that when money comes into the hands of a public official in pursuance of statute, he can make no disposition of it unless authorized to do so by statute.

Very truly yours,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

Note: Black, in his Second Edition of Interpretation of Laws, page 579, states the rule as follows:

"Where an amendment is made by declaring that the original statute 'shall be amended so as to read as follows,' retaining part of the original statute and incorporating therein new provisions, the effect is not to repeal, and then re-enact, the part retained, but such part remains in force as from the time of the original enactment, while the new provisions become operative at the time the amendatory act goes into effect, and all such portions of the original statute as are omitted from the amendatory act are abrogated thereby and are thereafter no part of the statute."

ELECTIONS—Voters—Qualification—Constitution of Virginia—Sections 23 and 32.—A man discharged from the Virginia militia as a deserter is not deprived of his right to vote, nor is he deprived of his right to hold public office.

RICHMOND, VA., December 15, 1915.

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

DEAR SIR:

I have received, through Lieutenant-Colonel and Judge Advocate General Thomas W. Shelton, an inquiry as to whether a man discharged from the Virginia militia as a deserter is deprived of his right to vote and hold public office.

Section 23 of the Constitution, relating to persons excluded from registering and voting, reads as follows:

"The following persons shall be excluded from registering and voting: Idiots, insane persons and paupers; persons who, prior to the adoption of this Constitution, were disqualified from voting, by conviction of crime, either within or without this State, and whose disabilities shall not have been removed; persons convicted after the adoption of this Constitution, either within or without this State, of treason, or of any felony, bribery, petit larceny, obtaining money or property under false pretenses, embezzlement, forgery, or perjury; persons who, while citizens of this State, after the adoption of this Constitution, have fought a duel with a deadly weapon, or sent or accepted a challenge to fight such duel, either within or without the State, or knowingly conveyed a challenge, or aided or assisted in any way in the fighting of such duel."

Desertion not being among the offenses above enumerated, a deserter is not deprived of his right to vote.

Section 32 of the Constitution, dealing with qualifications of officers, etc., provides that "every person qualified to vote shall be eligible to any office of the State, or of any county, city, town, or other sub-division of the State, wherein he resides, except as otherwise provided in this Constitution, and except that this provision as to residence shall not apply to any office elective by the people where the law provides otherwise. * * *" It, therefore, follows that a deserter is not deprived of the right to hold a public office.

Very truly yours,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

ELECTIONS—Registration—Veterans—Constitution of Virginia—Section 20, Article 2:—The provision of sub-section 2 of section 20, article 2, of the Constitution is mandatory. Unless a person can comply with the provisions thereof he is not entitled to register. The fact that the person who offers to register is a veteran of the late war between the States creates no exception which would permit him to register in violation of this provision of the Constitution.

RICHMOND, VA., August 28, 1916.

JOHN B. GRAYSON, ESQ.,
Warrenton, Va.

DEAR SIR:

Acknowledgment is made of your letter of August 23, 1916, addressed to the Attorney General of Virginia, in which you ask the following question:

"Is a veteran of the Civil War required to comply with section 20, article 11, of the Constitution of Virginia, which provides that unless physically unable, he must make application to register in his own hand writing without aid, suggestion, or memorandum, etc.?"

Sub-section 2 of section 20 of the Constitution, which section prescribes the qualifications for persons who register after 1904, reads as follows:

"That, unless physically unable, he make application to register in his own hand writing, without aid, suggestion, or memorandum, in the presence of the registration officers, stating therein his name, age, date and place of birth, residence and occupation at the time and for the two years next preceding, and whether he has previously voted, and, if so, the State, county and precinct in which he voted last."

I am of the opinion that this provision of the Constitution is mandatory and unless a person can comply with the provisions thereof, that he is not entitled to register. See *In re Validity of Local Option Election Held in the City of Suffolk on the 19th day of December, 1910*, 17 Va. L. Reg. p. 353.

I am of the further opinion that the fact that the person who offers to register is a veteran of the late war between the States, creates no exception which would permit him to register in violation of this provision of the Constitution.

Very truly yours,

LESLIE C. GARNETT,
Assistant Attorney General.

ELECTIONS—*Special School Election—Chapter 255, Acts 1906—Section 62, Code Va. 1904—Acts 1908, page 83.*—All persons who were entitled to vote at the last preceding general election and all who are entitled to vote at the general election to be held in November, 1916, are entitled to vote in a special school election to be held prior to the general election in November, 1916.

RICHMOND, VA., August 17, 1916.

WILLIAM B. SHAW, ESQ.,

Clerk of School Board of Claremont, Va.

DEAR SIR:

I acknowledge your letter of July 31, 1916, to the Attorney General, setting forth the fact that since the last general election there had been held the regular town election in the town of Claremont and the special school election for the town of Claremont, but there has been no election since the last general election in which the voters of the entire Claremont school district participated.

Section 8 of chapter 255 of the Acts of 1906, reads as follows:

“All registered voters of any such school district who were qualified by law to vote in the last preceding *general* election shall be qualified to vote in any such special election.”

Section 8 of chapter 368 of the Acts of 1916, reads as follows:

“All registered voters of the said Claremont school district who were qualified by law to vote in the *last preceding* election shall be qualified to vote in the said special election.”

You desire the opinion of this office as to whether voters qualified to vote in the two town elections mentioned above, but who were not qualified to vote in the last preceding general election, are qualified to vote in the coming special election under the Act of 1916.

If these were the only provisions of the law with regard to this matter, it would be my opinion that the qualification of voters must be determined by those who qualified at the last preceding general election, since the Act of 1916 must refer only to an election in which the entire school district participated. However, by reference to section 62 of the Code 1904, volume 3, page 19, you will see a further provision which is applicable to all special elections. This provision is in the Acts of 1908, page 83, and, so far as applicable to the question as presented by you, is as follows:

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

I am, therefore, of the opinion that all voters who were entitled to vote at the last preceding general election and all who are entitled to vote at the general election to be held in November, 1916, are entitled to vote in this special school election for the Claremont school district.

Very truly yours,

LESLIE C. GARNETT,
Assistant Attorney General.

ELECTIONS—*Election Officers—Constitution of Virginia—Section 31—Section 117, Code of Virginia.*—Under the provisions of section 31, Constitution of Virginia, a member of a town council is ineligible for service as a judge of election.

RICHMOND, VA., *September 11, 1916.*

A. PENDLETON STROTHER,
Pearisburg, Va.

MY DEAR SIR:

Acknowledgment is made of your letter of September 8, 1916, addressed to the Attorney General, in which you request him for an opinion on the following questions: First, Is it lawful for a member of a town council of an incorporated town to serve as a judge of election? Second, If the member of the town council is not eligible is it not the duty of the other judges to appoint another judge to serve instead of the person so disqualified?

The last paragraph of section 31 of the Constitution reads as follows:

"No person nor the deputy of any person, holding any office or post of profit or emolument, under the United States Government, or who is in the employment of such government, or holding any elective office of profit or trust in the State, or in any county, city, or town thereof, shall be appointed a member of the electoral board, or registrar, or judge of election."

It seems very clear from this provision of the Constitution that a member of a town council is ineligible for service as a judge of election.

As to your second question, it is provided by section 117 of the Code as follows:

"It shall be the duty of the electoral board of each city and county appointed as provided by section thirty-one of the Constitution, in May, nineteen hundred and four, and in each year thereafter, to appoint three competent citizens, being qualified voters, whose terms of office shall begin on the first of June following their appointment, who shall constitute the judges of election for all elections to be held in their respective election districts for the term of one year or until their successors are appointed, and shall at the same time appoint two clerks for each place of voting, whose terms of office shall be co-incident with judges, to whom shall be administered by the judges, or either of them, or by the officer swearing the judges, the same oath as that taken by the said judges. Wherever it is possible to do so, the persons so appointed judges of election shall be chosen for each voting place from persons known to belong to the two political parties casting the highest and next highest number of votes at the last preceding election, each of whom shall be able to read and write. The members of any electoral board who shall wilfully fail to comply with this requirement shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined not less than one hundred nor more than five hundred dollars; but no election shall be deemed invalid when the judges shall not belong to different political parties or shall not possess the above qualifications. Should any judge of election fail to attend at any place of voting for one hour after the time prescribed by law for opening the polls at such election it shall be lawful for the judge or judges in attendance to select from among the bystanders one or more persons possessing the qualifications of judges of election, who shall act as judge or judges of such election, and who shall have all the powers and authority of judges appointed by said electoral board: provided, however, that if the judge or judges present have information that the absent judge or judges will not attend, he or they need not wait for the expiration of an hour or any other time. Should all the judges appointed for any place of voting fail to attend at the place of voting for one hour after the time prescribed by law for

opening the polls at such election, it shall be the duty of any justice of the district in which the election is held, who shall be applied to for that purpose, or the mayor, if the election is in any election district in a town or a city, to appoint three judges of election for such election district, who shall possess the same qualifications and have the same powers as judges appointed by an electoral board. Should no judges of election be appointed for any county, city, or place of voting therein, or if appointed they neglect or refuse to act for one hour after the time prescribed by law for opening the polls at such election, it shall be lawful for any three qualified voters of the district, who shall be present and willing to act, upon taking the oath prescribed for judges of election, to proceed to hold, conduct, and certify the election in the manner provided in this chapter, and for that purpose shall have all the powers and authority of judges appointed by an electoral board, which shall include the power to appoint clerks if those chosen by the electoral board shall fail to attend or refuse to act."

Yours very truly,

LESLIE C. GARNETT,

Assistant Attorney General.

ELECTIONS—*Electoral Boards—Compensation—Section 70, Code Va. 1904, as amended.*—The *per diem* for the services of all the members of the electoral board, including the Secretary, is distinctly set out in section 70, Code of Va. 1904, as amended. The maximum of \$25.00 provided in this section for the expenses of the Secretary can be used only for the purpose of reimbursing for sums actually paid out by him for debts actually incurred in the performance of his official duties. No part of the same can be used to compensate the Secretary for his services.

Same.—The General Assembly has fixed the pay of each member of the electoral board, including the Secretary at \$2.00 per day and a city cannot increase the compensation so fixed.

RICHMOND, VA., *December 15, 1915.*

HON. B. O. JAMES,

*Secretary of the Commonwealth,
Richmond, Va.*

DEAR SIR:

Yours of December 10th received, as also the letters which you enclosed from Mr. H. R. Bryarly, dated December 1st and December 8th. The question propounded is whether the Secretary of the Electoral Board of the city of Winchester, Va., may receive, in compensation for his services, an amount in excess of the *per diem* of \$2.00 fixed by section 70 of the Virginia Code, 1904, as amended 1912, p. 652. That section reads as follows:

"Each member of the electoral board shall receive from the county or city, respectively, for each day of actual service the sum of two dollars and the same mileage pay as now paid jurors; provided, that no member of such board shall receive more than ten dollars in any one year, exclusive of mileage, unless one or more special elections be held in such year, in which event the members of the electoral board shall be paid additional amounts at the same *per diem*, and mileage; and provided, further, that the Secretary of such board shall in addition to the *per diem* provided for be allowed his expenses not to exceed more than twenty-five dollars in any one year, and provided, further, that the counties and cities shall furnish the necessary

postage and stationery, including a bound book for the minutes of its proceedings, for the use of the board. Each member of the electoral board, before he shall be entitled to receive any amount under this act, shall make out a statement under oath, of his claim, and the Secretary shall in addition make out under his oath a statement of postage and stationery used by the board, and the statements when so made out and found correct shall be paid by the board of supervisors of the county or the council of the city for which such board was appointed."

No question of mileage is involved in the case put to me, and the *per diem* for the services of all the members of the board, including the Secretary, is distinctly set out in the section above quoted. It is also apparent that the maximum of \$25.00 provided in the act for the expenses of the Secretary can be used only for the purpose of reimbursing him for sums actually paid out by him, or debts actually incurred by him in the performance of his official duties. No part of the same can be used to compensate the Secretary for his services, because the section specifically provides that each member of the board shall receive "for each day of *actual service* the sum of two dollars." The section makes a plain distinction between sums paid the members for *services* and payments made them for *expenses*. The General Assembly having fixed the pay of each member of the board, including the Secretary, at \$2.00 per day, the city of Winchester cannot increase the compensation so fixed. See *Norfolk v. Pollard*, 94 Va. 279; *Johnson v. Block*, 103 Va. 478 and *Field v. Auditor*, 83 Va. 882.

The position of the Secretary of the Electoral Board is one of importance and the duties devolving upon him are doubtless frequently worth to the State more than the *per diem* provided in the section; but the General Assembly has seen fit to fix the compensation for this service, and no other body has the right to add to or subtract therefrom. Any citizen accepting the position thereby agrees to render the service for the sum set out in the statute.

Very truly yours,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

EXAMINERS OF RECORDS—*Duties of the examiners of records and of clerks of courts—section 3325a of the Code, as amended by the Acts of 1916 and section 492 of the Code of Va. 1904—Statutes.*—Section 3325a of the Code of Va. 1904, as amended, and 492 of the Code of Va. 1904 are remedial statutes and were passed for the good of the public and provide cumulative remedies, and, therefore, are not repugnant to each other.

Same—Statutes—Construction—Duties of clerks.—To construe sections 492 and 3325a of the Code as being repugnant would clearly violate the intention of the law-making body. The remedies provided therein for the assessment of property for taxation are cumulative and it is still the duty of clerks of court to report such property to the commissioner of the revenue for assessment.

Statutes—Construction.—Sections 492 and 3325a of the Code are remedial statutes and should be liberally construed and so construed as to carry out the intention of the legislature, which is the cardinal aim with reference to all statutes.

RICHMOND, VA., July 10, 1916.

MR. CHRISTOPHER B. GARNETT,

*Executive Assistant, State Tax Board,
Richmond, Va.*

Acknowledgement is made of your letter of the 7th inst. requesting an official opinion as to whether certain provisions of section 492 of the Code still remain a part of the law of Virginia, or whether same have been expressly or impliedly repealed by the language of section 3325a of the Code as amended by Acts of 1916, chapter 492, page 828, defining the duties of examiners of records.

The provisions of chapter 492 of the Code of 1904 involved are as follows:

"If the property consists of money, bonds or other evidences of debt under the control or in the possession of a receiver or commissioner, it shall be listed by and taxed to such commissioner or receiver, and the clerk of each court shall furnish to the commissioner of the revenue with all bonds and funds held by the commissioners or receivers under the authority of the court."

The provisions of chapter 492 of the Acts of 1916 involved are as follows:

"It shall be his duty annually to examine all causes pending in the courts of his circuit, and the records thereof, and ascertain and report all money, bonds, notes, stocks, shares of stock, capital, capital stock, choses in action, other evidences of debt, and all and every other species of personal property and income subject to taxation under the control of the courts in his circuit, or held by any person, bank, or corporation subject to the orders of such courts, or in the hands of or under the control of receivers, commissioners and fiduciaries appointed by such courts, or appointed by any deed or will."

These statutes are, of course, remedial statutes and should be liberally construed, and should be construed so as to carry out the intention of the legislature, which is the cardinal aim with reference to all statutes. The object of the legislature in enacting these statutes was, of course, to see that money, bonds or other evidences of debt under the control, or in the possession of receivers or commissioners subject to the orders of the courts should be properly assessed for taxation, and the question therefore is whether the legislature intended by imposing the duty upon the examiner of records to report this species of property to the commissioners of revenue for assessment to impliedly repeal the existing law requiring clerks of the courts to report this class of property to the commissioners of revenue.

These statutes being remedial and being *pro bono publico*, it is my opinion that they are cumulative remedies and are, therefore, not repugnant to each other. This opinion is strengthened very materially by the history of the legislation involved.

You will note by reference to chapter 705 of the Acts of 1896, page 773, which is the original act creating examiners of records, that these last-named officers were directed to make a report of this class of property to the commissioners of revenue,

"and thereupon such commissioner of revenue shall assess the taxes thereon as if such report was made by the clerk of said courts or by fiduciaries as now prescribed by law."

If, therefore, the original act was repugnant to the provisions of section 492, as above set out, after March 4, 1896 (the date of the approval of the act creating

examiners of records), it became the exclusive duty of examiners of records to report this class of property. However, by an act approved February 24, 1898, chapter 490, Acts of 1898, page 519, section 492 of the Code was amended and re-enacted, and the clerks of courts were again required to furnish the commissioner of revenue a list of this class of property held by commissioners or receivers under the authority of the court. If, therefore, these acts are repugnant, on and after February 24, 1898, the date when section 492 of the Code was re-enacted as aforesaid, it became the exclusive duty of the clerks of the court to report this class of property to the commissioners of revenue. However, on March 3, 1898, chapter 707, Acts of 1898, page 756, the law was amended and re-enacted as to the duties of examiners of records and these officers were again required to report the aforesaid class of property to the commissioners of revenue, and the commissioners of revenue directed to enter upon the personal property books the names of the persons mentioned in the examiners' reports and the aggregate amount of the property chargeable to each and extend the taxes upon such property "as in the case of other persons and property entered upon such book." If, therefore, these acts are to be construed as repugnant the exclusive duty was again imposed upon examiners of records to report this class of property to the commissioners of revenue for assessment.

However, section 492 of the Code was again amended and re-enacted December 10, 1903, by an act in force February 1, 1904, Acts of 1902, '03, '04, page 643, and the provision as above set out directing clerks of courts to report this class of property to the commissioners of revenue was again re-enacted. And, therefore, if the provisions of these two acts are to be construed as repugnant, from March 3, 1898 to February 1, 1904, it was the exclusive duty of the examiners of records to report this class of property while from February 1, 1904 to June 17, 1916, the date when the acts of the last legislature went in force, it was the exclusive duty of clerks of courts to report this class of property.

This statement of the history of these two statutes demonstrates that to construe them as repugnant would clearly violate the intention of the law-making body, and I am, therefore, confirmed in my opinion that the remedies provided therein for the assessment of property for taxation are cumulative, and that it is still the duty of the clerk to report such property to the commissioners of revenue for assessment.

Very truly yours,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

EXAMINERS OF RECORDS—*Compensation—Words and phrases—Term of office.*—The Examiner of Records of the 10th Judicial Circuit is not entitled to claim the benefits of the provisions of section 10 of chapter 352 of the Acts of 1914, which exempts from the application of the provisions of that chapter officers in cities having a population of 100,000 inhabitants or more, until the expiration of their terms of office. As the expression "term of office" cannot be held to apply to one who holds office during the pleasure of the appointing power, such as an examiner of records, but must be held to apply to those officers only who are appointed for a definite period of time.

NOTE.—This portion of this opinion was reversed by the Supreme Court of Appeals in the case of *Sands, Examiner of Records, v. C. Lee Moore, Auditor of Public Accounts*, 119 Va., page 744.

Same—Compensation.—Under the provisions of chapter 352 of the Acts of 1914, an examiner of records cannot receive from the public treasury more than the total compensation and expenses allowed by this act, which provides that the total expenses of an examiner of records shall not exceed the amount paid out in the conduct of the affairs of his office during the year ending December 13, 1913, and limits the compensation of the examiner of records to \$2,500 per annum.

Same—Examiners of records—When entitled to compensation.—An examiner of records is entitled to compensation as soon as his assessment is made and his report filed.

Same—Chapter 490, Acts of 1916, chapter 352, Acts 1914.—Where the assessment of an examiner of records is made and the report filed prior to the time chapter 490, Acts 1916, goes into force, the amount of his compensation is controlled by the provisions of chapter 352, Acts 1914. On property assessed and reported subsequent to June 17, 1916, the examiner of records is entitled to compensation therefor, as provided by chapter 492, Acts of 1916. The maximum limit of which compensation is controlled however by chapter 490, Acts 1916, which limits such compensation to \$4,000 and expenses.

Same.—Examiners of records assessing and reporting property subsequent to June 17, 1916, are entitled to only so much compensation for the additional property assessed and reported as would not make the total compensation received exceed the \$4,000 and expenses, as provided in chapter 490 of the Acts of 1916. For taxes assessed and reported prior to June 17, 1916, the settlement should be made according to chapter 352 of the Acts of 1914, while for taxes assessed and reported subsequent to that time the additional compensation should be computed according to section 6 of chapter 492 of the Acts of 1916, the total of which for the current year cannot exceed the \$4,000 and expenses provided for in chapter 490, Acts 1916.

Same—Duty of Auditor to pay if the compensation computed according to section 6 of chapter 707 of the Acts of 1897-98 does not exceed the limit provided in chapter 352, Acts 1914.—The duty of the Auditor of Public Accounts is to make payment and look to the examiner to refund and pay into the treasury the compensation paid him on any property reported by him that shall be relieved from taxes erroneously assessed thereon, and the compensation paid him on any assessments which are not collected and are returned delinquent.

RICHMOND, VA., May 22, 1916.

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

DEAR SIR:

Acknowledgment is made of your letter of May 16, 1916, informing the Attorney General that the Examiner of Records of the 10th Judicial District has filed his report of the valuations of personal property which he is required, by the Act of March 3, 1898, Pollard's Code, section 3326a, to ascertain and report annually; and that the amount of his commission, under section 6 of said act, is \$5,728.77, payment of which is requested by him. Acknowledgment is also made of your letter of May 20, 1916, informing me that the report of the examiner of records filed, pursuant to section 3, chapter 352, Acts of Assembly 1914, shows

the total expenses of his office for the year ending December 31, 1913, \$2,489.39. Upon this state of facts, the opinion of the Attorney General is requested in the following language:

"Have I the right at this time to refuse to pay this compensation because it exceeds the \$2,500.00 salary and expenses provided for in chapter 352, Acts 1914, or am I authorized to make the payment and look to the examiner to pay back into the treasury any excess above the amount allowed by law for salary, expenses, etc., in accordance with section 4, chapter 352, Acts 1914?"

An answer to these inquiries should settle, so far as the Attorney General's office is concerned, the method by which the compensation of every examiner of records in the State may be determined.

The provisions of section 6 of the said Act of March 3, 1908, are as follows:

"The examiner of records shall be entitled to receive a compensation for his services under this act, to be paid in the same manner as the compensation is now paid to commissioners of revenue, one-tenth of one per centum for the first one million and a half dollars of aggregate amount of property assessed under this act and one-fifteenth of one per centum of all accounts in excess of one million and a half dollars; provided, the said examiner of records shall refund and pay into the treasury the compensation paid him on all property hereafter reported by him that shall be relieved of taxes erroneously assessed thereon."

The act of March 27, 1914, chapter 352, Acts of Assembly 1914, page 707, limits the annual compensation of an examiner of records to \$2,500.00, "and the sums actually paid out by him for necessary office expenses and the amounts actually paid by him as premiums of the official bond of himself or clerks, and as compensation to his deputies and assistants; provided, however, the amount so paid in premiums and compensations as aforesaid shall in no case exceed the amount paid out in the conduct of the affairs of said office during the year ending December thirty-first, nineteen hundred and thirteen."

Section 10 of the same act contains the following provision:

"Provided, however, that the provisions of this act limiting the compensation of said officers shall not be affective until the expiration of the terms of office of the present incumbents in cities having a population of one hundred thousand inhabitants or more."

The Examiner of Records in the 10th Judicial Circuit, being the Examiner of Records for the circuit court of the city of Richmond, which city has a population of more than 100,000 inhabitants, it is necessary to consider whether the proviso in section 10 applies to him. I am of the opinion that this official cannot claim the benefits of the provisions of this act. The decisions seem to be numerous that where there is a provision against a change in the salary of a public officer during his "term of office," it cannot be held to apply to one who holds office during the pleasure of the appointing power, but must be held to apply to those officers only who are appointed for a definite period of time. The following citations should be sufficient to establish this principle:

"The word 'term,' when used in reference to the tenure of office, means ordinarily a fixed and definite time, and does not apply to appointive offices held at the pleasure of the appointing power." *State v. Gordon*, 238 Mo. 168, 26 Am. & Eng. Ann. Cases 312, quoting Mechem on Public Officers.

In the note to this case in the American and English Annotated Cases, *supra*, it is said:

"It is well settled that a constitutional provision against a change in the salary of a public officer during his term of office does not apply to an office held during the pleasure of the appointing power, because one having such a tenure does not hold the office for the term within the meaning of the constitutional provision."

A long list of cases is cited supporting this doctrine.

Throop on Public Officers, 303, uses the following language:

"The word 'term' is uniformly used to designate a fixed and definite period of time * * *, and an officer who holds his office at the pleasure of another officer * * * has no official term within the meaning of the constitutional or statutory provisions relating to such term."

If, therefore, the compensation of an examiner of records in cities having a population of 100,000 or more is not exempted by the terms of section 10 of the act of March 27, 1914, from the operation of the act during the terms of office of the present incumbents, it follows that such an examiner of records cannot receive from the public treasury more than the total compensation and expenses allowed by said act. As shown above, this act provides that the total expenses of an examiner of records shall not exceed the amount paid out in the conduct of the affairs of his office during the year ending December 13, 1913. It, also, limits the compensation to \$2,500.00 per annum. Adding the \$2,500.00 compensation allowed by this act the \$2,489.39 reported by the examiner of records as the total expenses of his office for the year ending December 31, 1913, we find that the provisions of the said chapter 352, Acts of Assembly 1914, p. 707, would limit the total amount which the examiner of records could draw from the treasury for compensation and expenses to \$4,989.39. For you, therefore, to draw your warrant upon the Treasurer in the sum of \$5,728.77, in favor of the examiner of records, would be to permit him to draw from the treasury \$739.38 for expenses in excess of the amount allowed by law for the calendar year.

I am of opinion that the examiner of records is entitled to his compensation as soon as his assessment is made and his report filed. This assessment having been made, and the report filed prior to the time that the act of March 22, 1916, chapter 490, page 825, goes into force, the amount of his compensation is controlled by the provisions of said chapter 352 of the Acts of 1914, and that you can only draw your warrant for the compensation and actual expenses allowed by the last-mentioned act, and that the amount allowed for actual expenses incurred in assessing and reporting the values of property prior to June 17, 1916, shall not exceed the total expenses of the examiner's office for the year ending December 31, 1913.

On any property assessed and reported subsequent to June 17, 1916, the examiner of records will be entitled to compensation therefor as provided by Acts of Assembly 1916, page 828, the maximum limit of which compensation is controlled by chapter 490 of the Acts of Assembly of 1916, page 825, limiting the compensation to \$4,000.00 and expenses. I am further of opinion that an examiner of records assessing and reporting property subsequent to June 17, 1916, would be entitled to only so much compensation, for the additional property assessed and reported, as would not make the total compensation received by him for the current year exceed the \$4,000.00 and expenses as provided in chapter 490 of the Acts of 1916, page 825.

You will observe that, in your final settlement with the examiner of records, it is my opinion that there should be a distinction made between the compensation allowed for the property assessed and reported on prior to June 17, 1916, and for that assessed and reported on subsequent to that time; that for taxes assessed and reported prior to June 17, 1916, the settlement should be made according to chapter 352, Acts 1914; that for taxes assessed and reported subsequent to that time, an additional compensation should be computed according to section 6 of chapter 492, Acts 1916, page 828; but that the total compensation for the current year could not exceed the \$4,000.00 and expenses provided for in chapter 490 of the Acts of 1916.

I am further of the opinion that, if the compensation computed according to section 6 of the act of March 3, 1898, does not exceed the limits provided as set out above in chapter 352 of the Acts of 1914, it is your duty to make the payment and look to the examiner to refund and pay into the treasury the compensation paid him on any property reported by him that shall be relieved from taxes erroneously assessed thereon, and the compensation paid him on any assessments which are not collected and are returned delinquent.

Very truly yours,

LESLIE C. GARNETT,
Assistant Attorney General.

EXAMINERS OF RECORDS—*Compensation—When earned—Acts 1897-98, chapter 707, Acts 1916 chapter 492.*—The compensation of an examiner of records is earned as soon as he has examined the cases pending in the courts of his circuit and has ascertained and reported all money, notes, stocks, shares of stock, capital, capital stock, choses in action, other evidences of debt and other species of personal property and income subject to taxation under the control of the courts of the circuit or held by any person or corporation subject to the order of the court or in the hands of fiduciaries. Therefore, if the examiner of records perform the service provided for in chapter 707 of the Acts 1897-8, prior to June 17, 1916, his compensation should be included under the act of 1897-8, but where the services required by the said act were performed on or after June 17, 1916, the compensation is to be determined by chapter 492 of the Acts of 1916.

RICHMOND, VA., *May 11, 1916.*

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 27, 1916, asking his opinion on certain matters relating to compensation of examiners of records under the recent amendment to the law in regard thereto.

Acts 1897-8, chapter 707, page 756, which is an act providing for the better assessment of personal property under control of fiduciaries, provides in section 6 thereof, for the compensation of examiners of records on the following scale:

“* * * one-tenth of one per centum for the first one million and a half dollars of the aggregate amount of property assessed under this act, and one-fiftieth of one per centum on all amounts in excess of one million and a half dollars: provided, the said examiner of records shall refund and pay into the treasury the compensation paid him on all property hereafter reported by him that shall be relieved of taxes erroneously assessed thereon.”

The aforesaid act was amended by the Acts of 1916, chapter 492, page 828, and section 6 thereof, provides for the present rate to be paid as compensation of examiners of records for assessing fiduciary property. The scale is as follows:

“* * * one-tenth of one per centum for the first million dollars of aggregate amount of property assessed under this Act, and one-thirtieth of one per centum on the next four million dollars, and one-fiftieth of one per centum on all in excess of five million dollars, provided that the commission on money shall only be one-fiftieth of one per centum: provided, that the said examiner of records shall refund and pay into the treasury the compensation paid him on all property hereafter reported by him that shall be relieved of taxes erroneously assessed thereon.”

This latter act did not have an emergency clause and does not become effective until June 17, 1916.

From the comparison of the aforesaid acts, it is apparent that the rate for examiners of records has been changed by the new act. The first question you put is as follows:

If the examiners of records should, prior to June 17, 1916, perform the services and make the reports required by the act of March 3, 1898, would it be your duty to pay them upon the rate prescribed by the earlier act, or by the rate prescribed by the act of 1916?

And the second question is a sequel of the first, to-wit:

If the examiners of records should perform the services and make the reports required by law, on and after June 19, 1916, is it your duty to pay them upon the rate prescribed by the earlier act or the rate prescribed by the later act?

As the examiner's compensation under the act of 1897-8 aforesaid, is earned as soon as he has examined the cases pending in the courts of his circuit and has ascertained and reported all money, notes, stocks, shares of stock, capital, capital stock, choses in action, other evidences of debt, and other species of personal property and income, subject to taxation under the control of the courts of the circuit, or held by any person or corporation, subject to the order of the court or in the hands of fiduciaries, I would say that if the examiner of records performs the services provided by said act of 1897-8 prior to June 17, 1916, his compensation should be calculated under the act of 1897-8, but if he performs the services required by said act, on or after June 17, 1916, the rate of compensation will be determined by the act of 1916, chapter 492, page 828.

Yours very truly,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

EXTRADITION—Deposit made for the benefit of the accused—Jail breaking.—

Where the statute of another State requires the deposit of a sum of money in the case of the extradition of a prisoner, which sum is to be paid to the supposed fugitive if not found guilty of the crime charged in the warrant but to the agent making the deposit in the case where the alleged fugitive is convicted of the crime charged, it is not a breach of trust for the clerk with whom said fund is deposited to return the same to the agent of the Governor of Virginia where the alleged fugitive before trial escaped by breaking jail.

RICHMOND, VA., August 29, 1916.

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

DEAR SIR:

The letter of the secretary to the Governor, dated August 24th, to the Attorney General, enclosing correspondence between the Governor of Virginia and the Governor of Ohio with regard to the extradition of I. D. Sanger, is before me for consideration.

From this correspondence it appears that the agent of the Governor of Virginia, in order to have a requisition for Sanger honored in Ohio was required to deposit with the clerk of the Court of Common Pleas, Champaign county, Ohio, the sum of \$50.00, which deposit as appears from the letter of the Governor was in conformity with section 115 of the General Code of Ohio which is as follows:

"On payment of costs by the agent, and the deposit of a sum of money with the clerk of the court, equal to ten cents a mile from the place where the arrest was made to the place for prosecution, the fugitive shall be delivered to such agent to be returned for prosecution. If the agent does not appear within the time so fixed, pay the costs, and make such deposit, the sheriff shall discharge the person so imprisoned. If the supposed fugitive is not found guilty of the crime charged in the warrant, the deposit shall be paid to him; but, upon the conviction of the fugitive of the crime so charged such sum shall be paid to the agent making the deposit."

It further appears that after Sanger was brought back to Virginia and while awaiting trial he escaped by breaking jail and is now at large. It is maintained by the Governor of Ohio that until Sanger is either acquitted or convicted, the deposit should remain in the hands of the clerk of the court, as trustee, for the person entitled thereto, and upon this proposition the opinion of the Attorney General is desired.

We have been unable to find authority or precedent bearing directly upon this proposition, but it is very clear from the provisions of the quoted section of the Ohio law that its purpose is to protect the supposed fugitive in the event of acquittal and to reimburse him for travelling expenses at the rate of ten cents a mile from the place of prosecution back to the place where he was arrested.

By sections 3754 and 3755 of the Code of Virginia, 1904, jail-breaking is in itself a crime in this State, as I assume it is in all the States of the Union. The accused, therefore, in order to avoid standing trial for the offense for which he was indicted, and upon which he was requisitioned, committed another crime, which is in the nature of a confession of guilt of the crime for which he was indicted. *Williams v. Commonwealth*, 86 Va. 607; *Dean v. Commonwealth*, 32 Gratt. 912; *Anderson v. Commonwealth*, 100 Va. 860.

The question is whether his wrongful and unlawful act of jail-breaking, in the nature of a confession of guilt of the offense for which he was indicted, is not such a forfeiture of any claim to the deposit which might arise in the future, as would warrant the trustee in returning the deposit to the party making it. It would seem that the jail-breaking of the accused would be such a confession of guilt on his part as to make it impossible to torture into a breach of trust the action of the clerk of the court in returning the money to the agent of the Governor of Virginia.

I cannot see how it can be contended that the legislature of Ohio intended that this deposit should be indefinitely kept awaiting the possible recapture of the

fugitive in some other State, or his almost impossible voluntary surrender for trial for the original and added offense. The trustee cannot use the deposit and if the accused should by possibility be recaptured and in spite of his second offense be acquitted of the original offense, he would yet be imprisoned for the second offense, and unable to return to the place in Ohio where he was arrested, and as a practical question the State of Virginia would be put to a far greater cost in his arrest and prosecution than the sum of \$50.00 and would be entitled to be reimbursed out of any property of the accused.

As I have before said there is no precedent that I can find covering this case, but it is respectfully submitted that for the clerk of the Court of Common Pleas of Champaign county, Ohio, to retain this deposit indefinitely under the circumstances above set out is a violation of the spirit of the law and a retention of trust funds after the object of the trust has ended.

Very truly yours,

LESLIE C. GARNETT,

Assistant Attorney General.

JUSTICES OF THE PEACE—*Fees*—*Section 3530 of the Code Va. 1904 as amended*—*Section 3527, Code Va. 1904*.—Section 3527, Code Va. 1904, is not impliedly repealed by the amendment to section 3530, but the two sections must be construed together and, therefore, justices of the peace are only entitled to one-half of the lawful fees set out in section 3530, Code Va. 1904, when these fees are paid out of the State treasury.

Same—Fees payable out of State treasury—Effect of amendment to section 3530, Code Va. 1904.—Section 3530, Code Va. 1904, as amended, in no way changes existing statutes in cases where it is provided that no fees shall be payable out of the State treasury.

RICHMOND, VA., *August 17, 1916.*

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

DEAR SIR:

Acknowledgment is made of your letter enclosing a communication from J. A. Purdie, Esq., Justice of the Peace, Richmond, Va., contending that by virtue of the amendment, section 3530, the Acts of 1916, page 856, justices of the peace are now entitled to the fees enumerated in the amendment, whether or not they are paid out of the treasury of the State.

It will be noted that the only effect of the amendment to the act of March 25, 1914, amending the aforesaid section 3530, is to provide that for admitting any person to bail the justice shall be entitled to a fee of \$1.00. The construction heretofore given to this section is that it simply provides for the lawful fees to which a justice may be entitled, just as other sections of the Code provide lawful fees to which sheriffs, sergeants, clerk of courts, constables and other officers are entitled; but section 3527 of the Code provides that these officers shall only be entitled to one-half of the lawful fees when they are paid out of the public treasury.

It is my opinion therefore, that section 3527 is not impliedly repealed by the amendment to section 3530 but that the two sections must be construed together, and that therefore justices of the peace are only entitled to one-half of the lawful fees set out in section 3530, when these fees are paid out of the State treasury.

I am further of the opinion that section 3530, as amended, in no way changes existing statutes in cases where it is provided that no fees shall be payable out of the State treasury.

Very truly yours,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

COMMISSIONERS OF REVENUE—*Fees—Transfer fees—Section 524, Code Va. 1904, section 459, Code Va. 1904, as amended—Section 250, Code Va. 1904, as amended—Section 525, Code Va. 1904, as amended.*—The law does not authorize commissioners of the revenue to make the entries for which transfer fees are given prior to the receipt of the clerk's list which is not authorized to be delivered before January 1st. Therefore, a commissioner or the revenue entering office on January 1st is entitled to the transfer fees for deeds recorded during the year ending the preceding December 31st, and he, not the outgoing commissioner, is entitled to the fees mentioned collected in the preceding year.

RICHMOND, Va., April 20, 1916.

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

DEAR SIR:

You have referred to this office, along with certain letters, a request for an opinion as to which commissioner of the revenue is entitled to the transfer fees, allowed by section 524 of the Code, for the year 1915 where there has been a change of commissioners effective on January 1, 1916.

By reference to section 467, we find that it is the duty of the commissioner of the revenue to note such changes as may happen within his county, district or city in his land book. By section 459 of the Code, as amended by Acts of 1915, p. 102, provision is made whereby the commissioner is informed of the conveyances of lands made during the preceding year. According to that section, it is made the duty of the clerk of the circuit or corporation court to deliver to each commissioner a list of the conveyances of lands in his district before January 15th of each year. This list, by the same section, contains lands conveyed which have been admitted to record "within the year ending on the thirty-first of December next preceding." According to section 520, Virginia Code, 1904, as amended by Acts 1915, page 219, it is made the duty of the commissioner to return a copy of the land book to the clerk of the circuit or corporation court "by the first day of August of each year."

Those fees to which your question is directed are found in section 524 of the Virginia Code, 1904, where it is provided in part as follows:

"Each commissioner shall be entitled to the following fees: * * *
For making an entry transferring to one person lands already charged to another, one dollar."

Although no provision is made in this section for the person by whom these fees are to be received in the first instance, we find that the next section, that is, section 525, Virginia Code 1904, as amended by Acts 1915, page 101, makes provision by language reading as follows:

"The transfer fees allowed by law to the commissioners of the revenue of the several counties and cities of the State shall be collected by the clerk of the court of record of said counties and cities at the time of recording deed. * * * The clerk, at the time the commissioners of the revenue return to the clerk's office the land books according to law, shall account to them for the fees so collected, deducting therefrom a commission of ten per cent. for his services."

From the above section, the answer to the question put by you would seem clear. The act for which compensation is received is, of course, "for making an entry," but we find that such entries are to be made from lists delivered by the clerk annually prior to January 15th and that these lists contain deeds admitted to record for the preceding year ending December 31st. It is, therefore, obvious that, in contemplation of these provisions, a deed might be admitted to record during the last minute of the year 1915, and, therefore, it would be improper for the clerk to deliver the list of fees, for the entry of which the commissioner is to be compensated, before the first Monday in January, 1916. I, therefore, arrive at the conclusion that, because there is no authority to make the entries for which transfer fees are given prior to the receipt of the clerk's list, which is not authorized to be delivered before January 1st, the commissioner entering office on January 1st is entitled to the transfer fees for deeds recorded during the year ending the preceding December 31st. Hence the incoming commissioner, and not the outgoing commissioner, is entitled to the fees mentioned collected in the preceding year.

Very truly yours,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

FEES—Attorneys for the Commonwealth—Delinquent taxes—Collection of.—There is no provision of the law providing for the collection of delinquent taxes by legal proceedings for the compensation of the attorneys for the Commonwealth, nor is there any way in which a fee for such services could be paid out of the public treasury.

Same.—The Auditor has the right, however, to consent upon the institution of such a suit to the attorney for the Commonwealth asking for fees to be paid out of the corpus in the hands of the court and that in the event of the sale of the property the court could pay such reasonable fee out of the corpus in the hands of the court as the services of the attorney justified.

RICHMOND, VA., October 26, 1916.

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

DEAR SIR:

Acknowledgment is made of your letter of the 23d instant, enclosing letter from Haskins Hobson, Esq., Commonwealth's attorney, of Chesterfield county, stating that there are two lots of land, one in Chesterfield county and one in

Powhatan county, upon which the delinquent taxes are equal to the value of the property, and that these lots of land are involved in chancery suits which have been pending for a great many years. He suggests that it will be necessary to sell the land for the taxes and that in order to do this considerable work must be done, for which the regular compensation of attorneys for the Commonwealth is hardly sufficient remuneration. You desire to be advised as to whether or not under existing law there is any way by which the attorney for the Commonwealth prosecuting such a suit could be compensated.

There is no provision in the law providing for the collection of delinquent taxes by suit for the compensation of attorneys for the Commonwealth, and I know of no way by which this money could be paid out of the public treasury. However, I am of opinion that you would be within your right to consent that upon the institution of such a suit the attorney for the Commonwealth could ask for fees to be paid out of the corpus in the hands of the court, and that in event of the sale of the property the court could pay such a reasonable fee as the services of the attorney justified. This proceeding would then be considered in the nature of a creditor's suit and in such a suit of course the usual practice is for the court to allow reasonable counsel fees.

Yours very truly,

LESLIE C. GARNETT,
Assistant Attorney General.

FEES—Nurses—Examination—Fee.—Under section 5 of chapter 254, Acts of 1916, all persons who had filed their application for registration as a professional nurse prior to June 17th, accompanying the same with \$5.00 fee provided by the prior statute affecting this question are required to pay an additional fee of \$5.00 before being allowed to take the examination.

RICHMOND, VA., June 16, 1916.

MRS. E. C. LEVY, *President,*
State Board Examiner of Registered Nurses,
Monroe Terrace, Richmond, Va.

DEAR MRS. LEVY:

In accordance with your request of this morning I am giving you in writing my opinion as to the proper construction of section 5 of the act, approved March 16, 1916, (Acts of Assembly, 1916, page 479), which provides that every applicant for registration as a professional nurse in this State, shall pay a fee of \$10.00 upon filing application. This act goes into effect on tomorrow, June 17, 1916. The former law provided that if the result of the examination was satisfactory, the secretary, upon the order of the board, should issue to the applicant a certificate to that effect upon the payment of a fee of \$5.00. I am informed by you that the board has received a number of applications for the examination to be held subsequent to June 17, 1916, and you desire to be informed as to whether such applicants shall be required after this date to pay an additional fee of \$5.00 before being allowed to take the examination.

While the new act contemplates that the \$10.00 fee shall accompany the application for registration it is nevertheless true that candidates for examination will

after June 17th, and prior to the examination, still be *applicants* within the meaning of this act, and, in order to take the examination, will have to comply with the requirements of this act in the matter of fee.

I would, therefore, suggest that the secretary of your board inform all persons who have filed their application prior to June 17th, accompanying same with the \$5.00 fee, that they will be required to pay an additional fee of \$5.00 before being allowed to take the examination.

I take pleasure in enclosing you a copy of House Bill No. 300 which forms chapter 254 of the Acts of 1916, as above.

Yours very truly,

LESLIE C. GARNETT,
Assistant Attorney General.

FINES—Oyster Fines—Section 44 of the oyster laws—Section 134 Constitution of Virginia.—The provision of section 44 of the consolidated oyster law, that oyster fines shall be paid to the oyster officers and placed to the credit of the oyster fund is in conflict with section 134 Constitution of Virginia, which provides that all fines collected for offenses against the State shall be set apart as a permanent literary fund. The fine, therefore, received by the justice imposing it must within thirty days be paid as the law directs. Under section 723 of the Code Va. 1904, the clerk is entitled to his commission, for receiving the money, and the oyster inspector, if directly instrumental in apprehending and bringing to trial the offender, is entitled to one-fourth of the fine, which one-fourth is not subject to any deduction.

Same—Section 718, Code of Va. 1904—When fine not paid—Duty of the justice—Informer's fee.—If at the time of the imposition of the fine by the justice the same is not paid, it is the duty of the justice within thirty days after the trial to certify the amount of the fine imposed by him to the clerk of the court, together with the costs and then in the event of the payment of the fine the informer gets one-fourth net and the balance after paying costs of collection shall go to the literary fund.

Same—Right of informer to part of fine.—Fines in being enforced and collected should bear the burden of such means as the legislature might deem best adapted to both their enforcement and collection, and the Constitution only intended to appropriate to the literary fund the amount given to the State after deducting such part as the legislature may have set apart to secure their enforcement and collection, and the giving to the informer a fee in the case of a forfeiture is, therefore, constitutional.

RICHMOND, VA., July 18, 1916.

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

DEAR SIR:

Acknowledgment is made of your request for an opinion of this office in regard to the letter of J. A. Chowning, oyster inspector, of July 8th, as follows:

"I have a lot of oyster fines that have been sent to the clerk's office by the justice, which will be collected by the sheriff and paid to the clerk, who is entitled to a commission of 5 per cent. for receiving the money. Now should I lose this 5 per cent. or should the State pay it?"

Section 44 of the consolidated oyster law applicable to this situation is as follows:

"All fines imposed and collected for violations of any of the provisions of this act, whether by regular oyster officials or through procedures in courts or before justices of the peace, shall be paid over to the said oyster officials, and placed to the credit of the oyster fund; provided, however, that when an oyster inspector is directly instrumental in apprehending and bringing to trial an offender in his district against whom a fine is imposed and collected under this act, one-fourth of the fine shall go to the said inspector and three-fourths to the credit of the oyster fund."

The provisions of this section of the oyster law that these fines shall be paid to the oyster officials and placed to the credit of the oyster fund seem to me to be in conflict with section 134 of the Constitution, which provides that all fines collected for offenses committed against the State shall be set apart as a permanent and perpetual literary fund. The fine, therefore, received by the justice imposing it shall within thirty days be paid, as the law directs, Code section 723, to the clerk, and the clerk, of course, is entitled to his commission for receiving the money, and the oyster inspector if directly instrumental in apprehending and bringing to trial the offender is entitled to one-fourth of the fine, which one-fourth is not subject to any deduction.

If at the time of the imposition of the fine by the justice the same is not paid it is the duty of the justice within thirty days after the trial to certify the amount of the fine imposed by him to the clerk of the court, together with the costs (Code, section 718); then in the event of the payment of this fine the informer gets one-fourth net, and the balance after paying costs of collection shall go to the literary fund.

I may add for your information in view of the conferences we have had in this regard that the Supreme Court of Appeals in *Southern Express Co. v. Walker*, 92 Va. 59, 64, has expressly held that fines in being enforced and collected should bear the burden of such means as the legislature might deem best adapted to both their enforcement and collection, and that the Constitution only intended to appropriate to the literary fund the amount coming to the State after deducting such part as the legislature may have set apart to secure their enforcement and collection. In the case under consideration the right of informers to fees in the case of a forfeiture was expressly upheld as constitutional.

The letter of Mr. Chowning is returned herewith.

Yours very truly,

LESLIE C. GARNETT,
Assistant Attorney General.

FINES—Informers—The informer is not entitled to one-half of the fine unless it appears that the provisions of section 715 of the Code of Va. 1904 have been complied with.

Same—Power of judge to order payment of half of fine to informer.—The judge of the corporation court of the city of Newport News, has no authority to enter an order directing the payment of one-half of a fine to an informer unless the provisions of section 715 of the Code of Va. 1904 have been complied with.

Same—Powers of the Auditor—There is no warrant in law authorizing the Auditor to pay a claim of this kind under such circumstances even though payment is directed by an order of court.

RICHMOND, VA., May 9, 1916.

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

DEAR SIR:

In accordance with your request of May 4, 1916, an examination has been made of your right to make payment to Mr. G. B. Houston, as an informer, of one-half of the fine recovered in the case of one Lobowitz, convicted in the police court of Newport News of peddling without a license.

From the files and correspondence presented to this office, it appears that none of the provisions of section 715 of the Code of Virginia was complied with; and I am, therefore, of opinion that your letter of May 2, 1916, to Mr. Thomas J. Christian, Newport News, Va., is entirely correct, in that compliance with the provisions of this section is a prerequisite to the right of the informant to one-half of the fine. I know of no authority vested in the judge of the corporation court of the city of Newport News to enter an order directing the payment of this claim by you and no warrant in law for your paying such a claim, under the circumstances as set out in the correspondence.

Very truly yours,

LESLIE C. GARNETT,
Assistant Attorney General.

FINES—Informers—Game laws—Informer's fee—Section 38, chapter 152, Acts 1916.—Under the provisions of section 38, chapter 152, Acts 1916, the Commissioner of Game and Inland Fisheries and wardens, special wardens, and other officers, or other persons who instigate a prosecution for violation of the game law is entitled to one-half of the cash fine collected from the defendant upon conviction.

Same.—The phrase "special warden, other officer or other person" is broad enough to include the commissioner, regular warden and other officers.

Same—Section 715, Code Va. 1904.—Under the provisions of section 715, Code Va. 1904, the whole of any fine goes to the Commonwealth even where the law allows a person prosecuting a part thereof, unless the name of the prosecutor is entered on the presentment at the time it is made, the indictment before it is presented to the grand jury, the information before it is filed, or the warrant before the process is served.

RICHMOND, VA., August 29, 1916.

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

DEAR SIR:

I beg to acknowledge the reference to this office of a letter of W. O. Hamlett, and Charles D. Townes, justices of the peace, of Waverly, Va., in the following terms:

"We had a case this morning brought by game-warden G. M. Inman to our attention and imposed a fine of \$20.00 and cost and gave the said game-warden 50 per cent. of fine according to law and I am enclosing herewith a check to you for remainder \$10.00."

You desire to be advised as to whether or not under the provisions of section 38, chapter 152 of the Acts of 1916, the regular game-warden, who is a salaried officer, is entitled to one-half of the cash fine collected upon a conviction for violation of game law, in a prosecution instigated by said regular warden.

After a careful consideration of section 38, I am of the opinion that the commissioner, warden, special warden, other officers or other persons who instigate the prosecution for violation of the game law, is entitled to one-half of cash fine collected from the defendant upon conviction. It is true that in the first part of this section the commissioner, warden or other officer instigating the prosecution is entitled to a fee of \$2.50, while it is further provided that "in addition any special warden or other officer or other person" shall receive one-half of the cash fine collected.

It seems to me clear that the phrase "special warden, other officer or other person" is broad enough to include the commissioner, regular warden and other officers.

However, I call your attention to section 715 of the Code which provides that the whole of any fine shall go to the Commonwealth, even where the law allows a person prosecuting to have part thereof, unless the name of the prosecutor be endorsed on the presentment at the time that it is made, the indictment before it is presented to the grand jury, the information before it is filed, on the warrant before the process is served. Before allowing this credit of fifty per cent. of the fine collected in the case under consideration I would require that the information be given you as to whether or not the name of the prosecutor was endorsed on the warrant before it was served.

Very truly yours,

LESLIE C. GARNETT,
Assistant Attorney General.

FINES—Literary Fund.—Fines collected for violations of agricultural seed law (chapter 286, Acts of 1910) must be paid into the literary fund of the State.

RICHMOND, VA., *December 6, 1915.*

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

DEAR SIR:

You have referred to us certain correspondence between Mr. Jno. H. Gose, clerk, corporation court, city of Bristol, and yourself as to the disposition of a check from said Jno. H. Gose, clerk, to G. W. Koiner, for \$25.00, for fines collected in cases of the Bristol Seed and Grain Co., \$20.00, and Union Seed Co., \$5.00, for violations of the Agricultural Seed Law, ch. 286, Acts 1910, sec. 11 (Supp. for 1910, p. 935). I beg to advise you that, for reasons set out in writing in an opinion of the Attorney General, dated April 14, 1914, rendered to Honorable C. Lee Moore, Auditor of Public Accounts (Report of the Attorney General for 1914, p. 63), I am of the opinion that these fines should be turned into the literary fund of the State, and, therefore, would advise that you endorse this check to Hon. Rosewell Page, Second Auditor, with the direction that the sum set out therein, to-wit: \$25.00, should be credited to the literary fund of the State.

Very truly yours,

CHRISTOPHER B. GARNETT,
Assistant Attorney General.

FORESTRY LAWS—Fires—Chapter 195, Acts 1914, as amended. Section 3702, Code Va. 1904, as amended; Chapter 305, Acts 1916, Section 3780, Code Va. 1904, as amended; Sections 722, 723, 730, 736, Code Va. 1904—Words and Phrases—Prima Facie Proof Defined.

Same.—The only persons punishable under section 22, chapter 305, Acts 1916, are persons or corporations as land owners who set or procure another to set the fire in question.

Same.—Section 23, chapter 305, Acts 1916, applies to those who operate non-oil burning engines through and near forests or brush in violation of the provisions of that section.

Same.—The offense being a misdemeanor, those who assist or take part in the commission thereof are equally guilty with the persons mentioned in these sections.

Same.—Section 3702, Code Va. 1904, applies to persons who set fire in a forbidden manner to woods or marsh or any stubble or brush straw or inflammable substance capable of spreading fire on lands whereby the property of another is damaged or jeopardized. While this section in its terms is broad enough to cover the offense mentioned in sections 22 and 23, chapter 305, Acts 1916, it can be construed so as not to conflict with the provisions of the later act, which construction should be given it.

Same.—The words, "on whose account," used in section 19, chapter 305, Acts 1916, apply to the land owner whose land is being burned over or threatened by fire, as well as to the party who is guilty of starting the fire.

Same—Criminal Liability.—One person is not responsible for the criminal acts of another in which he did not participate either directly or indirectly; therefore, while the land owner may not always be guilty of the criminal offense under chapter 305, Acts of 1916, the person who sets the fire always is provided the other elements of the offense are established.

Same.—Section 23 of chapter 305, Acts 1916, makes only the operator and his employees criminally liable for operating an engine of the forbidden classes under the specified conditions of that section when not equipped with the appliances therein mentioned; therefore, a mill owner who does not operate his engine, but rents it to another, cannot be guilty under this section.

Same.—The law is applicable to railroad companies who operate other than oil burning engines in violation of this act.

Same—Criminal responsibility of corporations.—Corporations are, in many cases, even in the absence of statute, liable to indictment for criminal violation of the law. Section 23 of chapter 305, Acts 1916, refers to corporations as well as individuals.

Same—Malicious prosecution.—The elements of malicious prosecution set out.

Same—Concealed weapons—Forest wardens.—Forest wardens are permitted under the provisions of section 3780, Code Va. 1904, as amended, to carry concealed weapons when in the discharge of their prescribed duties.

Same—Commonwealth's Attorneys, duty of.—It would appear to be the purpose of chapter 305, Acts 1916, to require the Commonwealth's attorney to prosecute violators of this act in the justices' courts as well as in the circuit courts.

Fines, disposition of—Collection by justices of the peace.—This subject discussed.

RICHMOND, VA., *October 17, 1916.*

HON. R. C. JONES,
State Forester,
Charlottesville, Va.

DEAR SIR:

I answer your inquiries in the order in which they were propounded, as follows:

1. *Prima facie* proof, as used in section 22 of chapter 195 of the Acts of 1914, means that proof which standing alone unexplained or uncontradicted is sufficient to maintain the proposition affirmed and if not rebutted remains sufficient for that purpose. *People v. Cairo, etc.*, 249 Ill. 97, 94 N. E. 11, 12.

2. Your trouble in regard to the questions embraced in this part of your letter seems to arise from a confusion of the criminal and civil liabilities imposed by chapter 305 of the Acts of 1916. These liabilities are separate and the enforcement of one is not a bar to the enforcement of the other. As the civil rights of individuals to recover for the damage resulting from fires is not a public question, but one solely concerning private rights, I shall express no opinion as to this subject.

As to the criminal liability of persons starting fires:

(1) It will be observed that the only persons punishable under section 22 are "persons or corporations, as land owner," who set or procure another to set the fire in question.

(2) Section 23 applies to those who operate non-oil burning engines through or near forest or brush in violation of the provisions of that section.

Each of the above cases being misdemeanors, those who assist or take part in their commission are equally guilty with the persons mentioned in the above sections.

(3) Section 3702 applies to any person who sets fire, in the forbidden manner, to "any woods or marshes," or "to any stubble, brush, straw or inflammable substance capable of spreading fire on lands whereby the property of another is damaged or jeopardized."

It will be observed that section 3702, as amended and re-enacted, was approved March 16, 1916, while chapter 305 of the Acts of 1916 was approved March 20, 1916. The law applicable to such a case is thus stated in 36 Cyc. 1086:

"Where two acts relating to the same subject matter are passed at the same legislative session, there is a strong presumption against implied repeal, and they are to be construed together, if possible, so as to give effect to each, but if the two are irreconcilable, the one which is the later expression of the legislative will must prevail."

Therefore, while section 3702 is in its terms broad enough to cover the things mentioned in sections 22 and 23 of chapter 305 of the Acts of 1916, I think that it can be construed so as not to conflict with the provisions of the later act, which construction I am of opinion should be given it.

3. I am of the opinion that the words "on whose account" used in section 19 of the act apply to the land owner whose land is being burned over or threatened by fire as well as to the party who is guilty of starting the fire.

I express no opinion, however, as to the validity of this provision.

4. The general rule is that one person is not responsible for the criminal acts of another in which he did not participate either directly or indirectly.

"Strictly speaking, the legal relation of principal and agent (or master and servant, or partnership) does not exist in regard to the commission of criminal offenses; and where it in fact appears that the person accused in no way participated in the criminal act he ought not, by construction, to be made responsible for it. *A fortiori*, a principal is not responsible criminally for an act of his agent in opposition to his will and against his orders, although such directions or instructions must be in good faith and not merely colorable, they will be presumed to be so until the contrary is proved. * * * Of course, a principal is criminally liable for the acts of his agent when he has participated in the acts, or has given such assent or concurrence thereto as would involve him morally in the guilt of the act." 8 R. C. L. sec. 17.

Under section 22 of chapter 305 of the Acts of 1916, the owner who sets or procures another to set fire to the things mentioned in that section is criminally liable if he neglects to take the precautions specified in that section. The fact that the owner is absent will not excuse him from criminal liability if he has procured another to set the fire unless he has, previous to the time the fire was set, taken the required precautions. If another sets the fire without being procured to do so by the land owner, the land owner is not criminally liable.

As to the criminal liability of the employee, the fact that he was procured to set the fire by the land owner or by his employer is no excuse.

"It is no defense to a criminal prosecution to prove that the accused committed the crime in the discharge of his duty as agent or employee of another person, for the command of a master to a servant, a principal to his agent, or a parent to his child will not justify a criminal act done in pursuance thereof." 12 Cyc. 159.

Therefore, while the land owner may not always be guilty of the criminal offense, the person who sets the fire always is, provided the other elements of the offense are established.

I am of the opinion that section 23 makes only the operator and his employees criminally liable for operating an engine of the forbidden classes under the specified conditions of that section when not equipped with the appliances therein mentioned. A mill owner who does not operate it, but rents it to another, could not be guilty under this section.

In my opinion the question of guilt will always turn on the establishment of who the operator of the mill is. The operator, in my opinion, is not only the man who actually feeds and runs the engine, but the man who controls the operation thereof.

The same law is applicable to railroad companies who operate other than oil burning engines in violation of this act.

As to the civil liability of such persons, this is a private matter affecting only private rights, and, therefore, not a question for this office. The enforcement of civil rights is a matter exclusively for private counsel.

5. As to the right of one injured by fire to bring a civil action for the resulting injury, this office has nothing to do, and will, therefore, refrain from expressing an opinion as to the civil liability of persons or corporations resulting

from fires set out either negligently or otherwise. The civil remedy will depend always upon the particular circumstances of each case and is a matter requiring the attention of private counsel.

It is a well recognized fact, however, that corporations are, in many cases, even in the absence of statute, liable to indictment for criminal violation of the law. *State v. Baltimore, &c., R. Co.*, 15 W. Va. 362; *Transportation Co. v. Standard Oil Co.*, 50 W. Va. 611; Whartons Criminal Law (11th ed.), page 156 et seq. See, also, section 4015, Code of 1904.

Section 23 of chapter 305 of the Acts of 1916, provides that various named engines, including locomotives:

“operated in, through or near forest or brush, which do not burn oil as fuel, shall be provided with appliances to prevent, as far as may be possible, the escape of fire and sparks from the smoke-stacks thereof, and with devices to prevent, as far as may be possible, the escape of fire from ash pans and fire boxes.”

The failure of the operator—that is, the owner under whose direction and control said engine is operated—to comply with the above requirements is made a misdemeanor punishable, upon conviction, by a fine of not less than ten dollars nor more than one hundred dollars for each and every offense committed. (Section 23 of chapter 305, Acts of 1916.) I am of the opinion that this section refers to corporations as well as to individuals.

6. The rule as to civil liability for malicious prosecution is stated thus in 26 Cyc. pages 67-68:

“All persons who have legal capacity to be sued and who are not by law exempted from responsibility for torts may be held responsible for damages in malicious prosecution upon proof of all essentials of the wrong.”

The essential elements necessary to be proved to maintain an action for malicious prosecution are:

- (1) The commencement or continuance of an original criminal or civil judicial proceeding;
- (2) Its legal causation by the present defendant against the plaintiff who was defendant in the original proceeding;
- (3) Its *bona fide* termination in favor of the present plaintiff;
- (4) The absence of probable cause for such proceeding;
- (5) The presence of malice therein;
- (6) Damage conforming to legal standards resulting to plaintiff (26 Cyc. 8).

7. By section 3780 of the Code, as amended by Act of 1908, it is expressly provided that this section (which punishes the carrying of concealed weapons)—

“shall not apply to any police officer, town or city sergeant, constable, sheriff, conservator of the peace, or to carriers of United States mail in the rural districts, or collecting officer while in the discharge of his official duty * * *.”

It was held in the *Wither's Case*, 109 Va. 837, that the limitation “in the discharge of his official duty” applies only to the next antecedent class of officers, to-wit, collecting officers, and not to other officers named in the statute.

By section 17 of the chapter 305 of the Acts of 1916, it is provided that:

“forest wardens ‘while holding said office’ shall ‘possess and exercise all the authority and power held and exercised by constables at common law and

under the statutes of this State, so far as arresting and prosecuting persons for violations of any of the forest fire laws or of any of the laws or rules or regulations enacted or made, or to be enacted or made for the protection of the State forestry reserves, or for the protection of the fish and game contained therein are concerned."

Although this power is limited to the objects above set out, I am of the opinion that forest wardens can carry weapons when in the discharge of their prescribed duties. I refrain, however, from expressing an opinion as to their rights in this particular when not in the performance of their official and prescribed duties.

8. By section 25 of chapter 305 of the Acts of 1916, it is provided that justices of the peace shall have jurisdiction to hear and determine all prosecutions for the purpose of enforcing fines and penalties collectible under the provisions of the act, not exceeding the amount of one hundred dollars, and of holding the offender under proper bail if necessary for hearing before the circuit court.

Immediately following, this section provides:

"It shall be the duty of the Commonwealth's attorney of the several counties to prosecute all violators of this act."

It would, therefore, appear to be the purpose of the act to require the Commonwealth's attorney to prosecute violators in the justice's court as well as in the circuit court.

9. The officers charged with the collection of fines imposed by the various courts of the State, including those imposed by justices of the peace, are required to make the necessary report of each fine imposed and collected and regular settlements through the prescribed channels which insure the regular payment of the same into the State treasury.

In such cases the fine imposed, together with costs, is paid either to the justices of the peace, the officer holding process duly issued (Code, section 722) or to the clerk of the circuit court. Justices are required to pay fines collected by them to the clerk within thirty days after receiving the same (Code, sec. 723). Other officers receiving fines are required to pay the same and all costs payable out of the public treasury to the clerk (Code, sec. 736). The clerk in turn is required to report the same to the Auditor of Public Accounts (Code, sec. 730) and to make proper settlements.

Very truly yours,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

FORMS—*Bonds.*

HON. DAVIS BOTTOM,

Superintendent of Public Printing,

Richmond, Va.

RICHMOND, VA., April 7, 1916.

DEAR SIR:

In accordance with your request of the 24th ultimo, I am sending you approved forms of bonds and contracts for printing and binding the reports of the Supreme Court of Appeals.

With reference to the bonds, you will note that I have prepared two forms, dependent on whether the surety offered is corporate or individual. I desire, however, to call your attention to the fact that these bonds will cover either the printing or binding of the reports, as the case may be, by the mere insertion, where blank is left, of the word binding or the word printing in the second paragraph before the words "of volume of the Virginia Reports," etc.

In the event that the principal executing the bond is a corporation, you may use the forms prescribed by making the following changes, to-wit: in both forms change the beginning of the bond so as to read: "Know all men by these presents, that we, principal, a corporation duly incorporated under the laws of, and," etc. Thereafter the bond should read just as the forms here given read until you reach the last clause known as the testimonial clause, which should be changed in the individual surety forms so as to read as follows:

"In testimony whereof the said principal has caused its corporate name and seal to be hereunto annexed and the same to be attested by the signature of, its, and the said, surety, hereto sets his hand and seal this the day of, 19....

.....[SEAL]

.....[SEAL]

ATTEST:

....."

A similar change in the testimonial clause in the bond of the corporate surety may be made as follows:

"In testimony whereof the said, principal, has caused its corporate name and seal to be hereunto annexed, and the same to be attested by the signature of, its, and the said, surety, has caused its corporate name and seal to be hereunto annexed and the same to be attested by the signature of, its, this the day of, 19....

.....[SEAL]

ATTEST:

.....

.....[SEAL]

ATTEST:

....."

Of course, in both bonds the acknowledgment of the principal should be changed so as to read as follows:

"ACKNOWLEDGMENT 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 and, whose names are signed to the above bond, bearing date 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."

In regard to the printing contract, I suggest that in the first paragraph instead of "between Davis Bottom, Superintendent of Public Printing of the State of Virginia, as the representative of said Commonwealth," you change it to read "between the Commonwealth of Virginia, by Davis Bottom, Superintendent of Public Printing of said Commonwealth, as the representative of said Commonwealth." I have made this change because the bonds are required to be executed in the name of the Commonwealth and it would be well to have the bond and contract correspond. I also suggest that in the third paragraph, second line, you change the word "manner" to "form" for the simple reason that the word "form" is found in the statute.

In regard to the contract for binding the Virginia Reports, I deemed it advisable to draw a new form, which I am enclosing.

If, after looking over the contracts and bonds, there is any question in your mind as to their form or mode of execution, I shall be glad to have you confer with me.

Yours very truly,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

FORMS—*Special Election School Bond.*

RICHMOND, VA., *September 26, 1916.*

HON. R. C. STEARNES,

*Superintendent of Public Instruction,
Richmond, Va.*

DEAR SIR:

In compliance with your request, I am herewith submitting a form of special election school bond, issued under chapter 255 of the Acts of the General Assembly of Virginia, 1906, as amended by chapter 184 of the Acts of Assembly, 1910.

Very truly yours,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

SPECIAL ELECTION BOND OF

..... SCHOOL DISTRICT, COUNTY, VIRGINIA.
Issued under chapter 255, Acts of Assembly, 1906, as amended by chapter 184,
Acts of Assembly, 1910.

WHEREAS, The school board of district, in the county of, Virginia, by resolution duly spread upon the minutes of the proceedings of said board declared that an additional school house or school houses are necessary to provide additional public school facilities for the children of school age in such district and the school funds of such district will not be sufficient to provide such additional school building or buildings and to furnish the same.

AND WHEREAS, Such statement of facts was confirmed and approved by resolution of the board of supervisors of said county and such resolutions of the school board and board of supervisors were duly certified to the circuit court of said county, together with the location of the school house or school houses to be erected, with all the plans, specifications and estimated costs thereof required approved by the division superintendent of said county and the superintendent of public instruction.

REPORT OF THE ATTORNEY GENERAL

AND WHEREAS, Said court in accordance with statute in such cases made and provided, ordered a special election to be held in said district, which was duly and regularly held as provided by law on the day of, 19...., at which election a majority of the qualified voters of said school district voting, authorized the issue of bonds for the amount recommended by said school board, to-wit: for the sum of \$..... and the result of such election was duly certified as provided by law, as evidenced by the certificate of the clerk of this county appearing on the back of this bond.

AND WHEREAS, Said amount, together with any other bonds of said school district do not exceed in the aggregate seventeen percentum of the aggregate assessed value of the real estate located in said school district,

AND WHEREAS, By resolution of said board, spread upon its minutes, the form of this bond and its denomination have been duly prescribed,

AND WHEREAS, All the requirements of the act under which these bonds are issued, to-wit: chapter 255 of the acts of the General Assembly of Virginia, 1906, as amended by chapter 184 of the Acts of Assembly, 1910, have been fully complied with.

Now, THEREFORE, In consideration of the premises, the school board of district, in the county of, Commonwealth of Virginia, doth hereby promise to pay to the Commonwealth of Virginia, for the benefit of the LITERARY FUND, for value received, the just and full sum of dollars (\$.....) principal with interest thereon at the rate of four (4) per cent. per annum, and to pay the said principal sum in fifteen (15) equal annual instalments of \$..... dollars each, beginning one year from the date of this bond and annually thereafter on the same day, together with the accrued interest on said instalment and upon the unpaid portion of this bond.

The said board agrees to set aside as a sinking fund annually from the school levies of said district such a sum as will provide for the payment of said instalments as they mature.

The statute under which this bond is issued creates a lien upon the school property erected and procured with the proceeds of the sale of this bond for the payment of the principal hereof and the interest to accrue hereon, and section 1433 of the Code of Virginia, as amended, Acts of 1916, page 836, makes this bond a lien against all funds and income of said district.

This bond or any instalment thereof is redeemable at the option of the said school board at any time before maturity upon the payment of principal and accrued interest.

In case default is made in the payment of any annual instalment of this bond or of the interest thereon, all of the instalments of this bond with interest thereon shall immediately become due and payable.

IN WITNESS WHEREOF, The said district school board has caused the chairman thereof to sign this bond for the said board and to affix its seal hereto, and have caused the clerk of said school board (who is also its secretary) to attest the same by signing his name hereto this day of, 19....

[Impress of Seal of Board]

.....
Chairman of School Board of District.

Attested by

Clerk of School Board of District.

[To be printed on back of bond.]

Special Election District Bond.

..... County.
..... District.
..... Amount of Loan.
..... Date of Loan.

No. Installment.	Principal.	Interest.	Paid.	Memo.
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15

Form approved by State Board of Education, October 6, 1916.

CERTIFICATE OF CLERK OF THE COUNTY.

State of Virginia }
 County of } to-wit:

This is to certify that the board of supervisors, consisting of the undersigned, clerk of this county, the Commonwealth's attorney and commissioner of the revenue of this county, met in my office and canvassed the returns of the special election, referred to in this bond, on the second day following said special election, and, thereupon, did certify to the board of supervisors of this county that at said election a majority of the qualified voters of said school district voting at said special election, authorized the issue of bonds in the amount of dollars (\$.....), and the board of supervisors spread said certification upon their minutes.

And I further certify that no notice of contest of said election was filed within ten days after said election.

Given under my hand this day of, 19....

 Clerk.

GAME AND FISH—*Game Laws—Chapter 152, Acts 1916—Non-resident License—Consuls.*—A consul of a foreign power is required to procure an alien's license (unless he is a citizen of the United States, in which event he would be required to procure a non-resident's license) in order to hunt in Virginia unless he should hunt only upon his own land, in which event no license would be required.

Same.—Distinction between ambassadors of foreign powers and consuls or representatives.

RICHMOND, VA., September 26, 1916.

HON. JOHN S. PARSONS, *Commissioner,*
Department of Game and Inland Fisheries,
Richmond, Va.

DEAR SIR:

Acknowledgment is made of your communication of September 25, 1916, in which you request me to inform you whether it would be necessary for the acting German Consul General of New York to procure a license to hunt in this State.

Section 32 of chapter 152 of the Acts of 1916 is as follows:

"Any person who hunts outside of the limits of his own or the adjoining property, except as provided in section 29 of this act, without first obtaining a license permitting him to do so, or any non-resident of the State or alien as hereinbefore provided who hunts in this State, except on his own land, without a license as hereinbefore provided, or who lends or transfers his hunting license to another, shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than five nor more than twenty-five dollars, but any resident of the State may hunt upon his own or the adjoining lands in season without obtaining a license, and it shall be unlawful for any person to use or attempt to use the license of another for hunting in this State, or for any person to hunt upon the lands of any gun club, hunting or fishing club, association or preserve, of whatsoever description, public or private, as a member thereof or resident land owner, without having procured in the proper manner a license, nor shall their memberships therein be construed to entitle them to hunting or fishing privileges as a resident land owner or *bona fide* tenant or lessee."

I am, therefore, clearly of the opinion that the German Consul General will have to procure an alien's license unless he is a citizen of the United States, in which event he would be required to procure a non-resident's license, as provided for in said act, unless he should hunt only upon his own land, in which event no license would be required.

While the law seems to be that the ambassador of a foreign power is not subject to the laws of the power to which he is accredited, and that his person is inviolable, the rule is very different in the case of consuls. The rule in the latter case is stated thus in 2 Corpus Juris, section 29, page 1305:

"Although some expressions of Vattel appear to countenance a different opinion, it is well settled that a consul is not entitled, by virtue of his office merely, to the immunities of a foreign minister, but is subject, civilly and criminally like other residents, to the tribunals of the country in which he resides. He is, however, upon principle and according to international usage, entitled to the liberty and safety necessary to the proper discharge of his functions. Thus a consul is generally exempt from personal taxes; from liability to have soldiers quartered in his house; from arrest for political reasons; from jury duty, and from militia duty, and a consul who, by express treaty, is not amenable to the process of the courts cannot be forced, by compulsory process, to attend as a witness."

I note what you say about the hardship of requiring a person to pay the prescribed license "for merely one or two days' sport, which probably results without success." However, it is not with what ought to be that I have to deal, but it is necessary to construe the laws as they exist.

Yours very truly,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

GAME AND FISH—*Game Laws—Chapter 152, Acts 1916, Section 2070a, Code Va. 1904 as amended—Rabbits—Season.*—A land owner may kill hares on his own land at any time during the year. Chapter 152, Acts 1916, does not change the provisions of section 2070a as amended as to this subject.

Same.—The board of supervisors of a county have not the power to forbid a land owner to kill hares on his own land at any season of the year.

RICHMOND, VA., October 2, 1916.

HON. JOHN S. PARSONS, *Commissioner,*
Department of Game and Inland Fisheries,
Richmond, Va.

DEAR SIR:

Acknowledgment is made of your letter of September 25, 1916, in which you request the Attorney General to advise you whether the board of supervisors of the county has the authority to issue a rule or regulation prohibiting land owners from hunting or killing hares upon their own land at any time during the year.

It is provided by sub-section 2 of section 2070a of the Code of Virginia, 1904, as amended, that nothing in this act shall restrict the killing of hares by residents of this State upon their own land at any time.

There is, therefore, no season for a land owner who kills hares on his own land at any time during the year, nor is there anything in chapter 152 of the Acts of 1916 which changes this provision of section 2070a, as amended.

The right of the board of supervisors to shorten the open season in their county is found in sub-section 5 of section 2070a of the Code of Virginia, 1904, as amended, which reads as follows:

"The board of supervisors of any county shall have the power to shorten the open season in their said county, and by regulations not inconsistent with the provisions of this section may further protect the game within their said county, and may include in such protection other game not specifically mentioned in this section; provided, that it shall be lawful to ship out of this State wild water fowl legally killed in the counties of Accomac, Northampton, Norfolk and Princess Anne." * * *

As the provision of the law giving the board of supervisors power to shorten the open season is found in the same act in which the provision above quoted, in reference to owners killing hares on their own land, is found, I am of the opinion that the board of supervisors have not the power to forbid a land owner to kill hares on his own land at any season of the year.

Very truly yours,

LESLIE C. GARNETT,
Assistant Attorney General.

GAME AND FISH—*Game Laws—Chapter 152, Acts 1916—Sections 16, 17.*—The law does not provide for deputy game wardens.

Same.—Under the provisions of section 17, chapter 152, Acts 1916, a special as well as a regular game warden is required to give bond there provided for.

Same.—The liability of a regular game warden for the acts of a special game warden who is placed under his control, depends upon whether a wrongful act was committed by the special warden while under the control and acting under the direction of the regular warden.

RICHMOND, VA., September 20, 1916.

HON. JOHN S. PARSONS,
Commissioner of Game and Inland Fisheries,
Richmond, Va.

DEAR SIR:

Acknowledgment is made of your communication enclosing a letter of W. T. Yancey, Esq., in which he desires to know whether deputy game wardens have to give bond and whether the game warden is responsible for the acts of his deputies.

On examination of chapter 152 of the Acts of 1916 I find that while section 16 of the act in the title of that section mentions deputy game wardens, that in fact there is no such officer as a deputy game warden. Section 14 of the act provides that the commissioner shall appoint a regular game warden and special wardens in each county and city of this State, as he may deem necessary to enforce the laws, with the further provision that there shall not be less than one regular warden for each county. Even section 16, the only section in which the word deputy is used in the body of the section, speaks of "special wardens" and not of deputies; therefore, I am clearly of the opinion that section 17 of chapter 152 of the Acts of 1916, which provides that before entering upon the discharge of his official duties each game warden shall give bond before the clerk of the circuit court of the county or corporation court of the city, etc., is applicable to special as well as regular game wardens. No distinction is made between regular and special game wardens in this section as is made in the other sections of the act, and this section expressly provides that "each game warden shall give bond."

As to the second inquiry, section 15 of chapter 152 of the Acts of 1916 provides as follows:

"The wardens shall assist the State game commissioner in the discharge of his official duties, the special wardens shall be under the control of such regular wardens as the commissioner may direct, and said wardens shall have like power and authority in the enforcement of this law as is provided in this chapter for the State game commissioner, and shall have jurisdiction throughout the entire State in all matters relative to the enforcement of this law, and the commissioner and each warden shall have and they are hereby invested with the power and authority necessary upon displaying his badge of authority or credentials of office, to arrest any person found in the act of violating any of the provisions of the forest, game and inland fish laws, heretofore, now or hereafter enacted, and to seize and to search any such person so arrested, together with any box, can, package, barrel or other container, hunting-bag, coat, suit, trunk, grip, satchel or fish basket carried by or in the possession of such person so arrested, and to enter and search any refrigerator, building, vehicle, car, coach, depot, office, restaurant, cafe, hotel, or other place of whatsoever nature in which the person making such arrest, as aforesaid, has reasonable ground to believe that the person so arrested has concealed or placed any fish or game which will furnish evidence of the violation of game and inland fish laws of this State, and such arrests, seizure or search may be made without warrant except that a dwelling may not be searched without a warrant, and any animal, bird or fish or part thereof which has been killed, taken or captured or had in or proven to have been in, possession of any person in violation of the game and fish laws of this State shall be deemed *prima facie* evidence that the person in whose possession the same is found is guilty of having taken, captured or killed such bird, fish or animal, and the same shall be seized by said warden; upon demand of any warden, or other officer, any person found hunting shall exhibit his license, and failure to do so shall be *prima facie* evidence that he is hunting without license."

Section 16 of the act provides that regular and special game wardens shall be subject to the supervision and correction by the commissioner and subject to removal by him in his discretion. Therefore, the liability of the regular game warden for the acts of the special game wardens who are placed under control of the regular warden would depend upon whether the wrongful act was committed by the special warden while under the control and acting under the direction of the regular warden.

Yours very truly,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

GAME AND FISH—*Game Laws—Section 2070a, Code Va. 1904, as amended.—Sub-section 2.*—One who kills hares on his own land out of season as provided in section 2070a, as amended, has no right to expose the same for sale on the market, and the purchaser of such rabbits would violate the provisions of this section and incur in so doing the penalty prescribed for the violation of the same.

RICHMOND, VA., October 9, 1916.

HON. JOHN S. PARSONS, *Commissioner,*
Department of Game and Inland Fisheries,
Richmond, Va.

DEAR SIR:

Acknowledgment is made of your communication of October 7, 1916, in which you request me to advise you whether a man who kills rabbits on his own land out of season can sell the rabbits so killed on the market out of the regular season.

This question is governed by sub-section 2 of section 2070a of the Virginia Code of 1904, as amended, as follows:

"It shall be unlawful for any person * * * to * * * buy, offer for sale or have in possession any * * * hares (or rabbits) * * * between February 1st and November 1st."

This section contains at the end thereof this proviso:

"Provided this shall not restrict the killing of hares or squirrels by residents in this State upon their own land at any time, nor shall this interfere as to laws now governing the boards of supervisors in the several counties in this State."

The only effect of this proviso, I think, is to permit the killing of hares and squirrels by residents of this State upon their own land at any time, and extends no further.

I am, therefore, of the opinion that one who kills hares on his own land out of season as permitted in section 2070a, as amended, has no right to offer the same for sale on the market, and, further, under the provisions of this section the purchaser of such rabbits would violate the provisions of this section and incur in so doing the penalties prescribed for violation of the same.

Yours very truly,

LESLIE C. GARNETT,

Assistant Attorney General.

GAME AND FISH—*Game Laws—Section 29, Chapter 152, Acts 1916.*—A land owner may hunt on adjoining lands without license if he obtains the consent of the owner thereof as provided in section 29 of chapter 152, Acts 1916.

RICHMOND, VA., October 23, 1916.

HON. JOHN S. PARSONS, *Commissioner,*
Department of Game and Inland Fisheries,
Richmond, Va.

DEAR SIR:

Acknowledgment is made of your communication of October 13, 1916, in which you request the Attorney General to advise you whether a resident who owns land adjoining a United States government forest reservation can hunt on the forest reservation without obtaining a license as provided by chapter 152 of the Acts of 1916.

Aside from the right of a person to hunt on a United States government reservation, as to which I express no opinion, it would seem that under the provisions of section 29 of chapter 152 of the Acts of 1916, which reads as follows:

"All owners and landlords and members of their families and tenants and renters, residing thereon, with the consent of the land owners, may hunt upon their own or adjoining lands without license;" that the land owner, if he obtains the consent provided for in this section can hunt on any land adjoining his land without obtaining a license to do so.

Yours very truly,

LESLIE C. GARNETT,

Assistant Attorney General.

GAME AND FISH—*Game Laws—Chapter 69, Acts 1906.*—Virginia game laws do not permit officers of the law to destroy traps and other instruments used in violation of the non-tidal fish laws; therefore, a game warden has no authority to destroy such traps and obstructions in violation of law, but should seize and hold the same for use in a prosecution of the person violating the law.

RICHMOND, VA., October 24, 1916.

HON. JOHN S. PARSONS, *Commissioner,*
Department of Game and Inland Fisheries,
Richmond, Va.

DEAR SIR:

Acknowledgment is made of your letter of September 29, 1916, addressed to the Attorney General of Virginia, in which you request him to advise you whether the game warden for Sussex county has a right to destroy, confiscate or seize fish traps or other artificial contrivances which have been constructed across the Blackwater river in Sussex county and which prevent the free passage of fish.

In your communication you call attention to the provisions of chapter 69 of the Acts of 1906, which you think bears upon this question. This act reads as follows:

"Be it enacted by the General Assembly of Virginia, That it shall not be lawful to take, kill or capture fish in the waters of the Nottoway river and its tributaries in Southampton, Sussex and Greensville counties, and also in Dinwiddie and Brunswick counties as far up as Slagle's mill dam, except private ponds, by means of seines, fykes, traps, fish slides, or in any other manner except by angling with a hook and line.

"This act shall not apply to the capture of minnows by means of a minnow net, when minnows are to be used as a bait, nor to the hauling of shad seines, or the use of shad dip nets, in the waters of the Nottoway river and its tributaries in the counties of Southampton, Sussex and Greensville, during the months of February, March, April and May, and in the waters of the said Nottoway river and its tributaries in the counties of Dinwiddie and Brunswick as far up as Slagle's mill dam during the months of February, March, April, May, June and July.

"Any person violating the provisions of this act shall be deemed guilty of a misdemeanor.

"This act shall be in force ninety days after the adjournment of the General Assembly."

It, therefore, appears to be clear that any person who takes, kills, or captures fish in the waters of the Nottoway river and its tributaries in Sussex county by means of seines, fykes, traps, fish slides or in any other manner except by

angling with hook and line is guilty of a misdemeanor as provided for in said act.

I find, however, no provision of the Virginia game laws which would permit the officers of the law to destroy such traps and other instruments used in violation of this statute. Therefore, the game warden has no authority to destroy such traps and obstructions, but should seize and hold the same as evidence to be used in the prosecution of the person violating the law.

Very truly yours,

LESLIE C. GARNETT,

Assistant Attorney General.

GAME AND FISH—*Game Laws*.—Chapter 152, Acts 1916, section 33, section 2071, Code of Virginia 1904, stated and referred to.

RICHMOND, VA., *October 24, 1916.*

HON. JOHN S. PARSONS, *Commissioner,*
Department of Game and Inland Fisheries,
Richmond, Va.

DEAR SIR:

Acknowledgment is made of your communication of October 18, 1916, in which you ask for a ruling on the following state of facts:

“A person who is hunting on A’s land with A’s permission jumps a rabbit and the rabbit crosses to B’s land with the hunter’s dogs in pursuit, following the rabbit to B’s land, and finally driving the rabbit back to A’s land, is the hunter guilty of an offense under the game laws?”

The law governing hunting on the land of another person is found in section 33 of chapter 152 of the Acts of 1916, where it is provided:

“If the owner of any premises shall post notices thereon, in conspicuous places, stating that hunting thereon without written permission is prohibited, then any person, who hunts on such lands, during that current year without first having obtained from the owner or agent thereof permission in writing to do so, shall be guilty of a misdemeanor, and, on conviction, shall be fined not less than five nor more than twenty-five dollars; provided, that if the owner or agent of such lands shall at the trial request the remittance of the penalty, the trial judge shall so order. Provided, that this section shall not apply to coon, opossum, beaver, skunk, fox or deer hunters.”

And in section 2071 of the Code 1904, which reads as follows:

“If any person without the consent of the owner or tenant, shoot, hunt, range, fish, trap, or fowl on or in the lands, water, mill ponds, or private ponds of another, which are enclosed, or the boundaries of which, or the streams adjacent to which, constitute a lawful fence, or on any lands, waters, mill ponds, or private ponds of another, east of the Blue Ridge, or in the waters of said land, he shall be deemed guilty of a trespass, and upon conviction thereof shall be fined not less than five dollars, nor more than fifty dollars, and in addition thereto shall be liable in an action for damages; and if any person, after being warned not to do so by the owner or tenant of any premises, shall go upon the lands of the said owner or tenant, he shall, in addition to the liabilities imposed under this section, be deemed guilty of a misdemeanor, and upon conviction thereof, punished by a fine not exceeding fifty dollars or imprisoned in the county jail not exceeding sixty days, or both, in the discretion of the justice or jury trying the case.”

As to whether the acts in question in the case stated constitute a violation of these statutes, is a question which must be determined by the courts, and as an opinion by this office on the subject would not determine the question, I must decline to express an opinion on this point.

Very truly yours,

LESLIE C. GARNETT,

Assistant Attorney General.

GAME AND FISH—*Game Laws—Chapter 152, Acts 1916, Section 3780—Code Va. 1904, as amended—Concealed Weapons—Game Wardens.*—A game warden is not permitted to carry concealed weapons.

RICHMOND, VA., October 21, 1916.

HON. JOHN S. PARSONS, *Commissioner,*
Department of Game and Inland Fisheries,
Richmond, Va.

DEAR SIR:

Acknowledgment is made of your letter of October 12, 1916, in which you say:

"Will you please advise this department whether game wardens, regular, special and *ex-officio* would have a right to carry a pistol or revolver on their person when in the discharge of their duties as game wardens?"

This question is governed by the provisions of section 3780 of the Code of Virginia 1904, as amended. This section makes it a criminal offense for any person to carry about his person hid from common observation certain weapons, with the following exception:

"provided that this section shall not apply to any police officer, town or city sergeant, constable, sheriff, conservator of the peace or to carriers of the United States mail in the rural districts or collecting officer while in the discharge of his official duty."

Under a statute similar to this section in force in 1838, which did not except from the operation of the statute constables, it was held in *Hicks' Case*, 7 Gratt. 597, that a constable could be convicted of carrying concealed weapons. It would, therefore, appear that the policy of the State is not to extend the class of persons entitled to carry concealed weapons beyond those specified in the act.

As I do not find any provision of the law permitting a game warden to carry concealed weapons, as a game warden is not one of the persons named in the statute, and as I find no other provision of the law exempting him from the operation of section 3780, as amended, and as he is not a conservator of the peace as defined by section 3912 of the Virginia Code 1904, I am of the opinion that a game warden, regular or special, is not entitled to carry concealed weapons.

Your attention is called, however, to section 3780, as amended, in which it is provided that the circuit judge of any county in term time and the hustings judge of any hustings court in term time, upon written application and satisfactory proof of good character and the necessity of the applicant to carry concealed weapons, may grant such permission for one year.

Very truly yours,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

GAME AND FISH—*Game Laws—Chapter 152, Acts of 1916.*—Every non-resident must procure a license before he can hunt in this State, except on his own land. Ministers are no exception to this rule.

RICHMOND, VA., *September 22, 1916.*

HON. JOHN S. PARSONS, *Commissioner,*
Department of Game and Inland Fisheries,
Richmond, Va.

DEAR SIR:

Acknowledgment is made of your communication of September 20th, in reference to the right of a non-resident minister to hunt in the State of Virginia without first procuring a non-resident license to hunt.

Section 32 of chapter 152 of the Acts of 1916 provides that:

"Any non-resident of the State * * * who hunts in this State, except on his own land, without a license as hereinbefore provided * * * shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than five nor more than twenty-five dollars. * * *"

I am, therefore, clearly of the opinion that every non-resident must procure a license before he can hunt in this State, except on his own land.

Yours very truly,

LESLIE C. GARNETT,
Assistant Attorney General.

GAME AND FISH—*Game Laws—Chapter 152, Acts 1916—Sections 29, 32.*—One who hunts bear, except those persons who are exempt from doing so under section 29 of chapter 152, Acts 1916, must obtain a license to do so.

RICHMOND, VA., *September 19, 1916.*

HON. JOHN S. PARSONS, *Commissioner,*
Department of Game and Inland Fisheries,
Richmond, Va.

DEAR SIR:

Acknowledgment is made of your communication of September 15, 1916, in which you request the Attorney General to advise you whether under the new game law a license must be obtained to hunt bear.

Section 32 of chapter 152 of the Acts of 1916 provides as follows:

"Any person who hunts outside of the limits of his own or the adjoining property, except as provided in section 29 of this act, without first obtaining a license permitting him to do so, or any non-resident of the State or alien as hereinbefore provided who hunts in this State, except on his own land, without a license as hereinbefore provided, or who lends or transfers his hunting license to another, shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than five nor more than twenty-five dollars, but any resident of the State may hunt upon his own or the adjoining lands in season without obtaining a license, and it shall be unlawful for any person to use or attempt to use the license of another for hunting in this State, or for any person to hunt upon the lands of any gun club, hunting or fishing club, association or preserve, of whatsoever description, public or private, as a member thereof or resident land owner, without having procured in the proper manner a license, nor shall their membership therein be construed to entitle them to hunting or fishing privileges as a resident land owner or *bona fide* tenant or lessee."

The exception to this provision is found in section 29 of the act, which reads as follows:

"All owners and landlords and members of their families and tenants and renters, residing thereon, with the consent of the land owners, may hunt upon their own or adjoining lands without license."

I am, therefore, clearly of the opinion that one who hunts bear, except those persons who are exempted from doing so under section 29 of the act, must obtain a license for so doing.

Yours very truly,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

GAME AND FISH—*Game Laws—Chapter 152, Acts 1916—Sections 29, 33.*—Section 29, chapter 152, Acts 1916, does not qualify section 33 thereof, but merely permits one to hunt upon his own land or adjoining lands with the consent of the land owners without license.

Same.—Whenever the owner of any premises posts the same in accordance with the provisions of section 33 of chapter 152, Acts 1916, written permission is required in order for one to hunt thereon. In other cases oral permission is all that is required.

RICHMOND, VA., *September 15, 1916.*

HON. JOHN S. PARSONS, *Commissioner,*
Department of Game and Inland Fisheries,
Richmond, Va.

DEAR SIR:

Acknowledgment is made of your letter of September 14, 1916, in which you ask me to give you my opinion as to when one has to get written permission to hunt on the land of another and when a verbal permission is all that is required.

Section 33 of chapter 152 of the Acts of 1916 provides as follows:

"If the owner of any premises shall post notices thereon, in conspicuous places, stating that hunting thereon without permission is prohibited, then any person, who hunts on such lands, during that current year without first having obtained from the owner or agent thereof permission in writing to do so, shall be fined not less than five nor more than twenty-five dollars; provided, that if the owner or agent of such lands shall at the trial request the remittance of the penalty, the trial judge shall so order. Provided, that this section shall not apply to coon, opossum, beaver, skunk, fox or deer hunters."

Therefore, if the owner of any premises posts notices thereon in conspicuous places, stating that hunting thereon without written permission is prohibited, it is necessary for one to obtain written permission from the owner before he can hunt thereon without incurring the penalty provided by this section.

Section 29 does not qualify section 33 of chapter 152 of the Acts of 1916, but merely permits one to hunt upon his own land or the adjoining lands with the consent of the land owners without license.

In addition to the provisions of chapter 152 of the Acts of 1916, relating to hunting on the lands of another, section 2071 of the Code reads as follows:

"If any person without the consent of the owner or tenant, shoot, hunt, range, fish, trap, or fowl on or in the lands, water, mill ponds, or private ponds of another, which are enclosed, or the boundaries of which, or the streams adjacent to which, constitute a lawful fence, or on any lands, waters, mill ponds, or private ponds of another, east of the Blue Ridge, or in the waters of said land, he shall be deemed guilty of a trespass, and upon conviction thereof shall be fined not less than five dollars, nor more than fifty dollars, and in addition thereto shall be liable in an action for damages; and if any person, after being warned not to do so by the owner or tenant of any premises, shall go upon the lands of the said owner or tenant, he shall, in addition to the liabilities imposed under this section, be deemed guilty of a misdemeanor, and, upon conviction thereof, punished by a fine not exceeding fifty dollars or imprisoned in the county jail not exceeding sixty days, or both, in the discretion of the justice or jury trying the case."

Therefore, it would seem that whenever the owner of any premises posts the same in accordance with the provisions of section 33 of chapter 152 of the Acts of 1916, written permission is required in order for one to hunt thereon. In other cases it would appear that oral permission is all that is required.

Yours very truly,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

GAME AND FISH—*Game Laws—Chapter 152, Acts 1916—Sections 23, 32.*—Under the provisions of chapter 152, Acts 1916, members of the Pamunkey Tribe of Indians are required to obtain a license to hunt.

RICHMOND, VA., *September 15, 1916.*

HON. JOHN S. PARSONS, *Commissioner,*
Department of Game and Inland Fisheries,
Richmond, Va.

DEAR SIR:

Acknowledgment is made of the letter of M. D. Hart, Esq., chief clerk of the Department of Game and Inland Fisheries, addressed to the Attorney General, bearing date September 13, 1916, in which he asked this office to inform him whether the members of the Pamunkey Tribe of Indians are permitted to hunt off of their own reservation without obtaining the license required by law.

Section 32 of chapter 152 of the Acts of 1916 reads as follows:

"Any person who hunts outside of the limits of his or the adjoining property, except as provided in section 29 of this act, without first obtaining a license permitting him to do so, or any non-resident of the State or alien as hereinbefore provided who hunts in this State, except on his own land, without a license as hereinbefore provided, or who lends or transfers his hunting license to another, shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than five nor more than twenty-five dollars, but any resident of the State may hunt upon his own or the adjoining lands in season without obtaining a license, and it shall be unlawful for any person to use or attempt to use the license of another for hunting in this State, or for any person to hunt upon the lands of any gun club, hunting or fishing club, association or preserve, of whatsoever description, public or private, as a member thereof or resident land owner, without having procured in the proper manner a license, nor shall their membership therein be construed to entitle them to hunting or fishing privileges as a resident land owner or *bona fide* tenant or lessee."

It will be seen, therefore, that the only qualification of this section is section 29 of the same act, which reads as follows:

"All owners and landlords and members of their families and tenants and renters, residing thereon, with the consent of the land owners, may hunt upon their own or adjoining lands without license."

These provisions of the act do not give the members of the Pamunkey Tribe of Indians any preference over other persons, and I am of the opinion that they come within the definition of "any person" as mentioned in section 32 of chapter 152 of the Acts of 1916, and are, therefore, required to obtain license to hunt on the lands of other persons unless they come within the exemption provided for in section 29, as last above quoted.

Yours very truly,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

GAME AND FISH—*Game Laws—Sections 2108, 2109, Code Va. 1904.*—Section 2109 refers to and prescribes the penalty for violation of section 2108 of the Code of Virginia 1904.

RICHMOND, VA., *September 14, 1916.*

HON. M. D. HART,

*Chief Clerk, Department of Game and Inland Fisheries,
Richmond, Va.*

DEAR SIR:

Acknowledgment is made of your communication over the telephone, in reference to section 2108 of the Code, as amended. Your question is this: Section 2108 provides no penalty for the violation of any of its provisions, therefore what effect has the act?

If you will turn to section 2109 of the Code you will find that it reads as follows:

"Any person violating any of the provisions of the preceding section shall on conviction thereof be fined for each offense twenty dollars and be imprisoned in jail until the fine is paid, but not exceeding thirty days, and forfeit all boats, nets, or other contrivances employed by him in such violation; provided, that in case of a violation of the provisions of the first sub-division of said section in relation to mountain trout, the amount of the fine shall not be less than five dollars nor more than twenty dollars. In a prosecution of a person for a violation of any provision of the first, second and third sub-divisions of said section the possession by such person of any of the fish mentioned in said sub-division shall be *prima facie* evidence of his guilt."

Section 2109 refers to and prescribes the penalties for any violation of section 2108 of the Code.

Yours very truly,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

GAME AND FISH—*Hunting*.—The provision of section 29 of chapter 152 of the Acts of 1916, permitting "owners and landlords and members of their families and tenants and renters residing thereon with the consent of the land owner" to hunt on such land is limited to such members of the family and landlord's family as reside on said land; therefore, the children of a resident owner of land in Virginia who reside out of the State of Virginia are required to obtain a license to hunt in this State before they can hunt upon their father's land located in Virginia.

RICHMOND, VA., August 29, 1916.

HON. JOHN S. PARSONS,

*Commissioner Game and Inland Fisheries,
Richmond, Va.*

DEAR SIR:

Acknowledgment is made of your communication addressed to the Attorney General in which you ask for an opinion as to the right of the sons of a resident of this State who reside without the State of Virginia to hunt on their father's land located in this State without the payment of a license as prescribed by chapter 152 of the Acts of 1916.

Section 29 of chapter 152 of the Acts 1916 reads as follows:

"Owners and landlords may hunt on their own lands without license.—All owners and landlords and members of their families and tenants and renters, residing thereon, with the consent of the land owners, may hunt upon their own or adjoining lands without license."
It is provided by section 32 that:

"* * * any non-resident of the State or alien as hereinbefore provided who hunts in this State, except on his own land, without a license as hereinbefore provided, or who lends or transfers his hunting license to another, shall be guilty of a misdemeanor and upon conviction shall be punished by fine of not less than five nor more than twenty-five dollars * * *."

It will be observed in section 29 that the members of the families of owners and landlords who are permitted to hunt on the land of owners and landlords with their consent are such members of their families who reside on said land. I think that the provisions of section 29 are perfectly clear as to this, however the above quoted provision from section 32 of chapter 152 of the Acts of 1916 confirms this view, as this act makes it a misdemeanor for any non-resident of the State to hunt except on his own land without a license.

I am, therefore, of the opinion that the children of a resident owner of land in Virginia, who reside out of the State of Virginia, are required to obtain a license to hunt in this State before they can hunt upon their father's land located in Virginia.

Very truly yours,

LESLIE C. GARNETT,

Assistant Attorney General.

GAME AND FISH—*Fishing rights in waters of the State*.—At common law all person have a common and general right of fishing in all tidal waters and no one can maintain an exclusive privilege to any part of such water unless he has acquired it by grant or prescription, notwithstanding the title to the bed of such a stream is in the riparian owner.

Same—Right of State to regulate right of fisheries in public waters.—There is no restriction upon States to regulate the public right of fishery.

Words and Phrases—Arm of the sea—Tidal waters.—An arm of the sea extends as far as the water of fresh rivers is propelled backward by the pressure of the tide so as to occasion a regular rise and fall.

Same—Right of prescription in tidal waters.—There can be no prescription of the exclusive right of fishery in tidal waters, since prescriptive rights are based upon the presumption of a grant, which has been lost by process of time. No grant could have been made in America prior to the magna charta, and the crown having no power to make a grant since the Magna Charta and prior to the revolution the right of exclusive fishery therein rests upon the grant of the legislature.

Same—Rights of riparian owners—Licenses.—Under such circumstances the riparian owner has only the common right of fishery in the waters of the tidal creeks running through his land. Having only common right of fishery in these waters, there can be no restriction upon the authority of the State to impose a license upon such riparian owner for catching crabs in the waters of a land-locked creek, as provided by sub-section 13 or section 2086 of the Code as amended.

RICHMOND, VA., August 24, 1916.

HON. JOHN S. PARSONS, Commissioner,
Department of Game and Inland Fisheries,
Norfolk, Va.

DEAR SIR:

Acknowledgment is made of your letter of the 21st, to the Attorney General enclosing a letter from Hon. William D. Evans, Commonwealth's Attorney, Middlesex county, Va., making inquiry as to whether or not it is necessary for persons owning a "land-lock" creek to have a license to crab in the waters of that creek.

By the common law all persons have a common and general right of fishing in all tidal waters and no one can maintain an exclusive privilege to any part of such waters unless he has acquired it by grant or prescription, notwithstanding the title to the bed of such a stream is in the riparian owner. 19 Cyc. 992.

Another principle which is equally well established is that there can be no restriction upon the State's authority to regulate the public right of fishery. *Boggs v. Commonwealth*, 76 Va. 994.

It will not be contended, I think, that the mere fact that riparian owners on both sides of a tide-water creek own to the center of a stream gives such riparian owners the exclusive right of fishery in the waters of said stream. In fact, the principle above-cited from 19 Cyc. is directly to the contrary, as are the decisions, and unless, therefore, the riparian owners in "land-lock" creeks can show an exclusive right of fishery in the waters of said creek by grant or prescription, the right of such riparian owners is only that in common with the rest of the public.

In England the King has no power and since the Magna Charta never had, to grant an exclusive right of fishery in an arm of the sea. A private and several right to fish in a navigable river must have had its origin before the Magna Charta. Angell on Tide Waters, 25, note; also *Tinicum Fishing Company v. Carter* (Penn.), 100 Am. Dec. 597, and cases there cited. *Collins v. Benbury*, (N. C.), 38 Am. Dec. 722.

An arm of the sea extends as far as the water of fresh rivers is propelled backwards by the pressure of the tide so as to occasion a regular rise and fall.

Under these conditions, I am of the opinion that there can be no prescription of the exclusive right of fishery in the tidal waters, since prescription rests upon the presumption of the grant which has been lost by process of time. No grant could have been made in this country prior to the Magna Charta and the Crown had no power to make a grant since the Magna Charta and prior to the Revolution.

The right of exclusive fishery therefore, must rest upon a grant of the legislature, and the only grant from the legislature that I can discover is set out in the following paragraph:

Riparian owners within the limits of whose lawful survey any creek is comprised are granted the exclusive right to use said creek for sowing or planting oysters or other shell-fish by virtue of the provisions of section 2136 of the Code, but this privilege is expressly limited to the right to its exclusive use for the planting of oysters or other shell-fish.

The riparian owner then, has only the common right of fishery in the waters of the tidal creeks running through his land, (this does not mean that he has not the exclusive right of planting oysters as aforesaid), and having only the common right of fishery in these waters, there can be no restriction upon the authority of this State to impose a license tax upon such riparian owner for catching crabs in the waters of said creek, as provided by sub-section 13 of the act approved March 22, 1916, amending section 2086 of the Code of Virginia.

I enclose herewith carbon copy for you to forward to Mr. Evans, if you so desire.

Very truly yours,

LESLIE C. GARNETT,

Assistant Attorney General.

GAME AND FISH—Game laws—Statutes—Construction—Birds.—The manifest purpose of section 2079 and of chapter 54, Acts of 1912, is to protect wild birds and protect their nesting and hatching so that the wild bird life of the State may be protected instead of destroyed. In view of this purpose it is the duty of the Department of Game and Inland Fisheries to hold that persons taking eggs from the nests of wild birds have destroyed the nests within the meaning of chapter 54 of the Acts of 1912, and said department should proceed upon this hypothesis until the courts have held to the contrary.

Words and Phrases—Destroy.—Birds nest for the purpose of laying and hatching eggs and any acts on the part of any person which renders the nests useless for that purpose comes within the term "destroy" as used in section 2079 and chapter 54 of the Acts of 1912. The word "destroy" as used in these sections should be construed as synonymous with taking away, and a person who has taken away from a nest the eggs of wild birds can be prosecuted under section 2079 of the Code of Virginia, 1904.

Statutes—Title.—It is questionable if the title to chapter 54 of the Acts of 1916, entitled "An act to prevent the barter and sale of plumage of all birds killed in Virginia other than game birds and domestic fowls" is broad enough to cover the provision thereof forbidding the destruction of nests and eggs of wild birds and it is doubtful if this act could be invoked in a prosecution for this offense, therefore, it would seem reliance would have to be had upon section 2079 of the Code of Va. 1904 in a prosecution for such offense.

RICHMOND, VA., July 11, 1916.

HON. JOHN S. PARSONS,
Commissioner of Game and Inland Fisheries,
Richmond, Va.

DEAR SIR:

Acknowledgment is made of your request enclosing a letter of July 8, 1916, from H. H. Bailey, Esq., District Inspector of the Migratory Bird Law and special game warden under your department, requesting a construction of section 2079, Code of Virginia, and chapter 54, Acts of 1916, page 62, with regard to the protection of eggs of non-game birds.

Section 2079 makes it unlawful at any time to kill or capture any wild birds other than game birds *or to destroy their nests or eggs*. Chapter 54 of the Acts of 1912 provides that it shall be unlawful to kill or capture wild birds other than game birds *or to destroy their nests or eggs*. The specific case presented in the letter of Mr. Bailey is that eggs of wild birds were taken in Northampton county, Va., and sold in Elizabeth City county and were there eaten. Certainly either the party who took the eggs from the nest, or the party who actually destroyed the eggs, has violated the law, and it may be that both have. The manifest purpose of the law is to protect wild birds and to protect their nesting and hatching so that the wild bird life of the State might be propagated instead of destroyed. This being the manifest purpose of the law, I think it is the duty of your department to hold that persons taking eggs from the nests of wild birds have destroyed the nests within the meaning of the act, and to proceed upon this hypothesis until the courts have held to the contrary. Birds nest for the purpose of laying and hatching eggs, and any action on the part of any person which renders the nest useless for that purpose, it seems to me, would come within the term "destroy." In fact I am of opinion that the courts would construe the word "destroy" to be synonymous in this instance with "taking away." I have not been able to find cases exactly in point but in the case of *Solomon v. City of Kingston*, (N. Y.) 24 Hun. 562-4, it was held that a statute providing that persons whose property is *destroyed* by mobs should be compensated therefor, contemplated not only the demolition or injury to such property but taking it away. I, therefore, think that section 2079 of the Code is sufficient authority for prosecuting in Northampton county a person who has taken away from a nest the eggs of wild birds.

With further reference to chapter 54 of the Acts of 1916, I desire to call your attention to the fact that the title is, "An Act to prevent the barter and sale of the plumage of all birds killed in Virginia other than game birds and domestic fowls." The destruction of nests and eggs is not embraced in the title to this act, and it is doubtful if this act could be invoked in any prosecution for this offense and reliance would have to be had upon section 2079 of the Code as above set out.

I return herewith Mr. Bailey's letter for your files.

Yours very truly,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

GAME AND FISH—*Game wardens—Statutes—Construction.*—The provisions of section 14, chapter 152, Acts 1916, that there shall be not less than one regular game warden in each county who shall be appointed from a list of ten suitable persons to be furnished the Commissioner of Game and Inland Fisheries by the board of supervisors of the various counties of the State is mandatory.

RICHMOND, VA., *June 30, 1916.*

HON. JOHN S. PARSONS, *Commissioner,*
Department of Game and Inland Fisheries,
Richmond, Va.

DEAR SIR:

Acknowledging your letter of June 28, 1916, requesting the opinion of this office as to whether a game warden appointed from a list furnished by the council or similar governing body of a city could be used as a regular game warden for the county in which the city might be situated, I beg to advise that section 14 of the game law provides that there shall be not less than one regular game warden in each county, and this regular game warden shall be appointed from a list of ten suitable persons to be furnished by the board of supervisors of such county. It is inconceivable that the board of supervisors of a county would, in its list, name a person not a resident of the county; and I hardly think the question which you put to this office would ever arise. The law is mandatory that there shall be not less than one regular game warden in each county, appointed as above set out; but section 15 of the game law seems to provide that each special game warden shall have jurisdiction throughout the entire State in all matters relative to the enforcement of the game law.

Yours very truly,

LESLIE C. GARNETT,
Assistant Attorney General.

GAME AND FISH—*Chapter 152, Acts, 1916, section 2071, Code Va. 1904.*—Chapter 152, Acts 1916, and 2071 are both in force in so far as they are not in conflict and in case of conflict the provisions of section 33 of chapter 152, Acts 1916, being the last act on the subject, prevails.

Same—Posted Lands.—In all cases where lands are posted in conspicuous places, the provisions of section 33, chapter 152, Acts 1916 apply. However, that portion of section 2071 Code of Va., which makes it unlawful to hunt upon the lands of another without permission, are not repealed by section 33, chapter 152, Acts 1916, and in case of unposted land, the provisions of section 2071 of the Code apply.

Same.—The last paragraph of section 33, chapter 152, Acts of 1916, which provides "that this section shall not apply to coon, opossum, beaver, skunk or deer hunters" does not give the persons enumerated therein the right to hunt upon the property of another without his permission, nor does it exempt those persons from the provisions of section 2071 of the Code.

RICHMOND, VA., *July 1, 1916.*

HON. JOHN S. PARSONS, *Commissioner,*
Department of Game and Inland Fisheries,
Richmond, Va.

DEAR SIR:

I acknowledge your letter of June 24th, requesting the opinion of the Attorney General as to whether section 33 of the Game Act, chapter 152, Acts of Assembly 1916, conflicts with section 2071, Code of Va. 1904, and if so in what particular.

Section 2071 of the Code of 1904 reads as follows:

"If any person, without consent of the owner or tenant, shoot, hunt, range, fish, trap or fowl on or in the lands, waters, mill ponds, or private ponds of another, which are enclosed, or the boundaries of which, or the streams adjacent to which, constitute a lawful fence, or on any lands, waters, mill ponds, or private ponds of another, east of the Blue Ridge, or in the waters on said land, he shall be deemed guilty of a trespass, and upon conviction thereof shall be fined not less than five dollars nor more than fifty dollars, and in addition thereto shall be liable in an action for damages; and if any person, after being warned not to do so by the owner or tenant of any premises, shall go upon the lands of the said owner or tenant, he shall, in addition to the liabilities imposed under this section, be deemed guilty of a misdemeanor, and upon conviction thereof, punished by a fine not exceeding fifty dollars or imprisoned in the county jail not exceeding sixty days, or both, in the discretion of the justice or jury trying the case."

Section 33 of the Game Law is as follows:

"If the owner of any premises shall post notices thereon, in conspicuous places, stating that hunting thereon without written permission is prohibited, then any person, who hunts on such lands, during that current year without first having obtained from the owner or agent thereof permission in writing to do so, shall be guilty of a misdemeanor, and on conviction, shall be fined not less than five nor more than twenty-five dollars; provided, that if the owner or agent of such lands shall at the trial request the remittance of the penalty, the trial judge shall so order. Provided, that this section shall not apply to coon, opossum, beaver, skunk, fox or deer hunters."

You will note that in section 2071 of the Code there are two paragraphs, one provides that if any person, without the consent of the owner or tenant, hunts, etc., upon the lands of another he shall be deemed guilty of a trespass and upon conviction be fined, and in addition shall be liable in an action for damages. The second paragraph provides that if, being warned not to do so by the owner of any premises, any person shall go upon the lands of said owner he shall, in addition to being liable to fine and in an action for damages, be deemed guilty of a misdemeanor and upon conviction subject to fine or imprisonment or both.

Both of these acts are in force in so far as they are not conflicting and in case of conflict, the provisions of section 33 of the Game Act, being the last act on the subject, of course prevail. As to whether or not they are conflicting will depend upon the facts and circumstances of each case as it arises, and, of course, it is impossible to foretell the various cases that might arise.

However, I think that it is safe to say that in all cases where lands are posted in conspicuous places the provisions of section 33 of the Game Law would apply, but I am of the opinion that that portion of section 2071 of the Code which makes it unlawful to hunt upon the lands of another without permission is not repealed by section 33 of the Game Law, and that in case of unposted lands that the provisions of said section 2071 of the Code would apply.

For your information I might add that the proviso contained in the last paragraph of section 33, to-wit: "provided that this section shall not apply to coon, opossum, beaver, skunk, fox or deer hunters" does not give the persons enumerated therein the right to hunt upon the property of another without his permission, nor does it except those persons from the provisions of section 2071 of the Code.

Very truly yours,

LESLIE C. GARNETT,

Assistant Attorney General.

PUBLIC HEALTH—Quarantine—Railroads.—If the State Board of Health declares an absolute quarantine prohibiting all persons from areas suffering from infantile paralysis coming through or stopping in Virginia, railroads can on their own motion refuse for transportation any person destined from such points to pass through or stop in Virginia.

Same.—If the circumstances warrant it, the State Board of Health can provide by rules and regulations that no transportation company shall bring to Virginia or transport through the State any person from an infected area; in such case transportation companies and their employees would by violating this rule incur the penalties prescribed by statute.

Same—Right to declare a quarantine.—The fullest quarantine that the State Board of Health can declare under the law would be an absolute quarantine against all persons coming from an area suffering from an infectious disease.

Same.—The State Board of Health can prescribe a rule or regulation that no person shall come into Virginia from localities where infantile paralysis is prevalent unless they are provided with certificates of reputable physicians showing that they have not been exposed to the disease. In order to enforce this rule or regulation agents of the State Board of Health may be stationed at points on the Virginia border to turn back persons coming from infected areas.

Same.—So long as such a quarantine is reasonable, the State Board of Health has authority to turn back all persons from infected areas at the State line; such a power must be exercised reasonably but before a regulation of the State Board of Health can be set up to be unreasonable, it would have to clearly so appear.

RICHMOND, VA., August 21, 1916.

DR. ENNION G. WILLIAMS,
Commissioner, State Board of Health,
Richmond, Va.

DEAR SIR:

Acknowledgment is made of the following inquiries from you touching the powers of the State Board of Health to deal with the situation created or which might arise by the prevalence of infantile paralysis in the city of New York.

"1. Can the railroads of Virginia on their own motion or by direction of the State Board of Health deny transportation to persons coming by interstate traffic from the areas now suffering from infantile paralysis?

"2. What is the fullest quarantine the State Board of Health can declare under the law?

"3. Can agents of the State Board of Health be stationed at points on the Virginia border to turn back persons coming from localities where infantile paralysis is prevalent and who are unprovided with certificates showing they have not been exposed to the disease?

"4. In case it were desirable to turn back all persons from such areas, what would be the authority of the board?"

In your interview with me you requested that this matter be given as early attention as possible and I have therefore given such consideration thereto as the time would permit.

Generally speaking the power to remove and quarantine persons who have been infected with communicable diseases or exposed to contagion, and the general power to establish quarantine lines, need not be conferred on health

authorities in express terms but may be implied from the general power to preserve the public health or to guard against the introduction or spread of contagious diseases. (21 Cyc. 394, and cases cited.)

However, chapter 179 of the 'Acts of 1910 (Va. Health Bulletin, 125) provides:

1. That the State Board of Health shall have power to provide for the care, segregation and isolation of persons, having or suspected of having any communicable, contagious or infectious 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 health.

2. That persons violating any rule of the State Board of Health made in pursuance of this act shall be guilty of a misdemeanor.

I might add that section 10 of the act creating the Board of Health, chapter 361, Acts of Assembly 1908, provides that upon satisfactory information of the approach to or transit through Virginia of infected persons, it shall be the duty of the secretary of the board of health to cause same to be stopped at the State line. The action of the secretary shall be subject to the control and supervision of the State Board of Health.

Section 13, (3d. sub-section) provides that it shall be unlawful for any person voluntarily exposed to dangerous, contagious or infectious diseases to come into the State within fifteen days from such exposure, unless such person shall have a certificate from a reputable physician stating that no danger of communication of disease by such exposed person exists.

From an early date the power of the States to enact and enforce quarantine laws for the safety and the protection of the health of their inhabitants has been recognized by Congress. *Morgan's L. T. R. & S. S. v. Louisiana Bd. of Health*, 118 U. S. 445; *Louisiana v. Texas*, 136 U. S. 1; *Compagnie Francaise v. State Bd. of Health (La.)*, 186 U. S. 380. It is also held that the State may prohibit the introduction within its limits of animals from districts in which infectious animal diseases prevail. *Smith v. St. Louis, Etc. Railroad Company*, 181 U. S. 248; *Rasmusson v. Idaho*, 181 U. S. 198.

In the light of the above authorities, I beg to submit the following answers to your questions:

1. If the State Board of Health were to declare an absolute quarantine prohibiting all persons from the areas now suffering from infantile paralysis coming through or stopping in the State of Virginia, I am of the opinion that the railroads could on their own motion refuse for transportation any persons therefrom destined to pass through or stop in Virginia.

I am further of the opinion, if the circumstances warranted, that the State Board of Health, could provide by rules and regulations that no transportation company should bring to Virginia or transport through Virginia any person from the infected area, and that the railroad companies and their employees would by violating this rule incur the penalties prescribed by the statute.

2. The fullest quarantine that the State Board of Health could declare under the law would be an absolute quarantine against all persons coming from the area suffering from infantile paralysis.

3. It follows that the State Board of Health can prescribe a rule or regulation that no person shall come into Virginia from localities where infantile

paralysis is prevalent unless they are provided with certificates of reputable physicians showing that they have not been exposed to the disease. In order to enforce this rule or regulation agents of the State Board of Health may be stationed at points on the Virginia border to turn back persons coming from the infected areas.

4. This question is answered, it seems to me, by the answers to the above questions, which point out that the board of health has authority to declare a quarantine against all persons coming from the infected area, so long as such a quarantine is a reasonable regulation. The power to make rules and regulations, of course, must be exercised reasonably but before a regulation of your board could be said to be unreasonable, I think it will have clearly to so appear.

Assuring you of the willingness of the Attorney General's office to co-operate with your board in any action necessary to protect the public health, I am,

Very truly yours,

LESLIE C. GARNETT,

Assistant Attorney General.

WITNESSES—*Public officers.*—The holding of a public position will not justify a person who has been summoned as a witness to testify in a case, to refuse to appear and testify in the absence of a statute exempting him.

Same—Public officers.—A public officer or employee cannot claim immunity when he is a necessary court witness.

RICHMOND, VA., *March 31, 1916.*

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

DEAR SIR:

You have referred to this office certain papers in which the following facts appear. A subpoena has been issued for Dr. Jas. O. Fitzgerald, bacteriologist in your department, to appear as a witness before the circuit court of Appomattox county on the 3d of April in suit of *Furbush v. Norfolk & Western Railway Co.* Upon communicating with the clerk of Appomattox you found that the facts in the case were that your bacteriologist had, on the 30th day of August, 1915, at the request of a physician at Appomattox, reported the bacteriological findings in certain samples of water sent to him. These samples were taken from the farm of Mr. Furbush, plaintiff in the case above mentioned. The suit is for contamination of the water supply and the alleged consequent sickness and expense. Transportation expenses have been forwarded to Doctor Fitzgerald.

The question you ask is whether Doctor Fitzgerald can be compelled to attend? It is obvious that to compel him to attend as a witness very seriously handicaps the work of your department, especially is this true in view of the hundreds of cases arising in this Commonwealth in which such testimony might be desired. I have, therefore, given the question most serious consideration with the hope, if possible, that such a precedent could not be established. In this case Doctor Fitzgerald has a personal knowledge of the contents of the water examined by him, and I know of no rule of law which will permit him to resist giving testimony. Even if he might be considered an expert witness, this would not relieve him from testifying because it is clear that although an expert need go to no

trouble or expense in order to furnish testimony, nevertheless, he must give to the court the result of such expert knowledge as he has, and, if properly subpoenaed, he is in contempt for refusing to do so.

Dixon v. the People, 48 N. E. (Ill.) 108.

Ex parte Demente, 53 Ala. 389.

People v. Conte, 122 Pac. (Cal.) 450.

Nor have I been able to find any statute exempting those holding public positions from attendance as witnesses. It seems clear that in the absence of such a statute, a public officer or employee cannot claim immunity when he is a necessary court witness.

40 Cyc. 2161.

I am, therefore, of the opinion that it would be advisable for Doctor Fitzgerald not to resist the process served on him.

I am returning herewith the papers referred to me.

Yours very truly,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

VITAL STATISTICS.—The certificates of birth and death which are filed with the State Registrar and reported under chapter 181 of the Acts of 1912 while in a sense public records are yet not such records as would prevent the Commissioner of Health from charging persons either for copying and certifying the same or for searching the said files.

RICHMOND, VA., *March 30, 1916.*

DR. ENNION G. WILLIAMS,

Commissioner, State Board of Health,

Richmond, Va.

DEAR SIR:

I find on my desk unanswered a query of yours as to whether the lists of births and deaths that are recorded under the terms of the Act of 1912, chapter 181, page 440, are to be considered a public record and, therefore, open to any one who cares to see them or may wish to copy them.

A careful examination of the said act shows that section 20 thereof is the only pertinent section to be considered. That section reads as follows:

"That the State Registrar shall, upon request, furnish any applicant a certified copy of the record of any birth or death registered under provisions of this act, for the making and certification of which he shall be entitled to a fee of fifty cents, to be paid by the applicant, and any such copy of the record of a birth or death, when properly certified by the State Registrar to be a true copy thereof shall be *prima facie* evidence in all courts and places of the facts therein stated. For any search of the files and records when no certified copy is made, the State Registrar shall be entitled to a fee of fifty cents for each hour or fractional part of an hour of time of search, to be paid by the applicant. And the State Registrar shall keep a true and correct account of all fees by him received under these provisions, and turn same over to the State Treasurer."

From the provisions of this section, I would conclude that while the certificates which are on file with the State Registrar are, in a sense, public records, you are authorized to charge either for copying and certifying the same or for searching the said files, and upon these conditions information in regard thereto may be procured by individuals.

Very truly yours,

LESLIE C. GARNETT,

Assistant Attorney General.

HOLIDAYS—Public holidays—Statutes—Construction.—Section 2844 of the Code of Va. 1904, as amended, does not give the Governor power to designate a day as a public holiday simply for the convenience of any class or profession. The Governor has the power to designate as a public holiday a day only for the purposes named in the statute, to-wit:., thanksgiving, fasting, and prayer or other religious observance.

RICHMOND, VA., *June 29, 1916.*

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

DEAR SIR:

You have informed me that you have received requests from the citizens of this State asking you to declare Monday, July 3d, a public holiday. As I understand it the reason assigned for such request is that Saturday, July 1st, is a half holiday, Sunday, July 2d, is a holiday while Tuesday, July 4th, is also a holiday, and it is thought that it will be a great convenience to the bankers and merchants not to have to open up their places of business on Monday. The power of the Governor to designate public holidays is contained in section 2844 of the Code (as amended 1906, page 117, 3 Va. Code, page 378). The section referred to, after designating certain public holidays, provides:

“and any day appointed or recommended by the Governor of this State or the President of the United States, as a day of thanksgiving or fasting and prayer, or other religious observance, are hereby designated and established, and shall be considered as public holidays.”

I do not think, therefore, that the Governor is given the power to designate a day as a public holiday simply for the convenience of the merchants and bankers; but that he may designate such a day only for the purposes named in the statute, to-wit: “thanksgiving, fasting, prayer or other religious observance.”

As to the effect of declaring a public holiday upon the payment of negotiable instruments, see sub-section 2 of the section referred to.

Yours very truly,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

INSURANCE COMPANIES—Deposit by—Insurance.—Insurance companies doing exclusively a marine insurance business in Virginia are required to deposit bonds with the State Treasurer in the sum of not less than \$10,000.

RICHMOND, VA., July 21, 1916.

MR. J. N. BRENAMAN,
*Deputy Insurance Commissioner,
Richmond, Va.*

DEAR SIR:

Acknowledgment is made of your request of the 20th inst. enclosing copy of your letter of the 13th inst. to subscribers at United States Lloyd's, New York, and the unsigned reply thereto presumably from Appleton & Cox, attorneys for said subscribers. Your letter advises these people that being licensed as a marine insurance company and for this reason not required to make deposit of bonds with the Treasurer of Virginia they have no right to assume risks on furniture material shipped from Richmond by rail and that if they propose to do this class of business in Virginia it will be necessary to make deposit of securities with the Treasurer of Virginia in the sum of not less than \$10,000.

The reply is as follows:

"On referring to your Insurance Laws, folio 56, section 2, we note marine companies are authorized 'to make all kinds of insurance on goods, merchandise or other property in course of transportation, whether on land or water, or any vessel or boat, wherever the same may be.'

Does not this embrace the risks referred to in your letter now acknowledged? Kindly advise us."

Accompanying this correspondence is your inquiry as to whether or not by the provisions of Acts of Assembly, 1906, being an act concerning the Bureau of Insurance, chapter 11 (14) repeals section 1271a of the Code.

Section 1271a of the Code (Acts 1889-90, page 125) is as follows:

"Insurance companies doing exclusively a marine business in this State shall not be subject to the provisions of section twelve hundred and seventy-one of the Code of eighteen hundred and eighty-seven requiring securities to be deposited with the Treasurer."

Sub-section (14) of chapter 2 of the Acts of 1906, chapter 112, page 134, provides:

"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."

The only exceptions provided in this chapter are:

"That this section shall not apply to mutual fire insurance companies conducting business exclusively in this State, and on a strictly mutual plan, and that pays its losses wholly from assessments upon its members, and that makes no division or distribution of its earnings or profits among its members, or to fraternal benefit companies, societies or orders."

And by section (1) of chapter 2 it is also provided that the words "insurance company or insurance companies" used in this Act shall not include fraternal benefit orders, associations or societies.

Sub-section 29 of chapter 8 of this act, being the last section of the law, provides that all acts and parts of acts not in conflict with this act are repealed.

It seems perfectly clear that companies doing exclusively a marine business in this State are also required to deposit bonds with the State Treasurer in a sum of not less than \$10,000, and that, therefore, the subscribers at United States Lloyd's who do a marine insurance business in this State as well as all other insurance companies doing business in this State, other than those excepted, as above stated, should be required to deposit with the State Treasurer bonds as aforesaid.

The correspondence forwarded to this office is returned for your files.

Very truly yours,

LESLIE C. GARNETT,

Assistant Attorney General.

INSURANCE—Section 23 of the Insurance Act.—Chapter 112 of the Acts of 1906 requires all insurance companies doing business in Virginia to file with the Corporation Commission an affidavit setting forth among other things that its certificate on policies are payable only to beneficiaries having a legal interest in the life of the person insured.

Same—Insurable interest.—One having any reasonable expectation of pecuniary benefit or advantage from the continued life of the insured has a legal insurable interest in the life of such person.

RICHMOND, VA., June 24, 1916.

MR. J. N. BRENAMEAN,

Deputy Commissioner of Insurance,

Richmond, Va.

DEAR SIR:

Yours of June 22d, enclosing letter from Mr. William J. Craige, Title Officer of the Provident Life and Trust Company, of Philadelphia, under date of April 27, 1916, received. You ask me to give your department my opinion on the question raised in Mr. Craige's letter.

Mr. Craige states that a citizen of Virginia has made application to his company for a policy of insurance on the life of said citizen, the proceeds thereof to be payable absolutely to an unincorporated charitable society, whose charitable operations are conducted in another State. Mr. Craige informs you that his company desires to issue the policy; and wishes to know what, in view of section 23 of the Insurance Act, would be the attitude of your department towards a company issuing such a contract to a citizen of Virginia through an agency located in this State. As I understand it, you desire me to advise your department what reply should be made to Mr. Craige's letter.

Section 23 of the Insurance Act 1906, chapter 112, requires all insurance companies doing business in this State to file with the Corporation Commission an affidavit setting forth, among other things "that its certificates or policies are payable only to beneficiaries having a legal interest in the life of the member or insured."

Mr. Craige does not state in his letter what relation, if any, exists between the citizen and the charitable institution to which he refers, but I am of opinion that you can safely advise the Provident Life and Trust Company, of Philadelphia, that your department can make no objection to the writing of such a policy provided the charitable institution has any reasonable expectation of pecuniary benefit or advantage from the continued life of the insured. This constitutes a legal insurable interest under the principles laid down in the *Mutual Life Insurance Company v. Board*, 115 Va. 836, where it is stated that the essential thing is that the policy shall be obtained in good faith and not for the purpose of speculating upon the hazard of a life in which the insured has no interest.

Mr. Craige states in his letter that the charitable society referred to is unincorporated and operates in another State. I have not discussed any possible bearing of this fact under the laws of another State, because I consider it immaterial so far as the duties of your department are concerned.

Yours very truly,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

INTOXICATING LIQUORS—*Prohibition—Chapter 146, Acts 1916, Section 9.*—Ardent spirits that a retail druggist may sell under prescription from a reputable licensed physician.

Same—Section 8.—Only one sale can be made by a retail druggist on one prescription not to exceed one pint of whiskey or brandy or one quart of alcohol.

Same.—What ardent spirits may be sold on affidavit.

Same.—Only one sale can be made on one affidavit and for no greater quantity of the ardent spirits mentioned in such affidavit than is specified therein. The only limitation as to the amount of ardent spirits that a retail druggist can sell on affidavit is the amount specified in the affidavit itself.

Same.—Such sale can be made only to a person not a minor nor of intemperate habits and not addicted to the use of any narcotic drugs.

Same.—A female cannot purchase wine for sacramental purposes, nor can she purchase ardent spirits on affidavit unless for her own use in *bona fide* home in accordance with the provisions of chapter 146, Acts of 1916.

Same.—One who assists a female in violating the provisions of this section by selling or furnishing ardent spirits to her under such circumstances as would amount to a violation of the prohibition act is also criminally liable.

Same.—A retail druggist who is duly licensed by existing laws as a druggist can sell flavoring extracts or toilet, medicinal preparations or solutions patent or proprietary medicines without being required to obtain a special license to do so, provided such medicinal preparations and patent and proprietary preparations contain no more alcohol than is necessary to hold the medicinal agents in solution and preserve the same, and provided that they are manufactured and sold as medicines and not as beverages and provided such preparations are intended for internal use, and not to be sold as beverages, and the other provisions of the prohibition act are complied with.

Same.—License that is required of manufacturers of flavoring extracts, etc., applies to manufacturers only and unless a retail druggist manufactures such articles a manufacturer's license is not required in order for him to sell such articles. If he puts them up or compounds such articles, however, he is a manufacturer and must obtain a manufacturer's license.

Same.—There is no restriction as to purchasers of toilet, medicinal, anti-septic, etc. preparations.

Same.—Neither a prescription from a physician nor affidavit is required for the purchase of toilet, medicinal, antiseptic, etc., preparations.

Same.—A retail druggist may manufacture such articles. In order for him to store the alcohol necessary for the manufacture of such articles, however, a manufacturer's license, as provided for in section 8, is required.

RICHMOND, VA., *October 18, 1916.*

HON. J. SIDNEY PETERS,
*Prohibition Commissioner,
Richmond, Va.*

DEAR SIR:

Acknowledgment is made of your communication of October 3, 1916, in which you have requested an opinion on a number of questions, which, for convenience, I am answering under their respective heads instead of attempting to answer them collectively:

(a) What ardent spirits may a retail druggist sell under a prescription from a reputable licensed physician?

This question is governed by the provisions of sections 8 and 9 of chapter 146 of the Acts of 1916. It is there provided that a retail druggist may sell (1) (a) pure grain, or (b) fruit alcohol, (2) pure whiskey, (3) pure brandy; while in a class to itself, nevertheless Jamaica ginger should be placed in this classification as (4). Pure grain or fruit alcohol, pure whiskey and pure brandy can be sold only for (a) medicinal, (b) scientific, (c) pharmaceutical, or (d) mechanical purposes. Jamaica ginger can be sold only on prescription on the same conditions as ardent spirits are sold under the provisions of chapter 146 of the Acts of 1916.

As to the quantity of ardent spirits which may be sold on prescription, it is provided by section 8 of chapter 146 of the Acts of 1916, that only one sale can be made on a prescription not to exceed one pint of whiskey or brandy or one quart of pure fruit or grain alcohol. The ardent spirits enumerated in the above classification (1) to (3) are the only kinds of ardent spirits that can be sold on prescription by retail druggists licensed under the prohibition act.

(b) What kind and the maximum quantity of ardent spirits retail druggists may sell to persons under an affidavit as prescribed by law?

The answer to this question is governed by the provisions of section 9 of chapter 146 of the Acts of 1916, which provides for the sale by licensed druggists of ardent spirits on affidavit. It is there provided that the only kind of ardent spirits that can be sold by retail druggists upon an affidavit is (1) pure grain or (2) fruit alcohol, and (3) wine. The alcohol embraced in classes one and two can be sold only for (a) scientific, (b) pharmaceutical and (c) mechanical purposes. The wine mentioned in class (3) can be sold only for sacramental purposes for use by religious bodies.

Only one sale can be made on one affidavit and for no greater quantity of the ardent spirits mentioned therein than is specified in said affidavit.

It, therefore, appears that the only limitation as to amount of ardent spirits that a retail druggist can sell on affidavit is the amount specified in the affidavit itself.

(c) To what class of purchasers may he sell such ardent spirits as are enumerated in your answer to question (b) immediately above?

This question is governed by the provisions of sections 9 and 42 of chapter 146 of the Acts of 1916. It is provided by section 9 that such sale can be made only to a person not a minor nor of intemperate habits and not addicted to the use of any narcotic drugs.

By the provisions of section 42 of the act it is made unlawful for any female to "order, receive or have in her possession any ardent spirits except as permitted by this act and not then unless she is the head of a family and for her own use in a *bona fide* home." As the use of such ardent spirits as a woman is permitted to purchase under the restriction of section 42 of the act is limited to ardent spirits for her own use in a *bona fide* home, it would clearly appear that she could not "order, receive or have in her possession" wine purchased for sacramental purposes nor could she purchase on affidavit the above-enumerated classes of alcohol except for a similar purpose.

While section 42 only purports to make it unlawful for a female "to order, receive or have in her possession" any ardent spirits except as therein provided, it is well to call attention to the fact that one who assists a female in evading the provisions of this section by selling or furnishing ardent spirits to her under such circumstances as would amount to a violation thereof is also criminally liable.

(d) May such retail druggists under this retail license sell flavoring extracts, or toilet, medicinal, antiseptic preparations or solutions, patent or proprietary medicines?

This question is governed by the provisions of section 8 of chapter 146 of the Acts of 1916, which, so far as applicable, reads as follows:

"The provisions of this act shall not be construed * * * to prevent the sale or gift and keeping and storing for sale by druggists and general merchants or others duly licensed by existing laws of any medicinal preparations manufactured in accordance with formulas prescribed by the United States pharmacopoeia and national formulary patent and proprietary preparations and other *bona fide* medicinal and technical preparations which contain no more alcohol than is necessary to extract the medicinal properties of the drugs contained in such preparations, and no more alcohol than is necessary to hold the medicinal agents in solution and to preserve the same, and which are manufactured and sold as medicine and not as beverages; or to prevent the manufacture and sale of toilet, medicinal and antiseptic preparations and solutions not intended for internal human use, nor to be sold as beverages, and upon the outside of each bottle, box or package of which is printed in English conspicuously and legibly and clearly the quantity by volume of alcohol in such preparations; or to prevent the manufacturing or keeping for sale of the food product known as flavoring extracts which shall be so manufactured or sold for cooking and culinary purposes only, and not to be sold for beverage purposes, provided that it shall not be lawful to manufacture or sell any toilet, medicinal, antiseptic preparations or solutions, or any flavoring extracts or patent or proprietary medicines or preparations, the manufacture or sale of which requires the payment of the United States liquor dealer's tax.

"It shall be unlawful for any person to sell such toilet, medicinal, antiseptic preparations or solutions or flavoring extracts or patent or proprietary medicines or preparations for beverage purposes in the guise of flavoring extracts or medicines, and it shall be unlawful for anyone but a licensed pharmacist to sell, dispense or give away to the consumer the extract, essence or tincture of Jamaica ginger, and such pharmacist only upon the prescription of a regular licensed physician, and then only upon the same conditions as ardent spirits are sold under the provisions of this act."

It would, therefore, appear that a retail druggist who is duly licensed by existing laws as a druggist can sell such articles as are mentioned in your question without being required to obtain a special license to do so, provided such medicinal preparations and patent and proprietary preparations and other *bona fide* medicinal and technical preparations contain no more alcohol than is necessary to hold the medicinal agents in solution and to preserve the same, and provided, further, that they are manufactured and sold as medicines and not as beverages, and provided the toilet, medicinal and antiseptic preparations and solutions are not intended for internal use, nor to be sold as beverages, and the other requirements of the prohibition act are complied with; nor is it necessary to obtain an additional license to sell flavoring extracts which are manufactured or sold for cooking and culinary purposes only and not for beverage purposes. Attention is called to the provision of this section which makes it unlawful to manufacture or sell any such article as above enumerated, the manufacture or sale of which requires the payment of the United States liquor dealer's license tax.

The license that is required of manufacturers of flavoring extracts or of toilet, medicinal preparations or solutions, patent or proprietary medicines or preparations seems to apply to manufacturers only, and unless a retail druggist manufactures such articles a manufacturer's license is not required in order for him to sell such articles. If he puts them up or compounds such articles, however, he is a manufacturer and must comply with the provisions of the last paragraph of section 8 of the act, which requires manufacturers of such articles to obtain a special license for the purchasing and storing of ardent spirits or alcohol necessary for the manufacture of said articles.

(e) To whom may they sell preparations, etc., mentioned in question (d) immediately above?

There appears to be no restrictions as to who such purchasers may be, and, therefore, it would seem that retail druggists may sell such articles to any persons making application therefor, provided, of course, such articles complied with the provisions of the act as to the quantity of alcohol therein.

(f) Is a prescription from a physician, or an affidavit prescribed by law required from purchasers for the purchase of articles prescribed in question (d)?

It is provided by the last paragraph of section 8 that druggists can sell grain, ethyl or fruit alcohol or pure whiskey or pure brandy only for the purposes therein specified, provided the same shall not be sold "except upon the written prescription of a physician in active practice," and it is provided by section 9 that wholesale and retail druggists may sell pure grain or fruit alcohol for the purposes therein specified, or wine for sacramental purposes as specified on "an affidavit in writing" as therein provided.

These are the only provisions regulating the sale of articles on prescription or affidavit except that provision of section 8 as to the sale of Jamaica ginger, and, therefore, I am of the opinion that neither a prescription from a physician or the affidavit required for the purchase of ardent spirits is necessary for the purchase of the articles mentioned in your question (d).

(g) May a retail licensed druggist manufacture articles mentioned in question (d)?

There is nothing in the act which forbids a retail druggist from also being a manufacturer of the articles mentioned in your question (d); indeed in many cases it is a part of the regular business of a retail druggist to compound or manufacture such articles. I am, therefore, of the opinion that retail druggists

have the right to manufacture the articles mentioned in your question (d). Your attention is called to the last paragraph of section 8 of chapter 146 of the Acts of 1916, which, so far as applicable to this inquiry, reads as follows:

"The manufacturers of flavoring extracts, or of toilet, medicinal, anti-septic preparations or solutions, patent or proprietary medicines or preparations permitted to be manufactured by this act shall be permitted to purchase and to store ardent spirits or alcohol necessary for the manufacture of said articles, but not to be sold or given away, provided that such manufacturer must secure a license from the court under the same conditions as provided in this act for the granting of license to sell ardent spirits to druggists and provided, * * *."

While it would seem that section 8 permits the compounding of flavoring extracts, medicinal preparations, etc., containing alcohol and the sale thereof not for use as a beverage without other license under the above quoted provision of section 8, which provides that the manufacturers of such articles as therein enumerated must secure a license from the court under the same conditions as provided for in this act for the granting of a license to sell ardent spirits to druggists, in order to be permitted to purchase ardent spirits or alcohol necessary for the manufacture of said articles, it is perfectly clear that any druggist who takes separate materials and compounds them into flavoring extracts or medicinal preparations or proprietary medicines or other articles is a manufacturer within the meaning of the terms of this act, and, therefore, even though the law would seem to permit said manufacturer to dispose of such articles containing alcohol as enumerated in section 8, yet in order for him to have on hand alcohol necessary for the compounding of these preparations he must secure a special license. (Reference is made to letter written you by this office on October 6, 1916, in reference to the matter of the inquiry of Laird L. Conrad, and to letter of October 4, 1916, written you in reference to the inquiry of Payne & Anderson.)

Very truly yours,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

INTOXICATING LIQUORS—*Prohibition—Chapter 146, Acts 1916—Duties of Commissioner of Prohibition.*—The Commissioner of Prohibition should not undertake to advise common carriers as to their rights and duties in relation to the transportation of ardent spirits.

RICHMOND, VA., October 31, 1916.

HON. J. SIDNEY PETERS,
Prohibition Commissioner,
Richmond, Va.

DEAR SIR:

Answering further your letter of October 24th relative to the right of common carriers, after November 1st, to transport ardent spirits from any point within this State to any point without the State, I repeat that the question is one of some difficulty, and that the law on the subject is now in the state of making, there being at least one important case pending in the Supreme Court of the United States involving the question as to what constitutes an unwarranted interference with interstate commerce in the matter of State regulation of transportation of ardent spirits.

I would, therefore, advise you to decline, for the present, the request of the common carriers for an expression of the views of your department on the subject. If, however, in the performance of your duties, you should find that the common carriers were pursuing any course in this regard which in any way interferes with the spirit and purpose of the prohibition act, and it should thus become necessary for you to take a stand on the subject, I shall be glad to consider the matter further in the light of any decisions which may in the meanwhile be rendered, and to advise you accordingly.

Yours very truly,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

INTOXICATING LIQUORS—*Prohibition—Chapter 146, Acts 1916—Soft Drinks—License.*—Although persons have been licensed to sell soft drinks, it is competent for the General Assembly to require that they shall not continue to sell under said license after November 1, 1916, without first obtaining a license as provided for in chapter 146, Acts 1916.

Same.—One who dispenses soft drinks on and after November 1, 1916, without having first obtained a license from the court to dispense soft drinks violates chapter 146, Acts 1916.

RICHMOND, VA., *October 31, 1916.*

HON. J. SIDNEY PETERS,
Prohibition Commissioner,
Richmond, Va.

DEAR SIR:

Yours of October 20th, enclosing letter of Mr. H. S. Rucker, received. The question as to the right of the town of Buena Vista to supplement the prohibition legislation, is a local question and not one upon which this office or your department should give advice.

Mr. Rucker calls attention to what appears to be a serious defect in the prohibition act (chapter 146, Acts 1916). Section 64b of that act makes it unlawful to dispense soft drinks without first obtaining a license to do so from the court. This part of the act goes into force on and after November 1, 1916. The point is made that dealers in soft drinks could not apply to the court for a license before November 1st, because the prohibition act was not then in effect; that they cannot, in the city of Buena Vista, apply for a license from the proper court, because that court does not convene until December. The question arises as to whether dealers in soft drinks in said city can continue their business, without a license from the court, during the month of November and until the court meets? Attention is also called by Mr. Rucker to the fact that the dealers in that city have, under the general tax bill, secured a license to sell soft drinks until May, 1917, and he asks whether the prohibition act can deprive said dealers of their "vested rights growing out of the granting by the city of their licenses."

I do not think there can be any doubt about the fact that notwithstanding the dealers may have their licenses, expiring next May, yet it is perfectly competent for the General Assembly to require that they shall not continue to sell under said license after November 1st without first obtaining another license "(without

additional cost)" from the court. The only question, therefore, is whether the fact that the court does not meet until December, making it impossible for the dealers to procure a license, constitutes a valid offense against prosecution for selling soft drinks during the month of November.

The exact language of the act, so far as applicable, is as follows:

"Sec. 64b. It shall be unlawful for any person, firm or corporation to dispense soft drinks without first obtaining a license to do so (for which no additional tax shall be charged) from the circuit court of the county, or corporation or hustings court of the city in which county or city the privileges are to be exercised."

Under section 67 of the act this provision is in force on and after November 1, 1916.

Thus, the provision of the statute is very plain, and any one who dispenses soft drinks on and after November 1st, without having first obtained a license from the court, is unquestionably violating the law.

I recognize the fact that the operation of this provision is exceedingly harsh and unfair, and was probably not intended by the General Assembly, yet the language used is so plain that speculation as to the intent of the General Assembly is useless. The intention of the legislature cannot be considered as against its plain mandate.

In cases like this where the operation of a statute is so plainly unjust, a situation is brought about alike embarrassing to the administrative officers and the courts. Indeed, it may be well doubted whether any jury would convict a merchant who sold soft drinks in the city of Buena Vista during the month of November, especially if he had filed with the clerk of the court notice of his intention to apply for a license as soon as the court meets, but the fact that juries would not convict in such cases, does not change the law.

Yours very truly,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

INTOXICATING LIQUORS—Prohibition—Chapter 146, Acts 1916—Section 15, Chapter 328, Acts 1916.—The Commissioner of Prohibition should oppose the granting of license to sell the forbidden classes of ardent spirits in territory known as exempted territory under the provisions of chapter 146, Acts 1916.

Same—License to druggists to sell ardent spirits in exempted territory.—Under section 15, chapter 146, Acts 1916, the courts have the right in exempted cities and counties to grant a retail druggists license to purchase and store or sell wine for sacramental purposes and pure fruit, ethyl and grain alcohol for medicinal, scientific or mechanical and pharmaceutical purposes.

Same—Such alcohol as may be sold on prescription.—No provision is made in the law for the sale of wine for other than sacramental purposes for use by religious bodies, and, therefore, wine cannot be sold under chapter 146, Acts 1916, on prescription.

Same—Section 9, chapter 146, Acts 1916—Ardent spirits that may be sold on affidavit by druggist without prescription.—Either a wholesale or retail druggist may sell pure grain or fruit alcohol for scientific, mechanical or pharmaceutical purposes, or wine for sacramental purposes for use by religious bodies on affidavit.

Same.—Druggists are not permitted to sell ardent spirits except on prescription or affidavit.

Same—Physicians.—No restriction is placed upon a physician as to the amount of ardent spirits that he may *bona fide* prescribe for a patient. The only restriction in such cases is placed upon the sale of ardent spirits by the druggist in accordance with the requirements of chapter 146, Acts 1916. A druggist can sell only the various classes of alcohol and whiskey and brandy. The law does not permit them to sell ardent spirits other than alcohol, whiskey and brandy, except wine when sold on affidavit for sacramental purposes for use by religious bodies.

Same.—Licensed druggists in exempt territory may purchase store and sell only those classes of ardent spirits permitted to be purchased, stored and sold in non-exempt territory. Under the provisions of chapter 146, Acts 1916, a retail druggist who has no license cannot sell any ardent spirits at all, nor can he purchase and store alcohol for the purpose of manufacturing or compounding medicinal or other preparations.

Same—Manufacturers of flavoring extracts.—There is no distinction between the privileges of manufacturers of flavoring extracts in exempted territory and territory not exempted.

RICHMOND, VA., October 28, 1916.

HON. J. SIDNEY PETERS,
Prohibition Commissioner,
Richmond, Va.

DEAR SIR:

This is a reply to that portion of your letter of October 3, 1916, numbered 4, and to subsequent questions contained in that communication.

Your first question under section 4 of your letter is as follows:

“(a) May a court grant a wholesale druggist's license to handle ardent spirits under this act in the cities and counties exempted, such as Norfolk, Portsmouth, Norfolk county, Richmond city, Henrico county, etc.?”

This is a question for the courts in such counties and cities to determine, and, therefore, not a matter on which I feel that I should express an opinion. However, I advise you to oppose the granting of license to sell the forbidden classes of ardent spirits in such exempted territory when such cases arise.

For your information, I will say that the answer to this question is governed by section 15 of chapter 146 of the Acts of 1916, in which it is provided that the act shall not be construed to prevent a duly licensed druggist or manager of a hotel licensed under this act from having shipped to him, or prevent any transportation company from delivering to him, pure brandy, pure whiskey, ale, beer, wine and pure fruit, ethyl and grain alcohol in such quantities and at such times as said druggist or manager of a hotel licensed under the act may deem necessary. This provision is qualified, however, by the following proviso:

“provided, that in the counties of Roanoke, Halifax, Bedford, Grayson, Smyth, Russell, Scott, Lee, Floyd, Augusta, Pittsylvania, Washington, Bland, Giles, Pulaski, Prince William, Southampton, Rockingham, Princess Anne, Amherst, Accomac, Carroll, Lunenburg, Prince Edward, Patrick, Brunswick, Henrico, Chesterfield, Campbell, Loudoun, Orange and Northampton, Montgomery and Louisa, and the cities of Roanoke, Staunton, Danville and Rich-

mond and Radford, it shall not be lawful for druggists to purchase, store or sell ardent spirits, except wine for sacramental purposes and pure fruit, ethyl and grain alcohol for medicinal, scientific, mechanical or pharmaceutical purposes, as provided in this act."

Additional territory was exempted by chapter 328 of the Acts of 1916, a special act, the provisions of which are substantially in accord with section 15 of chapter 146 of the Acts of 1916.

Your next question is:

"(b) May the court having jurisdiction grant a retail druggist license to retail ardent spirits in the exempted cities and counties?"
I am of the opinion that under the aforesaid provisions the court would have the right in such cities and counties to grant to retail druggists license to purchase, store or sell wine for sacramental purposes and (1) pure fruit, (2) ethyl and (3) grain alcohol for (a) medicinal, (b) scientific and (c) mechanical or (d) pharmaceutical purposes.

Your next question is:

"(c) If the court may grant such retail license to retail ardent spirits in exempted territory, what ardent spirits may such druggists sell?"

The ardent spirits permitted to be sold in such territory are enumerated in the above quotation from section 15 of the provisions of chapter 328 of the Acts of 1916, and are as follows: Wine for sacramental purposes, and (1) pure fruit, (2) ethyl and (3) grain alcohol for (a) medicinal, (b) scientific and (c) mechanical or (d) pharmaceutical purposes.

Your next question is:

"(d) May such druggists, if licensed, sell the permitted kinds of ardent spirits under a prescription from a physician?"

He can sell the alcohol on prescription. No provision is made in the law for the sale of wine for other than sacramental purposes for use by religious bodies, and, therefore, wine cannot be sold under the provisions of the act on prescription.

Your next question is:

"(e) Are there any kinds of ardent spirits which such druggists may sell without a prescription, but upon an affidavit?"

Under the provisions of section 9 of the prohibition act, either wholesale or retail druggists may sell pure grain or fruit alcohol for (a) scientific, (b) mechanical or (c) pharmaceutical purposes or (3) wine for sacramental purposes for use by religious bodies, on affidavit. I am, therefore, of the opinion that in accordance with the provisions of section 9 the alcohol therein mentioned and wine for sacramental purposes for use by religious bodies may be sold by such druggist on an affidavit.

Your next question is:

"(f) Are there any kinds of ardent spirits which such druggists in the exempted territory may sell without either a prescription from a physician or an affidavit, and, if so, what kind of ardent spirits may be sold and to whom may such druggists sell them?"

I find no provision permitting the sale of ardent spirits by druggists except on prescription or affidavit.

Your next question is:

"(g) May a physician lawfully write a prescription for any kinds of ardent spirits to be filled and sold in exempted territory? If so, what kinds of ardent spirits may he prescribe, and what kinds of ardent spirits may he not prescribe, to be filled and sold in the exempted territory?"

The only restriction in such case is placed upon the sale of alcohol by the druggist and not upon *bona fide* prescriptions by a physician in accordance with the requirements of the provisions of the prohibition act. It would appear from the provisions of section 9 of the prohibition act that a druggist can sell only the various classes of alcohol and whiskey and brandy. I find no provision in the law permitting them to sell ardent spirits other than alcohol, whiskey and brandy, except wine when sold on affidavit for sacramental purposes for use by religious bodies. While there seems to be no restriction placed upon a physician as to the kind of ardent spirits he may prescribe for his patients, provided he complies with the various provisions of the prohibition law, as I have said there is a restriction placed upon druggists as to the kind of ardent spirits that they may sell upon prescription.

As to your request that I advise you what kind of ardent spirits a physician may not prescribe to be filled and sold in exempted territory, this is a question which is too broad to be answered in an opinion, but must be determined as each individual case arises.

Your next question is:

"7. If a retail druggist may buy, store, use and sell ardent spirits, or any kinds of ardent spirits in territory which is not exempted without a license, just what is the difference in the privileges of a licensed and unlicensed druggist in said territory which is not exempted?"

The licensed druggist may purchase, store and sell only those classes of ardent spirits permitted to be purchased, stored and sold in non-exempted territory under the provisions of chapter 146 of the Acts of 1916, while a retail druggist who has no license cannot sell any ardent spirits at all, nor can he purchase or store alcohol for the purpose of manufacturing or compounding medicinal and other preparations.

Your next question is:

"8. Are there any differences in the privileges of licensed manufacturers of flavoring extracts, etc., in exempted territory and territory not exempted? If so, please define these differences."

As the restrictions contained in section 15 of the act above quoted is limited to druggists, the words reading:

"* * * provided * * * it shall not be lawful for druggists to purchase, store or sell ardent spirits, except wine for sacramental purposes and pure fruit, ethyl and grain alcohol for medicinal, scientific, mechanical or pharmaceutical purposes, as provided in this act."

I am of the opinion that this restriction does not affect the provisions of section 8 of the act, which allows manufacturers of flavoring extracts or of toilet, medicinal, antiseptic preparations or solutions, patent or proprietary medicines or

preparations permitted to be manufactured by this act, to purchase and to store ardent spirits or alcohol necessary for the manufacture of said articles and not to be sold or given away. It, therefore, follows that there is no difference in the privileges of licensed manufacturers of flavoring extracts, etc., in exempted territory and in territory not exempted.

Very truly yours,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

INTOXICATING LIQUORS—*Prohibition Act—Chapter 146, Acts 1916, Section 14—Druggists.*—A druggist who has not obtained a license to sell ardent spirits as provided for by chapter 146, Acts 1916, cannot sell any kind or amount of ardent spirits, flavoring extracts, toilet and medicinal articles that may be sold by druggists.

Same.—An unlicensed druggist may sell under a prescription from a physician preparations including alcohol accompanied with other drugs provided he does not compound such preparations; provided, further, that it is a preparation that can be sold lawfully under the provisions of chapter 146, Acts 1916.

Same.—An unlicensed druggist may sell alcohol when compounded with other drugs which do not denature the alcohol in the compounding process, provided such unlicensed druggist does not compound the article in question, and provided, further, that the same is such an article as can be legally sold under the provisions of chapter 146, Acts 1916.

Same.—If such druggist compounds the article in question it will be necessary for him to obtain a manufacturer's license under the provisions of section 8, chapter 146, Acts 1916, in order to store alcohol necessary for compounding such preparations. It is, of course, necessary that the articles in question be such articles as are permitted to be sold under the provisions of chapter 146, Acts 1916.

Same.—It is necessary for the druggist to procure a manufacturer's license in accordance with the provisions of section 8, chapter 146, Acts 1916, in order to compound or manufacture medicinal preparations in accordance with formulas prescribed by the United States Pharmacopoeia and National Formulary. If, however, he does not compound or manufacture the same and these articles are such articles as are not forbidden to be sold under chapter 146, Acts 1916, an unlicensed druggist may sell same.

RICHMOND, VA., October 28, 1916.

HON. J. SIDNEY PETERS,
Prohibition Commissioner,
Richmond, Va.

DEAR SIR:

In response to that portion of your letter of October 3d, No. 3, I am answering, under their respective heads, the questions embraced in that portion of your letter. For convenience, I have answered your questions in the order asked, placing the answer immediately under each question.

"3. (a) What amount and kind of ardent spirits may a retail druggist, without any license under this act whatever, sell?"

This question is answered by the provisions of section 14 of the prohibition act, which provides that before a druggist shall sell ardent spirits either on prescription or affidavit as provided for in this act he must procure a license to do so from the circuit court of the county or corporation or hustings court of the city.

Therefore, a druggist who has not obtained a license to sell ardent spirits, as provided for by the prohibition act, cannot sell any kind or amount of ardent spirits.

Your questions (b), (c) and (d), which read as follows:

“(b) What quantity and kind of ardent spirits may this unlicensed druggist sell, if any, under a prescription from a reputable physician?”

“(c) What amount and kind of ardent spirits may a druggist unlicensed by this act sell to persons under affidavit?”

“(d) To what classes of persons may such unlicensed druggists sell ardent spirits upon affidavit?”

are answered by the answer to the foregoing question.

Your next question is:

“(e) What, if any, kind of ardent spirits, flavoring extracts, toilet, medicinal, antiseptic preparations or solutions may an unlicensed druggist sell without a prescription from a physician and without an affidavit from the purchaser?”

So far as this question relates to ardent spirits, it has been answered by the above answer to question (a). As to the flavoring extracts, toilet, medicinal, antiseptic preparations or solutions, this question is governed by that part of section 8 of the prohibition act, which is copied into my letter of October 18, 1916, in reply to that portion of your letter of October 3d, numbered 2.

Your next question is:

“(f) To what persons may an unlicensed druggist sell the articles described in question (e)? Can he sell such articles to the public generally?”

This question is also answered by my letter of October 18th, in reply to that portion of your letter numbered 2, question (e).

Your next question is:

“(g) May an unlicensed druggist sell under a prescription from a physician a preparation, including alcohol, compounded with other drugs (for instance, tincture of iodine or bichloride of mercury, etc.), which compounding process denatures alcohol and renders it unfit to be used as a beverage?”

He may, provided he does not compound such preparations, and provided, further, it is such a preparation as can be legally sold under the provisions of chapter 146 of the Acts of 1916.

Your next question is:

“(h) May an unlicensed druggist sell either under a prescription from a physician or upon affidavit, or without either a prescription or affidavit, the compounds described in question (g)?”

My answer to your question (g) I think sufficiently answers this question.

Your next question is:

"(i) May an unlicensed druggist sell alcohol when compounded with other drugs which do not denature the alcohol in the compounding process, such as tincture of gentian compound, tincture of lavender compound, etc.?"

If such unlicensed druggist does not compound the article in question, and provided, further, they are such articles as can be legally sold under the provisions of chapter 146 of the Acts of 1916, I am of the opinion that he can sell the same (section 8). If, however, he compounds the article in question, as I wrote you in my letter of October 18, 1916, and in several previous communications, it will be necessary for him to obtain a manufacturer's license under the provisions of section 8. In order to store the alcohol necessary for compounding such preparations, of course it is necessary that the articles in question be such articles as are permitted to be sold under the provisions of chapter 146 of the Acts of 1916.

Your next question is:

"(j) May an unlicensed retail druggist sell medicinal preparations manufactured in accordance with the formulas prescribed by the United States Pharmacopoeia and National Formulary, patent and proprietary preparations, and other *bona fide* medicinal and technical preparations, which contain no more alcohol than is necessary to extract the medicinal properties of the drugs contained in such preparations, and no more alcohol than is necessary to hold the medicinal agents in solution, and to preserve the same as medicines, and not as beverages, without a prescription from a reputable physician?"

If such articles are compounded or manufactured by the druggist, as I have before said, it will be necessary for him to procure a manufacturer's license in accordance with the provisions of section 8 of the prohibition act. If, however, he does not compound or manufacture the same, and these articles are such articles as are not forbidden to be sold under the provisions of chapter 146 of the Acts of 1916, I am of the opinion that an unlicensed druggist may sell the same.

Very truly yours,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

INTOXICATING LIQUORS—Chapter 146, Acts 1916—Sections 8, 9, 14, 64a, 64b—License required of druggists.—In reference to the purchase, use, storage and sale of ardent spirits by druggists are—

- (1) License to wholesale dealers in drugs,
- (2) To retail dealers in drugs,
- (3) To manufacturers of flavoring extracts, etc.

Same—Soft Drinks.—License is required of persons dispensing soft drinks.

Same.—Ardent spirits that a wholesale druggist may sell.

Same.—Persons to whom wholesale druggist may sell ardent spirits.

RICHMOND, VA., October 28, 1916.

HON. J. SIDNEY PETERS,
Prohibition Commissioner,
Richmond, Va.

DEAR SIR:

Acknowledgment is made of your letter of October 3, 1916, in which you ask for an opinion as to a number of matters in reference to chapter 146 of the Acts of 1916. Your first inquiry is as follows:

"The clauses in chapter 146 of Acts of Assembly 1916, relating to the purchase, use, storage and sale of ardent spirits by druggists are such as to require some explanation for the benefit of a large number of druggists seeking information. As I read these paragraphs and clauses I understand that this law provides for three kinds of licenses by the court having jurisdiction:

1. A license to wholesale dealers in drugs.
2. To retail dealers in drugs.
3. To manufacturers of flavoring extracts, etc.,

and so far as druggists' provisions for licenses are concerned, none others. If I am correct in this analysis, will you please say so, and if I am not correct, kindly advise me wherein I am not correct."

The beginning of the fourth paragraph of section 8 of chapter 146 of the Acts of 1916 reads as follows:

"The manufacturers of flavoring extracts, or of toilet, medicinal, anti-septic preparations or solutions, patent or proprietary medicines or preparations permitted to be manufactured by this act shall be permitted to purchase and to store ardent spirits or alcohol necessary for the manufacture of said articles, but not to be sold or given away, provided that such manufacturer must secure a license from the court under the same conditions as provided in this section for the granting of license to sell ardent spirits to druggists, and provided that said manufacturers shall make the monthly report as is required of druggists by this act."

The first paragraph of section 14 of chapter 146 of the Acts of 1916 reads as follows:

"Before a druggist shall sell ardent spirits on prescription, or pure fruit, ethyl, or grain alcohol for scientific, mechanical or pharmaceutical purposes, or wine for sacramental purposes on affidavit as provided in this act, he must procure a license to do so from the circuit court of the county, or the corporation or hustings court of the city."

It is provided in the fourth paragraph of section 14 of the act as follows:

"The court may also in its discretion issue * * * a license to wholesale druggists only to sell pure grain, ethyl and fruit alcohol to any druggist, or other person for scientific pharmaceutical and mechanical purposes, or wine for sacramental purposes for use by religious bodies under the provisions of section 9 of this act; and pure grain, ethyl and fruit alcohol, pure whiskey, pure brandy, and wine for sacramental purposes to retail druggists in Virginia only, licensed under this act, and pure grain, ethyl or fruit alcohol to retail druggists outside of the State of Virginia, where the sale thereof is permitted by law; provided that any citizen may appear personally or by counsel in opposition to the granting of any license herein provided for."

These are the only provisions in the law requiring license of druggists in reference to the traffic in ardent spirits.

You are, therefore, correct in your analysis of the act so far as a license is required of druggists in reference to the purchase, use, storage and sale of ardent spirits by druggists. Your attention, however, is called to sections 64a and 64b of the act, which define the words "soft drinks" as used in the act and require persons dispensing the same to obtain a license from the circuit court of the county or corporation or hustings court of the city in which the privilege of dispensing soft drinks is to be exercised.

Your second inquiry (No. 1 in your letter) reads as follows:

"Will you kindly advise me to whom, and to whom only, a wholesale druggist, licensed under the aforesaid act to handle ardent spirits, may sell ardent spirits, making your answer sufficiently comprehensive as to the class of purchasers as to exclude all other purchasers to whom said wholesalers may not sell.

I presume that under this license the law does not limit the wholesaler as to the kind or quantity of ardent spirits which they may purchase, and that there is correspondingly no limitation upon the kind and quantity of ardent spirits which a common carrier may deliver to them, and that there is no prescribed limit upon the kind and quantity of ardent spirits which such licensed wholesale druggists may store.

If I am correct in this interpretation, please be good enough to say so. If I am incorrect, kindly point out my error."

The fourth paragraph of section 14 of chapter 146 of the Acts of 1916, which provides for the licensing of wholesale druggists, provides that the proper court may, in its discretion, issue a license to wholesale druggists only to sell (1) pure grain, (2) ethyl and (3) fruit alcohol to (a) any druggist or (b) other person for scientific, pharmaceutical and mechanical purposes, or wine for sacramental purposes for use by religious bodies. Under the provisions of section 9 of chapter 146 of the Acts of 1916, wholesale druggists may also sell (1) pure grain, (2) ethyl and (3) fruit alcohol, (4) pure whiskey, (5) pure brandy and (6) wine for sacramental purposes to retail druggists in Virginia only, licensed under this act, and they may also sell (1) pure grain, (2) ethyl or (3) fruit alcohol to retail druggists outside of the State of Virginia, where the sale thereof is permitted by law.

It is provided by section 9 of chapter 146 of the Acts of 1916 that it is lawful for wholesale druggists to sell (1) pure grain or (2) fruit alcohol for scientific, pharmaceutical and mechanical purposes or wine for sacramental purposes for use by religious bodies, such sale, however, under the provisions of section 9, can be made only to a person (1) not a minor, nor (2) of intemperate habits and (3) not addicted to the use of any narcotic drugs.

While the above mentioned persons are apparently the only persons to whom the above enumerated classes of ardent spirits can be sold under the provisions of chapter 146 of the Acts of 1916, it is impossible for me to determine every case that it is possible may arise under this act in advance. Therefore, while it would seem that wholesale druggists could sell ardent spirits as provided for in chapter 146 of the Acts of 1916, only to the above named persons, I do not feel that I should attempt to express an opinion on the subject which would embrace within the exclusion all classes of persons other than those mentioned in this letter, without consideration of the facts and circumstances in each particular case.

Very truly yours,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

INTOXICATING LIQUORS—*Prohibition Act—Chapter 146, Acts 1916, Sections 9 and 42.*—Under the provisions of section 9, chapter 146, Acts 1916, only dentists, physicians and veterinary surgeons are permitted to purchase alcohol to be used in the practice of their professions. The act does not provide for the purchase of ardent spirits by nurses except when bought on prescription of a regularly licensed physician.

Same—Females.—Under chapter 146, Acts 1916, a female nurse cannot purchase even on prescription alcohol for use in the practice of her profession, not to be used as a beverage.

RICHMOND, VA., *October 24, 1916.*

HON. J. SIDNEY PETERS,
*Prohibition Commissioner,
Richmond, Va.*

DEAR SIR:

Acknowledgment is made of your letter of October 16th, in which you ask my opinion on the following questions:

"1. Please advise if a member of the Instructive Visiting Nurses Association and other professional nurses, male and female, may purchase, under chapter 146 of the Acts of the Assembly of 1916, pure grain, ethyl or fruit alcohol for use in the practice of their profession and not to be used as a beverage.

"2. May retail druggists in exempted territory, that is, those cities and counties exempted from the druggists' clauses under the aforesaid chapter by statute, sell pure grain, ethyl or fruit alcohol to professional nurses, male and female, for use in the practice of their profession?"

In reply to your first question, under the provisions of section 9 of chapter 146 of the Acts of 1916 only dentists, physicians and veterinary surgeons are permitted to purchase such alcohol to be used in the practice of their professions. The act, therefore, does not provide for nurses except when bought on prescription of a regular licensed physician.

Your attention is called to section 42 of chapter 146 of the Acts of 1916, which makes it unlawful for any female to use or receive or have in her possession any ardent spirits except as permitted in this act, and not then, unless she is the head of a family and for her own use in a *bona fide* home.

Therefore, under the law a female nurse cannot purchase even on prescription alcohol for use in the practice of her profession and not to be used as a beverage.

The answer to the first question also answers your second question, for the reason that the only alcohol permitted to be sold in the exempted territory by retail druggists is that for scientific, mechanical, pharmaceutical purposes, and for medicinal purposes to doctors, dentists and veterinarians.

Very truly yours,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

INTOXICATING LIQUORS—*Chapter 146, Acts 1916—Section 13.*—The superintendent of a jail hospital can obtain a license as provided for superintendents of hospitals to purchase and store ardent spirits and dispense the same only upon prescriptions and only to the patients, and is required to make the same report as is required of druggists.

Same.—No limit is set upon the quantity of ardent spirits that a jail physician may prescribe, but the superintendent of the jail hospital cannot dispense more than a pint of whiskey on a single prescription.

Same—Ardent Spirits—Dispensed in charitable hospital upon prescription.—Such ardent spirits must be reported as druggists report sales.

Same.—Under the provisions of section 13, chapter 146, Acts 1916, ardent spirits may be prescribed *bona fide* to patients in institutions as the result of alcoholism.

RICHMOND, VA., October 23, 1916.

HON. J. SIDNEY PETERS,
*Prohibition Commissioner,
Richmond, Va.*

DEAR SIR:

Acknowledgment is made of the following communication:

In the city jail hospital of Richmond, Va., Dr. Gordon has to treat a great many persons for delirium tremens, and in his treatment has to use whiskey.

1. What procedure must he take to procure whiskey for the hospital?
2. Is he limited as to the amount he shall use for such patients?
3. When may he use it for his patients; what restrictions are placed upon him; what reports, if any, will he have to make?

Doctor Gordon, as the superintendent of the jail hospital, can obtain a license as provided for superintendents of hospitals to purchase and store ardent spirits and dispense the same only upon prescriptions and only to the patients of the hospital, making the same reports as required of druggists. No limit is set upon the quantity he may prescribe, but he cannot dispense more than one pint of whiskey on a single prescription. The prohibition act makes it unlawful to give away ardent spirits except under certain conditions in one's own home. Therefore, ardent spirits dispensed in a charitable hospital upon prescription only must be reported as druggists report sales.

Section 13 of the prohibition act expressly permits ardent spirits to be prescribed *bona fide* to patients in institutions as a result of alcoholism.

Very truly yours,

LESLIE C. GARNETT,
Assistant Attorney General.

INTOXICATING LIQUORS—*Prohibition Act—Chapter 146, Acts 1916—Sections 64a, 64b—Soft Drinks.*—Chapter 146, Acts 1916, does not prescribe what kind of notice is necessary to an applicant to sell soft drinks. The notice required in such cases is left to the courts to determine.

RICHMOND, VA., October 18, 1916.

MR. N. C. RATHBUN,
*Chase City Progress Co.,
Chase City, Va.*

DEAR MR. RATHBUN:

Yours of October 16th received. The matter you mention falls under the jurisdiction of the Prohibition Commissioner, and the Attorney General has no jurisdiction in the matter except through him or the Governor, yet I feel justifi-

fied in saying that inasmuch as the statute does not prescribe what kind of notice is necessary, your application to sell soft drinks is left to the courts, and your court having decided it, it is the law in your circuit until it is reversed either by your court itself or by the Court of Appeals.

As to your question concerning the status of merchants who sell soft drinks who do not get their license at the present term of the court, will say that this office has no jurisdiction in the matter, and it would be improper for me to express an opinion on the question in its present status.

In order, however, that you may not be inconvenienced, I am referring your letter to the proper authority, the Prohibition Commissioner, and have asked him to inform you as to what his attitude will be in the matter.

Very truly yours,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

INTOXICATING LIQUORS—*Prohibition—Chapter 146, Acts 1916, Sections 64a and 64b—Soft Drinks.*—Section 64b, chapter 146, Acts 1916, requires all who sell bottled soft drinks, whether wholesale or retail, and one who manufactures soft drinks and sells the same by wholesale to obtain a license to dispense the same as provided for therein.

RICHMOND, VA., October 6, 1916.

HON. J. SIDNEY PETERS,
Prohibition Commissioner,
Richmond, Va.

DEAR SIR:

Acknowledgment is made of your communication of October 6, 1916, which reads as follows:

"Do you construe section 64b of prohibition act to require one who sells bottled soft drinks to take out license according to terms thereof as a 'dispenser?' Do you construe section to require manufacturer of soft drinks who only sells by wholesale to comply therewith?"

Section 64a of chapter 146, Acts of 1916, reads as follows:

"The words 'soft drinks,' as used in this act, shall be construed to embrace and include any and all beverages, patented, domestic or otherwise, of every description and kind, which may be offered for sale, in this State, not embraced in the words 'ardent spirits,' as defined in this act."

Section 64b of the act provides that it is "unlawful for any person, firm, or corporation to dispense soft drinks without first obtaining a license to do so. * * *"

Your attention is called to section 2 of chapter 146 of the Acts of 1916, which reads as follows:

"The word 'person,' as used in this act, shall be construed to embrace all natural persons, firms, corporations, combinations and associations of every kind."

As the law clearly provides that all persons who dispense soft drinks must obtain a license so to do, the only question to be determined is whether one who sells bottled soft drinks and one who manufactures soft drinks to be sold only by wholesale are dispensers of soft drinks within the meaning of the act.

This word was judicially defined in *Johnson v. City of Chattanooga*, 36 S. W. 1092; 97 Tenn. (13 Pickle) 247, as follows:

"To dispense is to deal out, to distribute, to give. So that giving liquors is included in a charge of dispensing liquor in a prosecution under an ordinance making it a misdemeanor to sell, deal out or give away liquors on Sunday."

In *State v. Ball*, 123 N. W. 826-7, 19 N. D. 782, it was said:

"Dispense means to deal out in portions, to dispense, to give."

In *Sawyer v. Frank*, 132 N. W. 851, 152 Iowa 341, citing *Johnson v. Chattanooga*, *supra*, it was said:

" 'Dispense' has been defined: 'To deal out in portions; to distribute; to give.' Webster's New International Dictionary. 'To deal out; to apportion; to distribute. To dispense is to deal out generally or indiscriminately to, distribute, to deal out to or divide among individuals.' Worcester's Dictionary. 'To deal or divide out; to give forth diffusively, or in some general way; practice distribution of.' Century Dictionary. A restaurant keeper who serves to his patrons at his premises intoxicating liquors to whomsoever orders and pays for the same 'dispenses' liquor within the meaning of the statute. It has also been held that giving away liquors constituted dispensing."

I, therefore, construe section 64b to require one who sells bottled soft drinks whether wholesale or retail, and one who manufactures soft drinks and sells the same by wholesale to obtain a license to dispense the same provided for by section 64b of the prohibition act.

Yours very truly,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

INTOXICATING LIQUORS—Chapter 146, Acts 1916—Prohibition Act—Sections 14, 64a and 64b—Soft Drink License.—Inasmuch as it is provided by section 64b, chapter 146, Acts 1916, that "any citizen may appear personally or by counsel in opposition to the granting of said license," etc., it would seem that some form of notice to the public that such license would be applied for is contemplated by this section.

Same—Advertisement.—While not provided for by chapter 146, Acts 1916, the safest method of procedure for the person applying for a soft drink license is to follow the method prescribed for obtaining license to sell ardent spirits.

RICHMOND, VA., October 6, 1916.

HON. H. L. ARRINGTON,
President Board of Pharmacy,
Norfolk, Va.

DEAR SIR:

Acknowledgment is made of your communication of October 4th, addressed to the Attorney General, in which you ask for an opinion in reference to what is necessary to procure a license to sell soft drinks as provided for by sections 64a and 64b of chapter 146 of the Acts of 1916.

You say in your letter:

"Is it necessary under said sections to post in the same manner as we have to post for the alcohol license, and is it necessary to advertise the fact in the newspapers as in section 14? I have taken these precautions and have advised others to do the same, but have been told by several that I am wrong in my construction."

This is not a matter which properly comes within the jurisdiction of the Attorney General, as it is for the courts, before whom application for the license provided for in said sections is made, to construe the meaning of these sections.

I, therefore, refrain from expressing an official opinion as to how this section should be construed. However, for your benefit, I will say that although these sections do not provide what steps shall be taken in the way of giving notice to the public before applying for such a license, and inasmuch as it is provided in section 64b that:

"* * * Any citizen may appear personally or by counsel in opposition to the granting of said license, and the court may in its discretion refuse to grant such license if convinced that the person applying is not a suitable person to exercise the said privilege * * *."

it would seem some form of notice to the public that such license would be applied for is contemplated by this section. Therefore, the safest method of procedure for a person applying for such a license is to follow the method prescribed for obtaining a license to sell ardent spirits, although, as I have said before, I do not express this as an official opinion.

Very truly yours,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

INTOXICATING LIQUORS—*Prohibition Act—Chapter 146, Acts 1916.*—Section 67, chapter 146, Acts 1916, does not require the consignee to affix the stamp to affidavits as provided for in the statute, and it may be affixed by the transportation company and by it cancelled with the initials of the person cancelling where the freight is prepaid.

RICHMOND, VA., *October 13, 1916.*

HON. J. SIDNEY PETERS,
Prohibition Commissioner,
Richmond, Va.

Subject: Re-affixing of revenue stamps at points other than points of destination, and by consignee in person. Official Inquiry No. 9.

DEAR SIR:

Acknowledging your letter, enclosing communication from Mr. W. D. Scott, concerning the affixing of stamps at other than the point of destination to the affidavit of consignees of ardent spirits after November 1, 1916, I beg to say that under section 67 there seems to be no objection to allowing these stamps to be paid for on the prepayment of freight for shipment of liquor to prepay points in Virginia, and cancelled by the transportation company and attached to the affidavit. Under section 67 the transportation company is required to handle the affidavits and the requirement is that the stamps shall be duly cancelled by

the initials in ink of the person affixing the same, and shall be paid for by the person making the affidavit. This does not seem to require that the consignee affix the stamp; and, therefore, it may be affixed by the transportation company and by that company cancelled with the initials of the person cancelling where the freight is prepaid.

Yours very truly,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

INTOXICATING LIQUORS—*Prohibition Act—Chapter 146, Acts 1916, Section 1.*—By chapter 146, Acts 1916, the General Assembly of Virginia has prohibited the sale of malt liquors, whether intoxicating or not.

Same—Constitutionality.—Such legislation is valid.

Same.—Section 1, chapter 146, Acts 1916, analyzed.

RICHMOND, VA., *October 13, 1916.*

HON. J. SIDNEY PETERS,

Prohibition Commissioner,

Richmond, Va.

DEAR SIR:

Acknowledgment is made of your request as follows:

“Please be kind enough to say whether malt beverage made without fermentation and containing absolutely no alcohol comes, in your opinion, within the purview of section 1, chapter 146, of the Acts of 1916.”

An analysis of section 1, chapter 146, Acts of 1916, shows that the words “ardent spirits” as used in the act embrace: (1) alcohol, (2) brandy, (3) whiskey, (4) rum, (5) gin, (6) wine, (7) porter, (8) ale, (9) beer, (10) all malt liquors, (11) absinthe, (12) all compounds or mixtures of any of the above twelve enumerated liquors, (13) all compounds or mixtures of any of the first twelve enumerated liquors with any vegetable or other substance, (15) all (a) liquids, (b) mixtures, or (c) preparations, whether patented or otherwise, which will produce intoxication, (16) fruits preserved in ardent spirits, and (17) all beverages containing more than one-half of one per centum of alcohol by volume, except as otherwise provided in this act.

From this analysis it will be seen that the statute provides that all malt liquors shall be construed as within the meaning of the words “ardent spirits” as used in the act. The question to be determined is whether a malt beverage made without fermentation and containing absolutely no alcohol is to be construed as being a malt liquor and, therefore, ardent spirits within the prohibition of the act.

This question has been before the courts of many of the States for determination, and, with the exception of the early decisions in the State of Kansas and the late decisions in the States of Kentucky and Louisiana, the rule is that “where the statute expressly forbids the sale of a certain class of liquor, non-intoxicating as well as intoxicating liquors of that class are included.”

Ex Parte Lockman, 46 L. R. A. (N. S.) 759, 760;

City of Bowling Green v. McMullen, 26 L. R. A. (N. S.) 895;

Luther v. State of Nebraska, 20 L. R. A. (N. S.) 1146.

The general doctrine as laid down in Woolen and Thornton on the *Law of Intoxicating Liquors*, in section 114, as follows:

"The power of the State to prohibit the sale of beverages seems to be unlimited. Thus, as has been elsewhere discussed, States have prohibited the sale of cider, a liquor usually not considered intoxicating, at least in most communities, although, as is well known, 'hard' cider if drank in excessive quantities will produce intoxication, usually of a serious character. All such laws have been upheld. And so it has been held that the legislature may prohibit the sale of malt liquor, whether intoxicating or not. As is well known, a malt liquor is made that is wholly or very nearly devoid of intoxicating effects. So the State may prohibit the sale of a non-intoxicating wine, such as is usually called grape juice. And it would seem there is no liquor that the State may not declare shall not be sold, or that it may not declare shall be considered intoxicating."

This work was published in 1910 and is the latest text book that we can find on the subject.

The identical question came before the Supreme Court of the State of Mississippi in *Extract and Tonic Co. v. Lynch*, 100 Miss. 650, 656. The court, speaking through Mayes, C. J., said:

"In the discussion of this case we start out with the admission of counsel that this drink is a beverage containing no alcohol, it is true, but containing 5-73/100 per cent. of malt, and we unhesitatingly pronounce the beverage a malt liquor. It can be nothing else. The legislative Acts of 1908, page 116, section 1, prohibit the sale in this State of any vinous, alcoholic, malt, intoxicating or other spirituous liquors. The sale of malt is prohibited whether in fact it intoxicates or not. In the case of *Fowler v. The City of Jackson*, 52 Sou. 876, 30 L. R. A. (N. S.) 1078; *Reyfelt v. State*, 73 Miss. 415, 18 Sou. 925, and *Edwards v. City of Gulfport*, 95 Miss. 148, 49 Sou. 620, it was held that where the statute prohibited the sale of a certain named class of liquors as intoxicating liquors, such liquors could not be lawfully sold though they were not intoxicants. 'Poinsetta' may or may not be an intoxicant, but it is a malt liquor and as such is prohibited from being sold in this State. The prohibition law cannot be made effective unless it excludes all subterfuges."

The doctrine that the general term "malt liquor," whether used in statutes imposing a tax upon traffic therein or whether used in statutes prohibiting the sale thereof, includes non-intoxicating as well as intoxicating malt liquor, has been approved in the States of Mississippi, *supra*, Maine, Ohio, Oklahoma, Illinois, Alabama, Wisconsin, Vermont, North Dakota, South Dakota, New Hampshire, Iowa, Nebraska and Virginia.

Kansas, following a very full opinion written by Judge Brewer, afterwards Mr. Justice Brewer, delivered in the *Intoxicating Liquor Cases*, 25 Kansas 751, in *Fontana v. Grant* (1897), 6 Kansas Ap. 462, held that the legislature could not prohibit the sale of hop tea, a "malt liquor containing about two per cent. of alcohol and is not an intoxicating liquor."

However, the doctrine as enunciated by Judge Brewer has been abrogated in Kansas by the statute of 1909, and the *Intoxicating Liquor Cases* has been expressly overruled in *State v. Miller*, 92 Kansas 994, 998, *et seq.*

In Georgia it was held in *Eaves v. State*, 113 Ga. 749, that it was unnecessary under a statute prohibiting the unlicensed sale of malt liquor to prove the liquors to have been intoxicating. I cannot find that this case was expressly

overruled, but in *Roberts v. State*, 4 Ga. App. 207, the term "malt liquors" was held not to include non-intoxicating drinks. To the same effect is *Caswell v. Wright*, 133 Ga. 714; *Howard v. Acme Brewing Co.*, 83 S. E. (Georgia) 1096.

However, the Georgia rule is specifically abrogated by the prohibition act passed at the extraordinary session of 1915 of the Georgia legislature, where the statute in terms prohibits the sale of all malt liquors of any name or description, whether alcoholic or not. This leaves the decisions in the States of Kentucky and Louisiana as the only States holding the contrary doctrine.

Bowling Green v. McMullen, 134 Ky. 747, 26 L. R. A. (N. S.) 895;
City of Shreveport v. Smith, 130 La. 126;
Village of Marthaville v. Chambers, 135 La. 767.

The following is a list of the cases approving the rule that where the statute forbids the sale of "malt liquors," the term includes all malt liquors, whether intoxicating or non-intoxicating:

State v. O'Connell, 99 Maine 61, 51 Atl. 59;
LaFayette v. Murray, 81 Ohio St. 474, 91 N. E. 294;
State v. Kaufman, 68 Ohio 635, 67 N. E. 1062;
Moss v. State, 4 Okla. Crim. Rep. 247, 111 Pac. 950;
Etter v. State, 4 Okla. Crim. Rep. 230, 111 Pac. 957;
Childers v. State, 4 Okla. Crim. Rep. 237, 111 Pac. 958;
Extract and Tonic Co. v. Lynch, 100 Miss. 651, *supra*;
Pennell v. State, 141 Wis. 35, 123 N. W. 115;
Feibelman's Case, 130 Ala. 122;
Denkins v. State, 149 Ala. 49 (1907);
Lambie v. State, 151 Ala. 86;
Elder v. State, 162 Ala. 41, 50 Sou. 370;
Luther v. State, 83 Neb. 455, 20 L. R. A. (N. S.) 1146 and note;
State v. Fargo Bottling Works (N. Dakota), 124 N. W. 386, 26 L. R. A. (N. S.), 872 and note;
Sawyer v. Boti (Iowa), 124 N. W. 787;
State v. York, 74 N. H. 125, 65 Atl. 685. approved in;
State v. Lebreque, May 2, 1916, reported 97 Atl. 747;
State v. Eli (South Dakota), 118 N. W. 687;
State v. Walder, 83 Ohio State 68.

In *State v. Spalding*, 61 Vermont 505, it was held that the statute prohibiting the sale of "cider" prohibited the sale whether it was intoxicating or not.

Langel v. Bushell, 197 Ill. 20.

In *State v. Dannenburg*, 151 N. C. 718, 26 L. R. A. (N. S.) 890, it was held that the city of Charlotte could pass an ordinance imposing a tax upon the sale of near beer, a non-intoxicating beverage.

The decisions of the Virginia courts seem to be in line with the overwhelming weight of authority in other States. In *Commonwealth v. Goodwin*, 109 Va. 828, 832, the expression "malt liquors" was judicially defined by the Court of Appeals, where it is said:

"* * * It seems to be well settled that the general term 'malt liquors' includes both intoxicating and non-intoxicating malt liquors."

In this opinion the court further says:

"Black, in his article on *Intoxicating Liquors*, in 23 Cyc. 41, 60, says that 'If the statute specifically forbids the unlicensed sale of malt liquors, the question of the intoxicating properties of the liquor sold is immaterial; it is only necessary to determine whether it was a malt liquor.'"

In this case the charter of the town of Manassas prohibited the sale of malt liquors without license. The defendant claimed the right to sell malt liquor under the revenue laws of the State, section 23½ of the Byrd Bill. The charter prohibited the sale of malt liquor without license, and the defendant had no license. This case approves *Commonwealth v. Dean*, 14 Gray (Mass.) 99; *State v. Spaulding*, 61 Vt. 505, *supra*, where it was held that if the law prohibits or regulates the sale of cider by name it applies to all cider, without regard to its intoxicating qualities. The Goodwin case also approves *State v. Kaufman*, 68 Ohio 635, *supra*.

The next case bearing upon this subject in Virginia was *Commonwealth v. Henry*, 110 Va. 879. Henry was arrested upon a warrant charging him with the sale of malt beverage in violation of section 23½ of the Byrd Bill, and was convicted by the justice and fined \$500 and placed in the custody of the sergeant of the city of Winchester. He applied for a writ of *habeas corpus* to the circuit court. The circuit judge holding the law unconstitutional, said:

"I regard the legislation as bearing upon a particular, defined type of harmless malt product, which must be construed in relation to the legislative treatment accorded other forms of malt liquor. So viewed, I regard the prohibition and regulation imposed upon this particular type and brand to the last degree oppressive and unreasonable, and that, therefore, the law is unconstitutional."

The decision of the circuit court was reversed by the Supreme Court of Appeals, Judge Cardwell saying:

"To place the traffic in malt beverages within the police power of the State, it is not essential, we think, that its harmfulness should be inherent in the article dealt in, as traffic in a harmless article may be regulated if regulation be expedient, so as to prevent it from becoming harmful to the public health and morals. The object of this legislation (section 23½), as already remarked, is to limit the use of intoxicants, and there is no indication anywhere in the Byrd liquor law, from its title to its conclusion, that the legislature deemed harmless the traffic in any kind of alcoholic beverages; on the contrary, there are the strongest indications that the legislature deemed the traffic in beer, by whatever name called, as especially likely to be harmful to the public, if not regulated, and the whole range of alcoholic drinks has been by the act regulated under one provision or another."

It is to be observed, however, that in the course of his opinion, Cardwell, J., employed the following language:

"It is not claimed that it would be competent for the State government to prohibit the sale of an absolutely harmless and nutritious article of food which contains no alcohol or other dangerous property, but the courts have gone very far in sustaining restrictive legislation in reference to cider, wines, malt liquors and other beverages which usually contain considerable quantities of alcohol, but which may, and often do, contain such a small percentage as to be absolutely non-intoxicating."

On page 893, the same learned judge says, quoting from the opinion of the Georgia Court of Appeals in *Campbell v. City of Thomasville*, 64 S. E. 815:

"Again it is said in the opinion: 'The argument that, since 'near beer' is not an intoxicating liquor, dealers in it should stand on the same footing as dealers in soda water and other similar beverages, well comports with the zeal and partizanship which is to be expected of counsel in the case, but we would stultify ourselves if we did not recognize an essential distinction and

a well-marked difference between the two classes. Both businesses are in a certain sense alike legitimate, but there are many varieties of legitimate businesses. An occupation may be lawful and yet may be neither useful nor necessary—in fact, may have a harmful tendency.’”

It is true that Judge Cardwell said that it was not claimed in the instant case that it would be competent to prohibit the sale of absolutely harmless and nutritious articles of food, but that the courts have gone very far in sustaining restrictive legislation in reference to malt liquors and other beverages. There was no question in the case of the sale of an article of food, but the question under consideration was the sale of malt liquor, a beverage, and, therefore, this statement cannot be considered as in any way affecting the former decision in the *Goodwin* case.

It is well to note that in New Hampshire in *State v. York*, 74 N. H. 125, *supra*, the Supreme Court held that the legislature did not intend that the violation of the statute prohibiting the sale of certain classes of liquor should depend upon whether the liquor was in fact intoxicating. After this decision was announced, the legislature re-enacted the section in question with changes which only tended to fortify the conclusions of the court.

In *State v. Lebreque*, decided May 2, 1916, 97 Atl. 747, the court said: “The interpretation of the statute has thus become fixed beyond the power of change, except by the legislature.” This is the well-recognized rule of statutory construction.

In the *Goodwin* case, *supra*, Buchanan, J., said that “the general term malt liquors includes both intoxicating and non-intoxicating malt liquors.”

After this decision was announced, the legislature passed the Prohibition Bill, which prohibited the sale of “all malt liquors.” As was said in the *Lebreque* case, this change only tends to fortify the definition approved by Judge Buchanan and the interpretation of the statute has thus become fixed beyond the power of change, except by the legislature.

The conclusion, therefore, is irresistible that the General Assembly of Virginia in prohibiting the sale of all malt liquors intended to prohibit the sale of all such liquors, whether intoxicating or not.

The next question which arises is whether a State may under the Federal Constitution prohibit the sale of a harmless non-intoxicating beverage? Does such a prohibition infringe the Fourteenth Amendment against taking liberty or property without due process of law? This is the very question considered by the Supreme Court of the United States in the case above referred to *Purity Extract & T. Co. v. Lynch*, 226 U. S. 184, appealed from the Supreme Court of Mississippi.

Reference has already been made to the fact that in that case the Mississippi Supreme Court decided that the sale of malt liquor is prohibited whether in fact it is intoxicating or not, and the Supreme Court of the United States, Mr. Justice Hughes delivering the opinion, affirmed this decision and declared that the Mississippi statute was not in violation of the Constitution of the United States.

The drink there involved was known as “Poinsetta.” The case was tried upon an agreed statement of facts in which the characteristics of the drink were set forth as follows:

“In substance, the statement is that it is composed of pure distilled water to the extent of 90.45 per cent., the remaining 9.55 per cent. being solids derived from cereals, which are in an unfermented state, and are

wholesome and nutritious'; that 'it contains 5.73 per cent. of malt, and is sold as a beverage'; that it does not contain either alcohol or saccharine matter, being manufactured in such a manner under a secret formula obtained from German scientists as to bring neither into its composition; that it is not intoxicating; that its taste and odor are distinctive; that its appearance is such that 'it would not probably be mistaken for any intoxicating liquor'; and that it 'cannot be employed as a subterfuge for the sale of beer, because it is bottled in a distinctive way, and its name blown in each bottle which contains the beverage.' It is further agreed that 'the United States Government does not treat Poinsetta as within the class of intoxicating liquors, and does not require anything to be done with reference to its sale.' "

In connection with this statement of facts, it should be noted that the Supreme Court of Mississippi in its opinion used language which showed that it did not accept as conclusive that Poinsetta could not be employed as a subterfuge for the sale of beer because "it is bottled in a distinctive way and its name blown in each bottle." The Supreme Court of the United States puts the question at rest in the following language:

"It is also well established that, when a State exercising its recognized authority, undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction, separately considered, is innocuous, it may not be included in a prohibition and scope of which it is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the government. (And cases cited) * * * With the wisdom of the exercise of that judgment the court has no concern; and unless it clearly appears that the enactment has no substantial relation to a proper purpose, it cannot be said that the limit of legislative power has been transcended. To hold otherwise would be to substitute judicial opinion of expediency for the will of the legislature,—a notion foreign to our constitutional system. * * *

It was competent for the legislature of Mississippi to recognize the difficulties besetting the administration of laws aimed at the prevention of traffic in intoxicants. It prohibited, among other things, the sale of 'malt liquors'. In thus dealing with a class of beverages which, in general, are regarded as intoxicating, it was not bound to resort to a discrimination with respect to ingredients and processes of manufacture which, in the endeavor to eliminate innocuous beverages from the condemnation would facilitate subterfuges and frauds and fetter the enforcement of the law. A contrary conclusion, logically pressed, would save the nominal power while preventing its effective exercise. The statute establishes its own category. The question in this court is whether the legislature had power to establish it. The existence of this power, as the authorities we have cited abundantly demonstrate, is not to be denied simply because some innocent articles or transactions may be found within the prescribed class. The inquiry must be whether, considering the end in view, the statute passes the bounds of reason and assumes the character of merely arbitrary fiat.

That the opinion is extensively held that a general prohibition of the sales of malt liquors, whether intoxicating or not, is a necessary means to the suppression of trade in intoxicants, sufficiently appears from the legislation of other States and the decision of the courts in its construction. * * *

We cannot say that there is no basis for this widespread conviction.

The State, within the limits we have stated, must decide upon the measures that are needful for the protection of its people, and, having regard to the artifices which are used to promote the sale of intoxicants under the guise of innocent beverages, it would constitute an unwarrantable departure from accepted principle to hold that the prohibition of the sale of all malt liquors, including the beverage in question, was beyond its reserved power."

The summary of my conclusion, therefore, is that the General Assembly of Virginia has prohibited the sale of malt liquors whether intoxicating or not, and that such prohibition has been held valid by the Supreme Court of the United States.

Very truly yours,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

INTOXICATING LIQUORS—*Prohibition Act—Chapter 146 of the Acts 1916, Sections 40 and 58—Statutes—Construction.*—The word "or" as used in section 40 of chapter 146 of the Acts of 1916, was used by the General Assembly disjunctively, and this section should be so construed; therefore, purchasers of ardent spirits may receive only one of the three classes of ardent spirits in a month permitted to be imported into the State.

RICHMOND, VA., *October 12, 1916.*

HON. J. SIDNEY PETERS,

Prohibition Commissioner,

Richmond, Va.

DEAR SIR:

Acknowledgment is made of your letter of September 8, 1916, in which you say:

"It is seriously contended by some people that under chapter 146 of the Acts of the Assembly of 1916, a person may order and receive, and a common carrier may carry, within one month one quart of distilled liquor and three gallons of beer and one gallon of wine; by others that they may not order all three of the above in one month, but only one of the three above-named kinds of ardent spirits.

"I will thank you to construe the act in this particular for my guidance."

The law governing this question is found in section 40 of chapter 146 of the Acts of 1916, which reads as follows:

"No person in this State shall receive or accept delivery from any railroad, steamboat, express company, or transportation company of any kind, or from any person whomsoever, any ardent spirits brought into this State from any point without the State, or ardent spirits transported from one point to another within this State, except as follows: He may receive one quart of distilled liquor 'in a single container,' or three gallons of beer, or one gallon of wine, not oftener than once a month * * *."

You will observe from reading the above section that it says a person may receive one quart of distilled liquor in a single container, *or* three gallons of beer, *or* one gallon of wine not oftener than once a month.

While it is true that the courts have some times construed the word *or* to mean *and* and the word *and* to mean *or* even in some instances in penal statutes, this rule is not without its limitations, which are stated as follows by *Black* in his book on the *Interpretation of Laws*, (2d edition), page 231:

"It must be remembered that the words 'and' and 'or' are in no sense interchangeable terms, but, on the contrary, they are used in the structure of language for purposes entirely different. It must be assumed that the language of a statute is chosen with due regard to grammatical propriety. And therefore the courts are not at liberty to treat these words as inter-

changeable on mere conjecture or according to their own notions of expediency or policy. On the contrary, they should be taken in their strict and proper meaning when such a reading does not render the sense of the law dubious, and the substitution of one for the other is permissible only when the context or other provisions of the statute require it, or when that is necessary to avoid an absurd or impossible consequence and to carry out the evident intention of the legislature."

It seems very plain after reading the provisions of section 40 of chapter 146 of the Acts of 1916, that the word *or* was used by the General Assembly disjunctively, and I am of the opinion that this section should be so construed, especially in the light of the provisions of section 58 of the same act, which reads as follows:

"This entire act shall be deemed an exercise of the police power of the State for the protection of the State, for the protection of the public health, peace and morals, and the prevention of the sale and *use of ardent spirits*, and *all of its provisions shall be liberally construed to effect these objects.*"

I am, therefore, of the opinion that the purchasers of ardent spirits may receive only one of the three classes of ardent spirits permitted to be imported into the State.

Very truly yours,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

INTOXICATING LIQUORS—*Prohibition Act—Chapter 146, Acts 1916, Section 14—Pharmacists—Females.*—A female who is a registered pharmacist and who owns and conducts her own drug store is not such a person as is entitled to a license under the law to sell ardent spirits, as she is not and cannot under the existing laws become a qualified voter.

RICHMOND, VA., October 10, 1916.

HON. J. SIDNEY PETERS,
Prohibition Commissioner,

DEAR SIR:

Acknowledgment is made of your letter of October 6, 1916, enclosing letter of E. L. Brandis, Esq., Secretary State Board of Pharmacy, in which you ask for a ruling on the following question:

"Can a female who is a graduate in pharmacy, from a recognized college of pharmacy, and is a registered pharmacist in good standing in this State, and who owns and conducts her own drug store and who is not the head of a family, be granted a license to purchase, store and sell ardent spirits permitted by the Prohibition Act?"

It is provided by section 14 of chapter 146 of the Acts of 1916, as follows:

"Before a druggist shall sell ardent spirits on prescription, or pure fruit, ethyl, or grain alcohol for scientific, mechanical or pharmaceutical purposes, or wine for sacramental purposes on affidavit as provided in this act, he must procure a license to do so from the circuit court of the county, or the corporation or hustings court of the city."

By a later provision of the same section it is provided as follows:

"Before the court shall grant any such license, the judge thereof shall be satisfied that the person making the application is a qualified voter of the State and of good moral character, is a registered pharmacist in good standing, or employs a regular pharmacist * * *."

It would, therefore, seem that a female who is a registered pharmacist and who owns and conducts her own drug store is not such a person as is entitled to a license under the law to sell ardent spirits, as she is not and cannot under the existing laws become a qualified voter.

Yours very truly,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

INTOXICATING LIQUORS—*Prohibition Act—Chapter 146 of the Acts of 1916—Section 8—Druggists.*—Any druggist who takes separate materials and compounds them into flavoring extracts or medicinal preparations or proprietary medicines is a manufacturer within the meaning of the terms of chapter 146 of the Acts of 1916. Therefore, even though the law would seem to permit said manufacturer to dispose of such articles containing alcohol as enumerated in section 8, yet in order to have on hand alcohol necessary for the compounding of these preparations he must have secured a special license.

Same—Exempted territory.—Where a place which was a part of one of the exempted counties, subsequent to the approval of chapter 146 of the Acts of 1916 becomes a city, it is the duty of the Commissioner of Prohibition and of the Attorney General to assume that such city is still within the restricted territory and leave the matter to the courts to determine.

RICHMOND, VA., October 6, 1916.

HON. J. SIDNEY PETERS,
Prohibition Commissioner,
Richmond, Va.

DEAR SIR:

Acknowledgment is made of your reference to this office of a letter of Laird L. Conrad, attorney at law, Harrisonburg, Va., of September 22, 1916, making the following inquiries:

1. Whether a registered druggist has a right, without special license, to make up flavoring extracts, camphor water, etc., which contain alcohol?
2. Can they buy alcohol in bulk and make up their own preparations of the above character for sale by them in due course of trade without obtaining the license required under the Prohibition Act for the sale of ardent spirits?

Mr. Conrad suggests that the law undoubtedly permits druggists to sell these preparations provided they are for external use and provided they do not contain sufficient alcohol for payment of the United States liquor dealer's tax.

Section 8 of the Prohibition Act sets out:

"The provisions of this Act shall not be construed * * * to prevent the sale or gift and keeping and storing for sale by druggists and general merchants or others duly licensed by existing laws of any medicinal preparations manufactured in accordance with formulas prescribed by the United States' Pharmacopoeia and National Formulary patent and proprietary preparations and other *bona fide* medical and technical preparations which contain no more alcohol than is necessary to extract the medicinal properties of the drugs contained in such preparations, and no more alcohol than is necessary to hold the medicinal agents in solution and to preserve the same,

and which are manufactured and sold as medicine and not as beverages; or to prevent the manufacture and sale of toilet, medicinal and antiseptic preparations and solutions not intended for internal human use, nor to be sold as beverages, and upon the outside of each bottle, box or package of which is printed in English conspicuously and legibly and clearly the quantity by volume of alcohol in such preparations; or to prevent the manufacturing or keeping for sale of the food product known as flavoring extracts which shall be so manufactured or sold for cooking and culinary purposes only, and not to be sold for beverage purposes, provided that it shall not be lawful to manufacture or sell any toilet, medicinal, antiseptic preparations or solutions, or any flavoring extracts or patent or proprietary medicines or preparations, the manufacture or sale of which requires the payment of the United States liquor dealer's tax."

This would seem to permit the compounding of flavoring extracts, medicinal preparations, etc., containing alcohol and the sale thereof not for use as a beverage, but there is a further provision in section 8 which provides that the manufacturers of such articles as above-enumerated must secure a license from the court under the same conditions as provided for in this act for the granting of license to sell ardent spirits to druggists in order to be permitted to purchase and store ardent spirits or alcohol necessary for the manufacture of said articles.

It is perfectly clear to me that any druggist who takes separate materials and compounds them into flavoring extracts or medicinal preparation or proprietary medicine, is a manufacturer within the meaning of the terms of this act.

Therefore, even though the law would seem to permit said manufacturer to dispose of such articles containing alcohol as enumerated in section 8, yet in order for him to have on hand alcohol necessary for the compounding of these preparations he must have secured a special license.

As to the last inquiry in the letter of Mr. Conrad, as to whether or not Harrisonburg, having been a part of the county of Rockingham at the time of the approval of the Prohibition Bill by the Governor but having become a city since that time, comes within the prohibited territory where whiskey or brandy cannot be sold (such as the county of Rockingham) even under prescription, I beg to say that I have been unable to find any authority in point, but it is your duty and mine to assume that Harrisonburg is still within the restricted territory, and leave this matter for the courts to determine, should it be in issue.

Very truly yours,

JNO. GARLAND POLLARD.

Attorney General of Virginia.

INTOXICATING LIQUORS—*Prohibition Act—Chapter 146, Acts 1916, Sections 8 and 14.*—Manufacturing druggists may manufacture flavoring extracts containing alcohol but must secure a license from the court provided for in section 14 of chapter 146 of the Acts of 1916, provided, however, that the flavoring extracts manufactured are such that the sale and manufacture thereof do not require the payment of the United States liquor dealer's tax, and further, that they cannot be sold for beverage purposes.

Same.—It is lawful for manufacturing druggists to have on hand alcohol after November 1st for the purposes of legitimate manufacture and not to be sold provided they secure a license from the court as above stated.

RICHMOND, VA., *October 4, 1916.*

HON. J. SIDNEY PETERS,
*Prohibition Commissioner,
Richmond, Va.*

DEAR SIR:

You have referred to this office several inquiries of Payne, Seay & Anderson, manufacturing druggists, Lynchburg, Va. The inquiries submitted to you by these manufacturers are:

1. Does the Prohibition Law prohibit the manufacture of flavoring extracts containing alcohol or prohibit the buying of alcohol without a license from the court?

2. If it is lawful for manufacturing purposes to secure several barrels of alcohol previous to November 1st, for the purpose of manufacturing flavoring extracts, without obtaining a license from the court?

Section 8 provides that the provision of the act shall not be construed to prevent the manufacture and sale of toilet, medicinal and antiseptic preparations and solutions not intended for internal use or to be sold as beverages or to prevent the manufacture and keeping for sale of the food product known as flavoring extracts which shall be so manufactured and sold for cooking and culinary purposes only and not to be sold for beverage purposes, provided that such toilet, medicinal, antiseptic preparations or solutions or flavoring extracts or patented or proprietary medicines or preparations are such that the manufacture and sale of the same does not require the payment of a United States liquor dealer's tax.

It is further provided that the manufacturers of these flavoring extracts and preparations as aforesaid shall be permitted to purchase and store ardent spirits or alcohol necessary for the manufacture of said articles but not to be sold or given away, provided that the manufacturer must secure a license from the court under the same conditions as provided in this act for the granting of a license to sell ardent spirits to druggists, and further provided that said manufacturers shall make the monthly report as is required of druggists by this act.

Answering the specific questions above, therefore:

1. Manufacturing druggists may manufacture flavoring extracts containing alcohol but must secure the license from the court provided for in section 14 of the act, provided, however, that the flavoring extracts manufactured are such that the sale and manufacture thereof do not require the payment of the United States liquor dealer's tax, and, further, that they cannot be sold for beverage purposes.

2. It will be lawful for manufacturing druggists to have on hand alcohol after November 1st for the purposes of legitimate manufacture and not to be sold, provided they secure the license from the court as above stated.

Very truly yours,

LESLIE C. GARNETT,
Assistant Attorney General.

INTOXICATING LIQUORS—*Transportation of—Prohibition Act—Chapter 146, Acts 1916.*—An express company may receive for shipment on its wagons in Bristol, Tenn., ardent spirits to be transported to points in Virginia so long as the express company complies with the Virginia law relating to the transportation and delivery of such ardent spirits.

RICHMOND, VA., *October 4, 1916.*

HON. J. SIDNEY PETERS,
Prohibition Commissioner,
Richmond, Va.

DEAR SIR:

"Interstate shipments of ardent spirits at Bristol, Tenn.-Va.—Official Inquiry No. 6."

Acknowledgment is made of your letter of September 23d, to the Attorney General, enclosing a letter from Mr. Robert C. Alston, General Counsel, Southern Express Company, saying:

"The Southern Express Company's construction of the law is that its wagons may go across the line into Tennessee and there receive and receipt for shipments of liquor from Bristol, Tenn., to points in Virginia, and may transport such shipments to points in Virginia in accordance with the provisions of your statute, the interstate transportation beginning at the time when the wagons receive the shipments. The title to the shipment certainly passes at that time, and the interstate transportation and the passing of title are exactly contemporaneous."

It is a well settled rule of law that the liability of the express company commences with the delivery of the goods to him or his agent at the place where he receives them. (*Southern Express Company v. McVeigh*, 20 Gratt. 286.)

If, therefore, an express company in any city in Tennessee receives for transportation ardent spirits to be shipped to Virginia, in accordance with the provisions of the Virginia statute, I can see no reason why this company cannot receive for shipment on its wagons in Bristol, Tenn., ardent spirits to be transported to points in Virginia, so long as the company complies with the Virginia law in the transportation and delivery of such ardent spirits.

I am, therefore, of the opinion that the letter of the General Counsel of the Southern Express Company correctly construes the law.

Very truly yours,

LESLIE C. GARNETT,
Assistant Attorney General.

INTOXICATING LIQUORS—*Prohibition Act—Chapter 146 of the Acts 1916, Section 19.*—A newspaper printed in Virginia cannot carry any advertisement of ardent spirits after chapter 146 of the Acts of 1916 takes effect.

Same.—Section 19, chapter 146, of the Acts of 1916, provides that the same does not apply to the circulation and publication of newspapers and periodicals published beyond the confines of Virginia, provided an obligation has been incurred or money paid for the same.

Same.—Analysis of section 19 of chapter 146 of the Acts 1916.

Same.—Sub-section 3 of section 19, chapter 146, of the Acts 1916, is not to be construed so as to permit the publication in newspapers or otherwise of advertisements of ardent spirits as forbidden by other portions of section 19. It is aimed at a custom supposed to exist whereby papers published under the guise of news articles, statements concerning the regulation or prohibition of the liquor traffic designed to affect public sentiment, when, as a matter of fact, the newspapers receive compensation for the publication from parties in interest.

RICHMOND, VA., September 30, 1916.

HON. J. SIDNEY PETERS,
Prohibition Commissioner,
Richmond, Va.

DEAR SIR:

Acknowledgment is made of your letter of September 8, 1916, in reference to section 19 of chapter 146 of the Acts of 1916, in which you say:

"Will you kindly advise me whether or not under section 19 of chapter 146 of the Acts of 1916, said section permits 'paid newspaper advertising, even though the advertising be printed in the State of Virginia?'"

An examination of section 19 of chapter 146 of the Acts of 1916 shows that this section of the act makes it unlawful for any person to advertise ardent spirits within this State upon (a) any street car, (b) railroad car, or (c) other vehicle of transportation, or (d) any public place, or (e) any public resort, or (f) upon any sign, or (g) upon any bill-board, or (h) by circular, (i) poster, (j) price list, (k) newspaper, or (l) periodical, or (m) otherwise.

This section further makes it unlawful to advertise the (1) manufacture, (2) sale, (3) keeping for sale, or (4) furnishing of ardent spirits, or (5) the (a) person from whom, or (b) the firm, or (c) corporation from which, or (6) the place where, or (7) the price at which, or (8) the method by which the same or any of them may be obtained.

The division of section 19, No. 2, makes it unlawful to (1) circulate, or (2) publish any (a) written, or (b) printed matter in which any advertisement specified in this section shall appear.

This section provides an exception to this latter provision, which provides that this prohibition does not apply to the circulation or publication of (1) newspapers and (2) periodicals published beyond the confines of this State, provided an obligation has been incurred or money paid for the same.

Another provision of this section, which refers to newspapers, is found under that portion of section 19, No. 2, which provides that it shall be unlawful to circulate (1) any price list, (2) order blank, or (3) other matter for the purpose of inducing or securing orders for such ardent spirits, no matter where located.

It is also provided by the same sub-division of section 19 that any (a) advertisement, or (b) notice containing the picture of a (1) brewery, (2) distillery, (3) bottle, (4) keg, (5) barrel, or (6) box, or (7) other receptacle represented as containing ardent spirits, or (b) designed to serve as an advertisement thereof, is within the inhibition of this section.

From these provisions of section 19, it clearly appears that a newspaper printed in Virginia cannot carry any advertisement of ardent spirits after the act takes effect.

It is to be noted, however, that that portion of section 19, numbered 3, provides that it shall be unlawful for any (1) newspaper, or (2) periodical published in this State to print in its columns statements concerning the liquor traffic for which the said (1) newspaper, or (2) periodical receives compensation of any kind unless such (1) newspaper or (2) periodical prints at the (a) beginning and (b) close of said statements in type of the same size used in the body of the article, the following statement: "Printed as paid advertisement." This provision is not to be construed so as to permit the publication in news-

papers or otherwise of advertisements of ardent spirits as forbidden by that part of section 19, first above referred to, but is aimed at a custom supposed to exist whereby papers published under the guise of news articles statements concerning the regulation or prohibition of the liquor traffic, designed to affect public sentiment, when, as a matter of fact, the newspapers received compensation for the publication from parties in interest. The provision last quoted was designed to prohibit this method of deceiving the public. It has no reference to advertising the manufacture, sale, keeping for sale or furnishing ardent spirits, which is absolutely prohibited in all newspapers and periodicals published in this State.

Very truly yours,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

INTOXICATING LIQUORS—*Prohibition Act—Chapter 146, Acts of 1916, Sections 38 and 39.*—The records required to be kept by common carriers under chapter 146 of the Acts of 1916 are required to be entered in a book and not upon loose leaves or cards to be bound into a book.

RICHMOND, VA., *September 26, 1916.*

HON. J. SIDNEY PETERS,
Prohibition Commissioner,
Richmond, Va.

DEAR SIR:

I have your letter in which you inform me that representatives of the Southern Express Company and Adams Express Company, common carriers doing business in Virginia, complain that in large centers like Richmond, Norfolk, etc., it will be practically impossible for them to literally carry out the provisions of the prohibition act, requiring each of their agencies to keep books alphabetically arranged as required by sections 38 and 39 of said act.

You state that you are convinced that the keeping of a "book" will be next to impossible without distressing inconvenience to the common carriers and to the consignees, and that you are convinced that loose leaves or loose cards, stoutly bound together in alphabetical order at the end of each calendar month, would meet the requirements of the law and will not be detrimental to the interest of the public, and you ask whether in my opinion such an arrangement would be a compliance with law.

The sections referred to require common carriers to keep *books* alphabetically arranged, in which shall be entered the name of the shipper and the consignee, amount and kind of liquor received, date of the delivery and to whom delivered. Section 38, dealing with intrastate shipments, requiring an additional entry of "by whom delivered." Both sections provide that this record shall be open to inspection by certain public officers or any other person. Section 40 limits the amount of ardent spirits to be received by one person not oftener than once a month, to one quart of distilled liquor or three gallons of beer or one gallon of wine. It seems, therefore, apparent that the purpose of requiring the common carrier to keep the book and making the same open to public inspection is to facilitate the detection of those who may receive more ardent spirits within a month than is allowed by law. Bearing in mind this purpose, it is, of course,

important that no such liberal construction be placed upon the word "book" as would facilitate those who might seek to evade the law or which would increase the difficulty of the officers in detecting its evasion. I am aware of the fact that loose leaves or even cards might be bound into a book, but the act evidently contemplates that when the record of these shipments is made it shall be made not upon loose leaves or cards, but upon what is already at the time of the entry a *book*. Note that in section 38 the common carrier must, upon receipt of the ardent spirits, make the entry in a book, and that this record must be signed by the consignee, that is, the record must be a book when signed by the consignee, not a loose leaf or a card afterwards to be made into a book.

Section 39, dealing with *intra and interstate* shipments, provides that the entry shall be made in a book before delivery. Now, as I understand it, the express companies desire to make these entries, not in a book, but on a card or sheet afterwards to be made into a book. I recognize the fact that it would be very much more convenient to have these entries made upon cards or loose leaves and to have the consignees receipt for shipments on same, yet at the same time it is apparent that the use of loose leaves or cards lends itself very much more readily to fraud. It is much easier to extract loose leaves or cards without detection than to tear leaves out of books.

I, therefore, advise you to inform the common carriers that you will insist upon the record required by the sections referred to to be entered in a book and not upon loose leaves or cards to be bound into a book. This may result in great inconvenience to the express companies and to the consignees, but no amount of inconvenience can be pleaded as an excuse for a violation of a statute.

Very truly yours,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

INTOXICATING LIQUORS—*Prohibition Act—Chapter 146 of the Acts of 1916—Sections 3 and 77.*—It is the intent of section 3 of chapter 146, Acts of 1916, to allow the shipments therein provided for to be made by the officers of the dispensaries on November 1, 1916, and, therefore, such shipments on that date are not unlawful.

Same.—Under this section it is unlawful for the carrier to transport ardent spirits after November 1, 1916.

RICHMOND, VA., *September 18, 1916.*

HON. J. SIDNEY PETERS,
Prohibition Commissioner,
Richmond, Va.

DEAR SIR:

Referring to your inquiry of even date, inquiring whether October 31st or November 1st is the last day on which officers in charge of dispensaries in Virginia may ship ardent spirits out of the State, will say that section 77 of chapter 146 of the Acts of 1916, known as the Prohibition Act, provides:

"This act shall be in force on and after the first day of November, nineteen hundred and sixteen, except so much thereof as provides for the election by the present General Assembly of a Commissioner of Prohibition and the commencement of the term of the said commissioner, as to which said exceptions an emergency is hereby declared to exist, which said provisions shall take effect at once." (Volume 4, Code, page 1131.)

Section 3 of the same act provides as follows:

“* * * The officers in charge of any dispensary, selling ardent spirits under the authority of the State of Virginia, are hereby granted the right to transport out of the State to a point where ardent spirits can be legally sold, any ardent spirits which are the property of said dispensary, provided that no such shipment can be made after November first, nineteen hundred and sixteen.” (Volume 4, Code, page 1099.)

I am of the opinion that the last quoted provision shows an intention on the part of the General Assembly to allow such shipments to be made by the officers of the dispensaries on November 1st, and that, therefore, such shipment on that date will not be unlawful.

It will be observed that under the provision of the same section 3 of the act it would be unlawful for the common carrier to transport the ardent spirits after November 1st. The shipment should, therefore, be delivered to the carrier in time to enable it to transport the same out of the State before midnight of November 1st.

Very truly yours,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

JAILS AND PRISONERS—*Convicts in State Penitentiary.*—Section 4144 of the Code, as amended, applies solely to prisoners in the State Penitentiary.

Credit Allowance for Good Behavior.—There is no provision of the law which gives jail prisoners any credit allowance for good behavior unless such jail prisoners are worked on the convict road or quarry forces of the State, as set out in chapter 217 of the Acts of 1910.

RICHMOND, VA., August 22, 1916.

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

DEAR SIR:

Acknowledgment is made of a letter of the secretary to the Governor of August 21, 1916, informing the Attorney General that the Governor has an application for clemency for a prisoner originally sentenced to serve a term in the State Penitentiary and whose sentence was afterwards commuted to imprisonment in jail, and inquiring whether under these circumstances the prisoner is entitled to allowance for good behavior provided for convicts in the Penitentiary, as set out in chapter 324, Acts of Assembly 1916.

I am of the opinion that the provisions of section 4144 of the Code 1904, as amended by a said chapter 324, Acts 1916, page 515, applies solely to prisoners confined in the State Penitentiary. I find no provision of the law giving jail prisoners any credit allowance for good behavior unless such jail prisoners are worked on the convict road or quarry force of the State as set out in chapter 217 of the Acts 1910, Pollard Supplement 1910, page 193. The law as to such jail prisoners was construed in the letter of the Attorney General to the Governor of August 3, 1916.

Very truly yours,

LESLIE C. GARNETT,

Assistant Attorney General.

JAILS AND PRISONERS—Convicts.—Section 4144 of the Code, as amended (chapter 324, Acts of 1916), does not apply to jail prisoners that work on the public roads.

Jails and Prisoners.—Chapter 354, Acts of 1908, providing that persons sentenced to work on the public roads in lieu of jail sentence shall be allowed certain credits for good behavior on their sentences, was repealed by implication by chapter 217 of the Acts of 1910. Chapter 217 of the Acts of 1910 governs the question as to the credits to which a prisoner in jail is entitled for good behavior.

Jails and Prisoners.—The rights conferred upon prisoners by chapter 217 of the Acts of 1910 are enforceable in the courts and do not depend upon the discretion of the Governor.

RICHMOND, VA., August 3, 1916.

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

DEAR SIR:

Acknowledgment is made of letter of your secretary of August 1, 1916, as follows:

"In an application received by the Governor for clemency for a prisoner sentenced to jail and at work on the public roads, the suggestion is made that possibly the increase of good behavior allowance made Penitentiary prisoners by the General Assembly at its session in 1916, applies also to jail prisoners on the roads, and the Governor would be glad to have you advise him on this point."

I am of opinion that the amendment to section 4144 of the Code, contained in chapter 324 of the Acts of Assembly 1916, does not apply to jail prisoners that work on the public roads. There are two acts of Assembly with regard to jail prisoners, the first being the act of March 14, 1908, Acts 1908, page 628, which provides as follows:

"All persons sentenced by any of the courts of the Commonwealth to work on public roads in lieu of a jail sentence shall be allowed credit for good behavior on their sentences to the same extent and upon the same terms as are now provided for convicts in the penitentiary."

The most liberal construction that can be given to this act is that it embodies section 4144 of the Code as it then was, as specifically as if the terms had been set out in the act. Prisoners now in jail, therefore, could claim the benefit of section 4144 of the Code as it was before the last amendment, notwithstanding the section has been amended as to convicts in the Penitentiary.

However, I am of opinion that the act of March 14, 1908, has been superseded by chapter 217 of the Acts of 1910, Pollard's Supp. 1910, p. 913, which provides as follows:

"All jail prisoners who are worked on the convict road or quarry force of the State shall have, for good behavior during the time they are working on said force, a reduction of four days per month for good behavior from the time for which they were sentenced. And it shall be the duty of the Superintendent of the Penitentiary to keep a record of each jail prisoner while at work on said convict road or quarry force."

Unless there is some distinction between "prisoners sentenced on the public roads in lieu of jail sentence" and "jail prisoners who are worked on the convict road or quarry force of this State," the provisions of the act of 1910 govern as to jail prisoners. I can draw no distinction between the two acts in that regard, and I am, therefore, of opinion that the act of 1910 must be invoked in computing the credits to which a prisoner in jail is entitled for good behavior. I am, however, of opinion that the rights conferred by the Acts of 1910 are enforceable in the courts and do not depend upon the discretion of the Governor, as do the credits for good behavior as provided in section 4144 of the Code, as amended.

Yours very truly,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

JAILS AND PRISONERS—Convicts—Credits Earned by Convicts.—Section 4144 of the Code as amended does not give a convict an absolute right to be discharged at the expiration of the period of his sentence less the credits earned, but only at such time "with the consent of the Governor." This section creates no rights in favor of those for whose benefit it was apparently enacted, as it makes the release of a prisoner in all cases prior to the completion of the period of his sentence depend upon executive clemency. This section is merely a guide or suggestion to the Governor as to how much of his sentence a convict should be required to serve, leaving the final decision in all cases to the Governor.

Statutes—Construction.—While the general rule of construction of statutes is that the statute is presumed to have some effect and is to be so construed, it is impossible to give such a construction to a statute where the words of the act express a contrary legislative intent in words of no uncertain meaning.

Jails and Prisoners—Convicts—Statutes.—The purpose of section 4144 being to encourage convicts to good behavior, and, its object being humane, there is no abuse of the discretion vested in the Governor for him to construe that section retroactively so far as the credits allowed convicts for good behavior are concerned.

Statutes—Construction—Convicts.—While section 4144 does not confer an enforceable right on convicts, nevertheless as statutes imposing a penalty should be construed strictly, it is no violation of the executive discretion to construe the penal portion of this section as operating only from the date the amendment of 1916 went into effect.

RICHMOND, VA., August 3, 1916.

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

DEAR SIR:

Acknowledgment is made of letter of your secretary of July 28, 1916, in the following language:

"I am directed by the Governor to ask you for an opinion as to the effect of the amendment made by the General Assembly at its last session, contained in chapter 324 of the Acts of the Assembly, 1916. The point on which the Governor desires information is as to whether or not the deduction of ten days a month for good behavior provided for in said act, takes effect from the time the act went into effect, ninety days after the adjournment of the General Assembly, or whether a prisoner is entitled to the full ten days' credit for good behavior from the beginning of his term."

I have caused considerable investigation to be made in regard to your inquiry, and the matter is not without difficulty of solution, and I am, therefore giving you my conclusion at some length.

The question here involved is occasioned by the amendment of section 4144 of the Code (1904) by act of the General Assembly, approved March 20, 1916. (Acts of 1916, p. 515.)

This section as found in the Code of 1904 provides that the Superintendent of the Penitentiary "shall keep a record of the conduct of each convict and for every month that a convict appears by such record to have faithfully observed the rules and requirements of the prison and not to have been subjected to punishment, there shall, with the consent of the Governor, be deducted from the term of service of such convict four days. Every time any convict is punished the name of the offender, the offense, a full and detailed description of the punishment, the time when the offense was committed, and when punishment inflicted, shall be recorded in a register provided for the purpose."

It is further provided that this register shall be inspected monthly by the board of directors of the Penitentiary and examined and reported upon biennially by a joint committee of the General Assembly.

The section as amended by the act of March 20, 1916 (Acts 1916, p. 515) changes the provisions of section 4144 as found in the Code of 1904 in two very material particulars.

The first change is that in lieu of the four days given for good behavior, the convict on the same terms is to receive ten days.

The second change in the law is more far reaching in its provisions and certainly a most material change in the terms and policy of the original law. The change, to quote from the statute, reads:

" * * * provided, for any violation of prison rules punishable by stripes or for escape or attempted escape from custody, the convict found guilty of such violation or of such escape or attempted escape shall forfeit all good conduct allowance earned by him up to that time * * *"

The opinion of the Attorney General has been requested as to the effect of section 4144, as amended by act of 1916, as to two phases of the amended law, they are:

First: Is the provision of the law extending the number of days allowed for good behavior retroactive in its effect? That is, are convicts, sentenced prior to the taking effect of the act of 1916, to receive an allowance of four days for the months served prior to the taking effect of the act of 1916, and the credit of ten days for each month thereafter, or can they be allowed a credit of ten days for each month of the term served, including those months served before the act of 1916 went into effect?

Second: Is the provision of law, as amended, which works a forfeiture of all the credit theretofore received by a convict upon his violation of certain prison rules, valid when regarded from a retroactive standpoint, or is it valid only when applied as to credits earned subsequent to the taking effect of the amended law?

It is to be observed that section 4144 does not give to convicts the absolute right to be discharged at the expiration of the period of sentence less the credits earned, but only at such time "with the consent of the Governor." Therefore, in its final analysis, section 4144 creates no rights in favor of those for whose

benefit it was apparently enacted, making the release of a prisoner in all cases prior to the completion of the period of his sentence, depend upon executive clemency. Therefore, under the law, regardless of the provisions of section 4144, a convict may be pardoned at any time by the Governor without reference to the provisions of this section. Section 4144 is merely a guide or suggestion to the Governor as to how much of his sentence a convict should be required to serve, leaving the final decision in all cases with the Governor.

That this is so is clearly shown by numerous decisions construing the meaning of the word "consent."

In *Cowen v. Paddock*, 17 N. Y. S. 387, 388, 62 Hun. 622, it was said that the word "consent" implies not merely that the person accedes to, but authorizes an act. "The word 'consent' implies some positive action." *Aull v. Columbia N. & L. R. Co.*, 42 S. C. 431, 20 S. E. 302, 304.

In construing a mechanics lien law providing that mechanics shall have a lien for labor done with the consent of the owner of the property, it was held in *National Wall Paper Co. v. Sirc*, 55 N. Y. S. 1009, 1010, 37 App. Div. 405, that the word "consent" implied that the owner had the power to give or withhold his consent in respect to the construction, alteration or reparation of the building.

While there is a rule of construction by which statutes are presumed to have some effect and are to be so construed, it is impossible to give such a construction to a statute where the words of the act express the legislative intent in words of no uncertain meaning.

I am, therefore, of opinion that it rests wholly within the discretion of the Governor as to whether the provisions of section 4144, as amended by act of 1916, are to be applied retroactively or prospectively only as to both provisions of the act; that under this statute convicts acquire no enforceable rights by which they can compel the giving of credit earned under the act by application to the courts; and, further, that there is no power or limitation to restrain the Governor from so treating the act.

The evident purpose of section 4144 of the Code, as amended, is to guide the Governor in the extension of his general pardoning power in cases which have no special circumstances calling for the exercise of this power, and operates as a suggestion that good conduct should receive a certain amount of consideration and reward, regardless of the lack of mitigating circumstances in the particular case which might otherwise afford no reason for the lessening of the term of imprisonment in the mind of the executive except for this suggestion on the part of the legislature.

This position is fully sustained by the opinion rendered the Governor of Massachusetts by the Supreme Court of that State, reported in 13 Gray 618, 621.

By chapter 284 of the Acts of 1857 the legislature of Massachusetts fixed in section 1 of the act a scale of reduction of the term of convicts to be earned by good behavior which the Supreme Court held in the opinion gave, on being earned, "a right to the promised benefit." Section 2 of the act provided that the record of conduct with the scale of deduction provided in the foregoing section should be submitted once in three months, by the warden, to the Governor and council, "that the same may be considered by them in the exercise of the executive clemency on behalf of each convict, if they shall deem the same conducive to the interests of the prison and promotive of the reformation of the convicts confined therein."

The court said:

"It imposes no duty upon the Governor and council to act in regard to any particular convict, but it is to enable them, with better means of judgment, to exercise the discretionary power of pardoning vested in them by the Constitution, and to be exercised with a view to general interests. The object appears to us to be to hold up to convicts a still further encouragement to good behavior, beyond the promised diminution of sentence, by selecting those for executive clemency, especially from those who are sentenced for long terms, who appear by the record to have conducted themselves uniformly or generally well. The declared object of this provision is to enable the Governor and council to exercise the power of pardon with a view to the interests of the prison and the welfare of the convicts."

In some States there are statutes of this nature under which convicts acquire enforceable rights, and it is in the light of the construction given such statutes that the Governor should be guided in the exercise of the discretion given him under this act.

In re Walsh, 87 Mich. 466, 473, the Supreme Court of Michigan in a well considered opinion laid down the following rules as to the effect of a statute similar to the one here in question, except that under the Michigan statutes convicts were given enforceable rights as to the deduction of time earned by them as a result of good conduct.

"1. That the rules in reference to the forfeiture of good time shall be plain, certain and specific, and known to the inmates of the prison.

"2. That they shall be adopted by the board of inspectors, and be of record.

"3. That each convict's record as to loss of good time, and for what reason he has lost it, shall be made known to him monthly.

"4. That the reports of the infractions of the rules shall be investigated each month at the regular meeting of the inspectors, and passed upon by them, and that a record shall be made of such action, so that the amount of lost time to be deducted from a convict's good time shall not rest upon the computation of the warden's clerk, but may be shown at once from the inspector's records. In justice, also, to the convict who is reported by the officers, who are human and liable to err, he should be given, if he desires, an opportunity to be heard upon such reports."

Speaking of the effect of an enforceable statute of this nature in an opinion, written at the request of the Governor of that State, the Supreme Court of Massachusetts (13 Gray 618, 619) has said:

"The first question is, whether this act gives a right to the convict to have his term of imprisonment reduced and shortened by such a scale; or, in other words, whether these provisions of law bear upon the sentence and shorten the term of imprisonment. We think they do. *They afford an assurance of the highest character that, upon condition of good behavior, the convict shall have the promised benefit of an earlier release* * * *." (Italics ours).

In answer to the second question set out, there can be no doubt as to the invalidity of that portion of the amended act which provides for the cancellation of credits already earned if applied to those credits earned prior to the taking effect of the act of 1916, that is, under an act which provided for credits which gave an enforceable right.

This question was settled *In re Canfield*, 98 Mich. 644. By act of 1877 convicts were given a credit of two months each for the first two years and seventy-five days each for the third and fourth years. By act of 1893 this was

reduced by two days in the first two years and by six days in the third and fourth years. The opinion of the court was expressed in this language:

“* * * The petitioner was convicted and sentenced under an earlier act, with this conditional right to a reduction of time. The effect of the act of 1893 is to deprive him, in part, of that right by impliedly providing that after the new law should take effect his credits should be estimated upon a less favorable schedule than that in force when he was sentenced. To that extent we think the law is *ex post facto*, its effect being to increase, and not to mitigate, petitioner's punishment. It follows that he is entitled to credit upon the basis of the earlier statute. To his case the later act has no application.”

But, as before pointed out, the convict acquires no enforceable right under section 4144, therefore the change made in the amended act is not *ex post facto*. It was probably with such a statute in mind that Denio, J., in *Hartung v. The People*, 22 N. Y. 95, 105, expressed in a dictum the opinion that “any change which should be referable to prison discipline, or penal administration, as its primary object might also be made to take effect upon past as well as future offenses,” as such increase in the punishment “would not raise any question under the constitutional provision” applying to *ex post facto* laws. In no other light could such an expression be sustained.

As to the first question: It is to be observed that “a law, the effect of which is simply to reduce or diminish the punishment with which an act was punishable when committed, cannot be *ex post facto*, because it inflicts no new or additional punishment.” *Shepherd v. The People*, 25 N. Y. 406, 415.

The general rule of construction of statutes is that they are to be applied prospectively. The exception to this rule is that a statute will be applied retroactively when the intention that it shall so operate is expressly declared or the very nature of the case shows that it was intended to have a retroactive action. It is equally well established that the rule that statutes are to be construed as prospective, unless a contrary intention appears from the face of the statute, applies to remedial statutes. *Duval v. Malone*, 14 Gratt. 24. *City of Richmond v. Supervisors of Henrico County*, 83 Va. 204, 212. In the latter case it was held that this general rule applied to amendatory statutes as well as to original acts and the rule as to remedial statutes was again set forth.

However, each of the decisions cited resulted from cases requiring a less broad construction than that required by an act of the nature of section 4144. Speaking of the application of the general rule, above stated, the Supreme Court of Indiana said in *Connecticut Mutual L. Co. v. Talbot*, 113 Ind. 373, 3 Am. St. Rep. 655, 659:

“* * * This is undoubtedly the general rule, and it is sometimes held that, to work an exception, the intent favoring retrospective application must affirmatively appear in the words of the statute. The better rule of construction, and the rule peculiarly applicable to remedial statutes, however, is, that a statute must be construed as to make it effect the evident purpose for which it was enacted, and if the reason of the statute extends to past transactions as well as to those in the future, then it will be so applied, although the statute does not in terms so direct, unless to do so would impair some vested right, or violate some constitutional guarantee.”

People v. Spicer, 99 N. Y. 225;
Larkin v. Saffarans, 15 Fed. Rep. 147;
Excelsior Mfg. Co. v. Keyser, 62 Miss. 155;
Baldwin v. City of Newark, 38 N. J. L. 158;
People v. Clark, 7 N. Y. 385;
Bishop on Written Laws, sec. 84.

This latter rule seems particularly applicable to such statutes as section 4144 where the statute confers an enforceable right. Certainly "the reason of the statute extends to past transactions as well as to those in the future."

My conclusion, therefore, is:

(1) The purpose of this law being to encourage the convicts to good behavior, and its object being humane and a liberal construction of it salutary in its effect upon the unfortunate inmates of the Penitentiary, there would be no abuse of the discretion vested in you to construe the law retroactively so far as the credits allowed convicts for good behavior is concerned, for the more credits allowed the greater the incentive to the convict to observe the rules and regulations of the institution; and

(2) As to that portion of the statute which provides for a forfeiture of all credits earned for good behavior by reason of infraction of the rules, while this provision confers no enforceable right upon the convict, because of the discretion vested in you in the premises, if the terms of the statute did confer such an enforceable right, an interpretation thereof retrospectively would be *ex post facto* and unconstitutional. Therefore, having in mind the fact that all statutes imposing a penalty should be construed strictly, and, where rights are conferred, must be construed prospectively, it would be no violation of your discretion to construe the penal portion of the statute, as aforesaid, as operating only since the amendment in the Acts of 1916 went into effect.

Yours very truly,

LESLIE C. GARNETT,

Assistant Attorney General.

JAILS AND PRISONERS—Penitentiary—Convicts—Section 4144, Code of Va. as amended.—Taking one year's sentence as a basis of computation, if at the end of the two hundred and fortieth day the prisoner has faithfully kept the rules and requirements of the prison, he should, with the consent of the Governor, be discharged.

JAILS AND PRISONERS—Penitentiary—Infraction of prison rules by convicts.—A violation of the provisions of section 4144 of the Code of Va. 1904 as amended causes the prisoner to forfeit all good conduct allowances earned by him up to that time during the whole period of his confinement.

RICHMOND, VA., June 15, 1916.

MAJ. JAMES B. WOOD,

*Superintendent of the Penitentiary,
Richmond, Va.*

DEAR SIR:

Acknowledgment is made of your letter of June 15th asking for my construction of the act of Assembly of 1916, page 551, amending and re-enacting section 4144 of the Code of Va. in relation to giving credit to convicts for good conduct. The provisions of the section are as follows:

"The superintendent shall keep a record of the conduct of each convict, and for every month that a convict appears by such record to have faithfully observed the rules and requirements of the prison and not to have been subjected to punishment there shall, with the consent of the Governor, be deducted from the term of service of such convict ten days; provided, for any violation of prison rules punishable by stripes or for escape or

attempted escape from custody, the convict found guilty of such violation or of such escape or attempted escape shall forfeit all good conduct allowance earned by him up to that time."

The questions upon which you desire my opinion are first, as to how the monthly credit of ten days for good conduct is to be computed; and, second, as to whether or not the proviso that the violation of prison rules punishable by stripes or for escape or attempted escape from custody, which works a forfeiture of good conduct allowance, applies to allowances made during the current year of the prisoner's confinement or all allowance earned by him up to that time?

As to the first proposition, while the law as written would seem to indicate that the convict should serve each month before receiving a ten days' allowance for good conduct, the practical effect of such method of computing his credit allowance for good conduct would be to keep a prisoner sentenced, for example, for one year, confined two hundred and seventy days allowing him a good conduct credit of only ninety days for the year, while if he has faithfully observed the rules and regulations of the prison he should be entitled to ten days a month out of the whole period of his one year's sentence, or one hundred and twenty days. This allowance of one hundred and twenty days would make the period of his confinement end on the two hundred and fortieth day.

My conclusion is that, taking one year's sentence as a basis of computation, if at the end of the two hundred and fortieth day the prisoner has faithfully kept the rules and requirements of the prison, he should, with the consent of the Governor, be discharged. Any other construction of the law than that above-given would make the convict serve that portion of his sentence for which his good conduct had entitled him to credit.

As to the second inquiry in your letter, as above set out, I beg to advise my opinion is that a violation of the provisions of this section causes the prisoner to forfeit all good conduct allowance earned by him up to that time during the whole period of his confinement.

Yours very truly,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

JAILS AND PRISONERS—Section 4144, Code Va. as amended by Acts 1916—*Prisoners delivered into custody of the Superintendent of the Penitentiary.*—Where punishment has been fixed at confinement in the Penitentiary and the court in its discretion in lieu thereof sentences prisoners to the convict road forces, they come within the provision of section 4144, Code Va. as amended by Acts of 1916, and are entitled to the ten days' deduction from their term of service for every month of good behavior.

Same.—Jail prisoners who are sentenced to the road force are not entitled to the benefits of the provisions of this law, and these prisoners get only four days a month for good behavior.

RICHMOND, VA., July 26, 1916.

NELSON SALE, ESQ.,

Attorney-at-Law,

Bedford, Va.

DEAR SIR:

I beg to acknowledge receipt of your letter of the 30th instant, inquiring whether or not the provision of Acts of 1916, giving prisoners in the Penitentiary credit for ten days' time in each month for good behavior, applies to prisoners sentenced for felonies by the circuit courts to work on county roads.

All prisoners delivered into the custody of the Superintendent of the Penitentiary, where punishment has been fixed as confinement in the Penitentiary, and the court, in its discretion, has, in lieu thereof, sentenced prisoners to the convict road force, come within the provisions of section 4144 of the Code, as amended by chapter 324 of Acts of 1916, and are entitled to the ten days' deduction from their term of service for every month of good behavior. The Superintendent of the Penitentiary keeps the same record, as I understand it, of the conduct of each prisoner sentenced to the convict road force for felonies as he does those sentenced to the Penitentiary for felonies. Only jail prisoners, who are sentenced to the road force, are not entitled to the provisions of this new law, and these prisoners get only four days a month for good behavior.

There are no formalities necessary in order to take advantage of this provision of the law. The superintendent keeps a record of each convict and automatically, at the end of his period of confinement, less time credited for good behavior, he is discharged. Any information you may want as to any particular convict will be furnished you by the Superintendent of the Penitentiary.

Yours very truly,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

JAILS AND PRISONERS—*Section 4144, Code Va. 1904, as amended, Acts 1908, page 628, chapter 217, Acts 1910.*—Jail prisoners who are sentenced to the road force do not come within the provisions of section 4144 of the Code as amended by Acts 1916, and these prisoners receive a credit of only four days a month for good behavior.

RICHMOND, VA., July 29, 1916.

NELSON SALE, ESQ.,
Attorney-at-Law,
Bedford, Va.

DEAR SIR:

I beg to acknowledge your letter of July 28th, and to say that when I wrote you on the 26th I did not understand that the punishment of the prisoner to whom you refer was fixed at six months in jail and a fine, but I am forced to the conclusion that the statement in my letter to you that jail prisoners who are sentenced to the road force are not entitled to the provisions of section 4144, as amended in the Acts of 1916, and that these prisoners get only four days a month is correct.

Of course, you will understand that my opinion to you is not given officially for the reason that I am made only the legal adviser of the officers at the seat of government, but as a courtesy to you I am giving you my unofficial opinion in the premises.

The act of March 14, 1908, Acts of 1908, page 628, provides:

"That all persons sentenced by any of the courts of this Commonwealth to work on public roads in lieu of a jail sentence shall be allowed credit for good behavior on their sentences to the same extent and upon the same terms as are now provided for convicts in the Penitentiary."

The most liberal construction that can be given to this provision of the law is that it embodies section 4144 of the Code as specifically as if the terms had been set out in the act, and therefore prisoners sentenced on the public roads in lieu of a jail sentence can still claim the benefits of section 4144 of the Code, although this section has been amended as to convicts in the Penitentiary. However, I desire to call your attention to chapter 217 of the Acts of 1910, Pollard's Supplement 1910, page 913, which provides as follows:

"That all jail prisoners who are worked on the convict road or quarry force of the State shall have, for good behavior during the time they are working on said force, a reduction of four days per month for good behavior from the time for which they were sentenced. And it shall be the duty of the Superintendent of the Penitentiary to keep a record of each jail prisoner while at work on said convict road or quarry force."

It would seem to me that this being the last law on the subject would govern unless there can be some distinction drawn between "prisoners sentenced on the public roads in lieu of jail sentence" and "jail prisoners who are worked on the convict road or quarry force of this State." I can draw no distinction between those prisoners, and from the statement in your letter it would seem that the jury having fixed the prisoner's confinement in jail he at any rate clearly comes within the provisions of chapter 217 of the Acts of 1910. As aforesaid, however, this opinion is not official and inasmuch as any action on the part of your client would have to be approved by the Governor, this office would, of course, be glad to give the Governor an official opinion should he desire it.

Very truly yours,

LESLIE C. GARNETT,

Assistant Attorney General.

JUSTICES OF THE PEACE—*Game laws—Chapter 152, Acts 1916—Justices of the peace—Informers' fees.*—A justice of the peace who issues a warrant for the arrest of an offender and has the case tried by another justice of the peace is not entitled to the tax of \$2.50 or one-half of the fine provided for in chapter 152, Acts 1916.

RICHMOND, VA., *September 29, 1916.*

HON. JOHN S. PARSONS, *Commissioner,*
Department of Game and Inland Fisheries,
Richmond, Va.

DEAR SIR:

Acknowledgment is made of your letter of the 22d instant, enclosing communication from C. T. Osborn, justice of the peace, Hiltons, Va., setting out the fact that he issued a summons for witnesses and found that a certain party was charged with dynamiting fish. Upon this information he issued a warrant for the arrest of the offender, who was tried and convicted before Gardner, justice of the peace. Mr. Osborn makes inquiry as to who is entitled to half the fine and tax fee of \$2.50.

I am of the opinion that under these circumstances neither of the justices of the peace would be entitled to half of the fine or the tax fee. Both of these

officials acted as judicial officers and it is certainly against public policy for such an officer to be interested in the fine which is imposed as a result of his judicial action.

In order for Osborn to be entitled to one-half of the fine he would have to have written his name at the bottom of the warrant as informer, and such a course would have put him in a very anomalous position. To permit justices of the peace to issue warrants for the arrest of offenders and then claim one-half of the fine imposed by conviction under this warrant would be conducive to all manner of fraud.

Very truly yours,

LESLIE C. GARNETT,
Assistant Attorney General.

JUSTICES OF THE PEACE—*Game laws—Chapter 152, Acts 1916, Section 3912.*—A justice of the peace as *ex-officio* game-warden in cases where he has reason to believe that the hunter is violating the law is required to compel such person to exhibit his license.

RICHMOND, VA., September 20, 1916.

HON. JOHN S. PARSONS, *Commissioner,*
Department of Game and Inland Fisheries,
Richmond, Va.

DEAR SIR:

Acknowledgment is made of the letter of J. T. Falls, Esq., addressed to you and which you referred to me for an opinion thereon. Mr. Fall's letter is in the following words:

"A good many justices of the peace claim that under the game law it would not be their duty as *ex-officio* officers to require hunters to show their license or to make an arrest. I would like to have your opinion as to the duties of justices of peace as game *ex-officio* wardens." * * *

Section 18 of chapter 152 of the Acts of 1916 reads as follows:

"All sheriffs, deputy sheriffs, marshals, constables, policemen, members of the Commission of Fisheries, oyster police captains, and oyster police inspectors or other peace officers of this State shall be *ex-officio* game wardens."

It will be observed that by the latter portion of section 15 of the Acts of 1916, it is provided as follows:

"* * * Upon demand of any warden, or other officer, any person found hunting shall exhibit his license, and failure to do so shall be *prima facie* evidence that he is hunting without license."

These sections do not specifically mention a justice of the peace. Such officers, however, by section 3912 of the Code are made conservators of the peace, and I am of the opinion would have a right to compel a person found hunting to exhibit his license as provided for in the above quoted provision of section 15 of chapter 152 of the Acts of 1916.

While I find no express provision of the act which compels a justice of the peace to require a hunter to exhibit his license, the act, as I have said, clearly confers such a right on the justice of the peace and where such right exists I am of the opinion that it imposes a duty upon the officers upon which it is conferred to exercise such right, and, therefore, that in cases where he has reason to believe that the hunter is violating the law a justice of the peace should require such person to exhibit his license.

Yours very truly,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

JUSTICES OF THE PEACE—*Jurisdiction*—Section 96, Code Va. 1904; sections 3956-3958, Code of Va. 1904—Sections 2940, 2942, Code of Va., 1904 as amended—Code Va. 1849, chapter 50, page 595, Code Va. 1866, chapter 150, page 640—Constitution 1869, Article 7, section 2—Code Va., 1873, page 90—Code Va. 1873, chapter 147, section 2—Code Va. 1887, chapter 140—Code Va. 1887, sections 2939, and 2940—*Misdemeanors*.—In trials of misdemeanors the law requires the officer making the arrest to bring the person accused of the misdemeanor before and to return the warrant to the justice in the magisterial district of the county in which the offense was committed, and that the offender shall be tried by a justice of said district unless for good cause shown said justice shall remove it to another district.

Same.—A justice of the peace is authorized to sit in another district than his own when requested by another justice to sit with him, so that while the justice is elected for the district, his functions do not seem to be limited to the district. In criminal cases, however usually the jurisdiction of justices hearing such cases is confined to his own district, but even in such cases one justice may associate other justices with him for the trial of the case. In civil matters a justice has the right to issue a warrant directed to a constable or sheriff of the county, but the warrant must be made returnable within the magisterial district where the defendant or one of the defendants resides, unless the justice, for good cause shown, on oath directs it to be returned to some other place than his district or corporation, and the justice issuing the warrant or such other justices as is designated to try it, is not required to reside in the magisterial district in which the warrant is made returnable. The jurisdiction of a justice for such purposes is co-extensive with his county.

RICHMOND, VA., December 9, 1915.

MR. P. M. JONES,
Shepherds, Va.

MY DEAR MR. JONES:

On account of the many pressing duties of my office, I have not been able to reply before this to your letter of November 17, 1915, with reference to the jurisdiction of a justice of the peace.

The question which you put is whether a justice of the peace, elected for one district, can summon a defendant living in another district to appear before the justice in the district from which the justice was not elected, and can the justice then go out of the district from which he was elected and try the case in the other district.

The answer to this question involves the question of the jurisdiction of justices under the statutes of the State of Virginia, so far as the territorial limits thereof are concerned.

Under section 96, it is provided that in each magisterial district there shall be chosen by the qualified voters thereof three justices of the peace.

When we come to examine the question of the jurisdiction of these justices, we find that, in cases of trial of misdemeanors, the law (sections 3956 and 3958) requires that the officer making the arrest shall bring the person accused of the misdemeanor before, and to return the warrant to, a justice in the magisterial district of the county in which the offense was committed; and that the offender shall be tried by a justice of said district, unless, for good cause shown, said justice shall remove it to another district.

So, also, section 2940 requires that a justice, when applied to by any person, shall issue a warrant directed to the proper officer requiring him to summon the person against whom the claim is to appear before him, or some other justice, on a certain day to answer such claim; and it is further provided that the warrant shall be made returnable to "some place within the magisterial district in which the defendant, or, if there be more than one, either defendant resides, or in which the cause of action arose, unless the justice, for good cause shown on oath, directed to be returned to some other place within his county or corporation."

It is also provided by section 2942, as amended by the Acts of 1914, page 44, that in the trial of all warrants, both civil and criminal, upon application of the defendant, at any time before trial, to the justice of the peace who issued said warrant and before whom it was returnable, said justice of the peace who issued said warrant shall associate with himself two other justices of the county who shall try said warrant.

A justice of the peace is certainly authorized to sit in another district than his own, when requested by another justice to sit with him; so that while a justice is elected for a district, his functions do not seem to be limited to the district.

In criminal matters, usually the jurisdiction of a justice to hear and try cases is confined to his own district; but even in such cases, one justice may associate other justices with him for the trial of the case.

In civil matters a justice certainly has the right to issue a warrant directed to a constable or sheriff of the county, but the warrant must be made returnable to some place within the magisterial district wherein the defendant, or any one of them, resides, or where the cause of action arose. The law is not as explicit here as in the criminal statute, and in order to come to a correct conclusion, it seems necessary to review the history of the jurisdiction of justices of the peace in civil matters in order, if possible, to get some light upon this question.

When the old county court was composed of justices, with a presiding justice, there was in the Code a chapter entitled "Warrants for Small Claims." See Code of Virginia, 1849, chapter 150, page 595. By a perusal of this chapter, it will be seen that it is very similar to our present chapter on the same subject, and it will be apparent from section 2 of said chapter that a justice had jurisdiction to try civil warrants all over the county, and that these warrants were returnable at that time to some place within the *constable's* district in which the defendant resided, unless the justice, for good cause shown on oath, directed it to be returned to some other place within his county or corporation. At that time, justices were not elected by districts, but were appointed from the whole county.

This same chapter was carried into the Code of 1860 as chapter 150, page 640, and the same provision is made as to the return of the warrants. It may be noticed that, by the Constitution of 1851, the county court was composed of not less than three, nor more than five justices, and that each county was laid off into districts, and in each district the voters elected four justices of the peace, who were required to reside in their respective districts, and hold office for the term of four years. When we study the jurisdiction of the justices, not as a county court but as magistrates in warrants for small claims, it becomes apparent that a justice in each case had jurisdiction, not only in his district but to try the warrants anywhere in his county.

By the Constitution of 1869, each county was required to be divided into three "townships;" and it was further provided that in each township there should be elected three justices of the peace. Constitution of 1869, article 7, section 2, Code of 1873, page 90.

It will be remembered that, by the Constitution of 1869, the county court was reorganized, and there was chosen by the legislature a judge to preside thereover, thus separating between the old county court and the justices of the peace. By the Code of 1873, it will be observed that the chapter on warrants for small claims is copied almost intact, and that by this Code a justice has jurisdiction to hear a case anywhere in a county, but that the warrant must be returnable to some place within the constable's district in which the defendant resides, or in which the cause of action arose, unless the justice, for good cause shown on oath, directed it to be returned to some other place within his county or corporation. (Code of 1873, chapter 147, section 2.) Examining the chapter on warrants for small claims in the Code of 1887, chapter 140, we observe that there is no limitation to the power of a justice to hear warrants in other districts than the one for which he was elected. (Code of 1887, sections 2939 and 2940.) On the contrary, a justice had the power, when applied to by any person, to issue a warrant directed to a constable of the magisterial district in which the defendant, or, if there were more than one of them, either defendant resided, or in which the cause of action arose. The warrant was returnable to some place within such district, and required the defendant to appear before the justice who issued the warrant, or some other justice, thus making it clear that a justice was not limited in the hearing of warrants to the magisterial district in which he was elected.

As the history of the law, therefore, shows that up to and including the Code of 1887, justices had authority in civil matters to issue warrants returnable in other districts than their own, summoning the person to appear before him, or some other justice, the inference would seem to be clear that, unless there is an express statutory authority limiting the power of justices in such cases to their own districts the justice of the peace still has authority to summon a defendant to any district in his county, to try him in such district, provided it is the district in which the defendant resides, or the cause of action arose.

Examining the form of section 2940 as it now stands and in the light of the foregoing history, we note that the justice's power is not limited to his own district, but the words of the section are general and authorizes a justice to issue a warrant directed to the constable or sheriff of the county wherein the defendant resides, *requiring him to summon the person against whom the claim is to appear before him, or some other justice, to answer such claim.* The section further provides that it shall be made returnable to some place within the magisterial dis-

trict in which the defendant, or, if there be more than one, either defendant resides, or the cause of action arose, unless the justice, for good cause shown on oath, directs it to be returned to some other place in his county or corporation. Here we notice that any justice may issue a warrant. We note further that the warrant is returnable (1) within the magisterial district in which the defendant, or either of them, resides, or (2) in which the cause of action arose, unless (3) the justice, for good cause shown on oath, directs it to be returned to some other place within his county or corporation. The warrant summons the defendant to answer before the justice who issues the warrant, or some other justice, but the statute does not provide that either the justice who issues the warrant, or the other justice before whom it is made returnable, shall dwell in the magisterial district in which the defendant resides, nor that either one before whom it is made returnable shall be a justice elected from the district in which the defendant resides.

My conclusion, therefore, briefly stated, is that in civil matters a justice of the peace may issue his warrant returnable in any magisterial district of the county, provided, first, the defendant, or either one of them, resides there; or, second, the cause of action arose there; or, third, good cause be shown on oath to the justice for directing it to be so returned there. And when he has made a warrant returnable to a magisterial district in which the justice does not reside, it is perfectly competent for the justice to try such a warrant, his jurisdiction for such purpose being co-extensive with his county.

Very truly yours,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

LICENSES—Section 50, Tax Bill—Peddler's License—Farmers, Exception.—Under section 50 of the tax bill a farmer who without compensation to himself brings to market the products of his neighbors and sells the same for the account of his neighbor, cannot be required to pay a license tax.

Same.—It is the purpose of section 50 of the tax bill to impose a license tax upon those who purchase farm products from the farmer in order that they may market the same at a profit, and there is nothing in this section to justify the conclusion that it was ever intended to subject to the payment of a license tax farmers who in neighborly co-operation and for mutual accommodation only bring each other's products to the markets for sale.

RICHMOND, VA., June 30, 1916.

HON. C. LEE MOORE,

Auditor of Public Accounts,

Richmond, Va.

DEAR SIR:

Acknowledgment is made of your letter of June 1st, informing me that the Commissioner of Agriculture has made of you in the following inquiry:

"I have inquiries from farmers in regard to an act passed by the last legislature (which you will find on page 773 of Acts 1916), desiring to know whether one farmer can bring to market the products of his neighbor and sell them on the market without paying license. In other words, can farmers co-operate with each other in delivering and selling their products when not receiving compensation for doing so?"

and asking my opinion as to the question submitted by Mr. Koiner.

The act above referred to, providing for peddlers' license, contains the following proviso:

"But this section shall not apply to those who sell or offer for sale in person *or by their employees*, ice, wood, meats, 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.*"

Under the act referred to I am of the opinion that a farmer who, without compensation to himself, brings to market the products of his neighbor and sells the same, for the account of his neighbor, cannot be required to pay a license tax.

It is plain from the language of the provision quoted, and from its context, that the purpose was to impose a license tax upon those who purchase farm products from the farmer in order that they may peddle the same at a profit, and there is nothing in the act to justify the conclusion that it was ever intended to subject to the payment of a license tax farmers who, in neighborly co-operation, and for mutual accommodation only, bring each others products to the markets for sale.

Yours very truly,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

LICENSES—*Taxation—License Taxes—Book Agents—Sections 56 and 57, Va. Tax Bill—Interstate Commerce.*—While the provisions of sections 56 and 57 of the Virginia Tax Bill in terms cover sales made by sample in this State for a non-resident publishing company through an agent, so far as they apply to publishing houses not resident in the State of Virginia, they are in conflict with the interstate commerce clause of the United States Constitution; therefore, to levy a license tax upon the representatives of such a company as book agents would be in violation of the interstate commerce clause of the Constitution of the United States.

Same—Interstate Commerce.—Wherever there is an interstate movement of goods subject to and consequent upon a valid contract in relation to such goods, State or municipal taxation of their sale is in violation of the interstate commerce clause of the Federal Constitution.

RICHMOND, VA., *May 17, 1916.*

HON. C. LEE MOORE,

Auditor of Public Accounts,

Richmond, Va.

DEAR SIR:

Acknowledgment is made of your request of today for an opinion as to the validity of sections 56 and 57 of the Virginia tax laws of 1916, with regard to license on book agents as applied to non-resident publishers. Enclosed with your letter is a communication from the Compton-Johnson Company, of Chicago, Ill., requesting a ruling as to the liability of their representatives, in any city, town or county of the State of Virginia, to a license as imposed under these sections. In this letter they state:

"Our business is that of publishers of high-grade educational books, which we market on a subscription plan, taking all orders from a prospectus of the book which is to be delivered later. The prospectus is not a full-copy

of the book, but is composed of sample sheets, and we guarantee that the book we deliver will be equal to the prospectus shown by our representatives. Attached to this letter you will please find a copy of the subscriber's order and subscriber's guarantee."

Sections 56 and 57 of the Virginia license tax laws, 1916, in terms cover this class of sales, but, from an examination of the law, I am constrained to say that, in so far as the sections apply to publishing houses not resident in the State of Virginia, they are in conflict with the interstate commerce clause of the United States Constitution. There are a number of cases decided by the Supreme Court of the United States which are in point, but it is perhaps sufficient to cite only one or two. The leading case is that of *Robbins v. Shelby County Taxing District*, 120 U. S. 489. In this case, Robbins was engaged in the city of Memphis, in the State of Tennessee, as a drummer soliciting the sale of goods for his firm, who were dealers in stationery in Cincinnati, Ohio. A statute of Tennessee required all drummers, not having a regularly licensed place of business in the taxing district, to pay the sum of ten dollars a week, or twenty-five dollars a month, for the privilege of offering goods for sale by sample. He was arrested for doing business without a license, and upon conviction, approved by the Supreme Court of Tennessee, an appeal was taken to the Supreme Court of the United States. That court held the statute unconstitutional and declared the negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce. A New Orleans merchant cannot be taxed there for ordering goods from London or New York, because in the one case it is an act of foreign, and in the other of interstate commerce, both of which are subject to regulation by Congress alone. This case was approved in *Brennan v. Titusville*, 153 U. S. 289, where Brennan sent orders for pictures and frames to Chicago, and subsequent to said orders, and, in consequence thereof, the goods were shipped from Chicago to Pennsylvania directly to the purchaser.

From these and other cases, the principle is deduced that where there is an interstate movement of goods subsequent to, and consequent upon, a valid contract in relation to such goods, State or municipal taxation of their sale is invalid.

Accordingly, therefore, I am of opinion that, to levy a license tax upon the representatives of the Compton-Johnson Company, of Chicago, as book agents would be to violate the interstate commerce clause of the Constitution of the United States.

Very truly yours,

LESLIE C. GARNETT,
Assistant Attorney General.

LICENSES—Taxation—License Taxes—Mercantile Agencies—Section 85 of the Virginia Tax Bill—Insurance Reports.—A company which is engaged in the business of reporting to insurance companies the gross worth and an estimate of the gross income of applicants for insurance, is not included within the meaning of the provisions of section 85 of the Virginia Tax Bill. The words "and others" as used in that section should be construed as being limited to persons, firms or corporations engaged in reporting the financial standing of merchants or persons of the same class.

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

RICHMOND, VA., May 25, 1916.

DEAR SIR:

Acknowledging your letter of the 25th instant, asking a construction of section 85 of the tax laws, which is as follows:

"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,"

with regard to the Retail Credit Company, Inc., 1208 Mutual Building, Richmond, Va., which is engaged in the business of reporting to insurance companies the gross worth and an estimate of the gross income of applicants for insurance, I beg to say that while the insertion of the term "and others" in the above section might seem to include any person, firm or corporation engaged in reporting the financial standing of applicants for life insurance, I am inclined to the opinion that the better construction would be that this term means, as suggested in the letter of the attorneys for this company in Atlanta, Ga., to limit the term to others of the same class as merchants. This opinion is confirmed by the use of the term "mercantile agencies" which would import, I think, an idea that the reports to be made were to be used for mercantile purposes.

Herewith I return the correspondence as per your request.

Very truly yours,

LESLIE C. GARNETT,

Assistant Attorney General.

LICENSES — *Taxation — License Taxes — Undertaker's License — Merchant's License*—Sections 87-88 and Section 45, Virginia Tax Bill.—A person who is licensed as an undertaker has no right to sell coffins, caskets, shrouds and other funeral supplies to be used by others in burying the dead, without a merchant's license.

Same.—Section 87 of the Virginia Tax Bill does not require an undertaker's license of any person who is merely engaged in buying and selling coffins and caskets and other funeral supplies.

RICHMOND, VA., May 25, 1916.

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

DEAR SIR:

Acknowledgment is made of your letter of today, asking a construction of sections 87 and 88, Tax Laws 1916, defining the business of an undertaker and imposing a State license tax for the conduct of that business, in the following language:

"Has a person, firm or corporation, licensed under this section, the right to sell coffins, caskets, shrouds and other funeral supplies to be used by others in burying the dead, or is a merchant's license required of a licensed undertaker to sell those supplies when he does not bury the dead for whom those supplies are procured?"

"Would any person, firm or corporation, not engaged in burying the dead, but who sells coffins, caskets and supplies, be required to take out undertaker's licenses provided for in section 87, or could he, under a merchant's license, sell those supplies?"

Section 87 is as follows:

"Any person, firm or corporation engaged in the business of burying the dead shall be deemed an undertaker. Any person, firm, or corporation engaged in such business without a license shall pay a fine of not less than ten dollars nor more than twenty-five dollars."

In response, therefore, to your first question, I beg to say that no person who is licensed as an undertaker has a right to sell coffins, caskets, shrouds and other funeral supplies to be used by others in burying the dead without a merchant's license. If this were not true, an undertaker in the city of Richmond, upon the payment of the \$50.00 license, might conduct a large mercantile establishment, buying and selling thousands of dollars worth of coffins, caskets and other funeral supplies, without paying any other license to the State of Virginia, which, of course, cannot be maintained.

In response to your second inquiry, I beg to advise that section 87 does not require an undertaker's license of any person who is merely engaged in buying and selling coffins, caskets and other funeral supplies.

Very truly yours,

LESLIE C. GARNETT,

Assistant Attorney General.

LICENSES—Taxation—License Tax—Peddlers—Merchant's Tax.—If a non-resident baking company desiring to do business in the State of Virginia domesticates under the corporation laws of that State, it will be required to take out a merchant's license at each place of business based upon its purchases, and this license will also be based upon the value of cakes manufactured by the company elsewhere and disposed of through its branch houses here. In such a case its merchant's tax will be based upon its purchases, which will obviate whether or not the articles manufactured by it out of the State and disposed of through its branch houses in the State should be considered as purchases.

Same.—If such a company domesticates under the corporation laws of the State of Virginia and proceeds to sell and deliver to the trade and only having a local place of business, it will not be required to take out a peddler's license.

Same—Section 50, Virginia Tax Bill.—If this company sells to dealers and to customers at places other than its regular place of business under section 50 of the Virginia Tax Bill, the goods manufactured by such company comes within the provisions of family supplies of a perishable nature not grown or produced by it and the peddler's license under these circumstances required of the company would be \$25.00 per wagon.

RICHMOND, VA., *July 19, 1916.*

HON. C. LEE MOORE,

Auditor of Public Accounts,

Richmond, Va.

DEAR SIR:

Acknowledgment is made of your letter of even date, referring to this office the letter of George Bryan, Esq., counsel for the Ward Baking Company, which is in the following terms:

"My client, the Ward Baking Company of New York and Baltimore, desires to do a business in this city of selling cake which it bakes, and to that end is asking for information as to the amount of State licenses or other taxes to which it would be liable. It is the purpose of this company

either to domesticate under the corporation laws of the State of Virginia or to form a subsidiary Virginia corporation. The business which the company will undertake to do is to drum the city of Richmond and other cities for trade, and to sell and deliver from its wagons to trade only the cake which it bakes. The company desires specific information as to whether or not it comes within the peddlers' law and upon what basis it is taxed."

You desire to be advised as to what taxes under the circumstances set out in the letter of Mr. Bryan will be required of this company.

If this company domesticates under the corporation laws of the State of Virginia, it would be on a par with Armour & Company and other corporations of like character, and will be required to take out a merchant's license at each place of business based upon its purchases. Under the decision in the Armour case this license will also be based upon the value of the cakes baked or manufactured by the company elsewhere and disposed of through its branch houses here.

If the company forms a Virginia corporation, of course its merchant's tax will be based upon its purchases, which will obviate any question of whether or not the cakes baked or manufactured by it out of the State and disposed of through its branch houses in the State should be considered as purchases.

It is my opinion that when this company organizes or domesticates as aforesaid and proceeds to sell and deliver to the trade only, it having a regular place of business, will not be required to take out a peddler's license. Under such circumstances this company will be in exactly a similar position to the Standard Oil Company, as to which it has been held that this company having a regular place of business can sell and deliver to the trade only, this method being an established feature of the business. Your decision in the Standard Oil case was arrived at upon the written opinion of Christopher B. Garnett, Esq., executive assistant of the Tax Board.

For your information, if this company proposed to sell and concurrently deliver to the consumer at places other than at its regular place of business, it is my opinion that under section 51 of the tax laws the cakes baked or manufactured by this company come within the provision of family supplies of a perishable nature, not grown or produced by it, and that the peddler's license under these circumstances required of this company would be \$25.00 per wagon.

Very truly yours,

LESLIE C. GARNETT,

Assistant Attorney General.

LICENSES—Virginia Tax Bill—Section 128 as amended, Acts 1916—Licenses—Labor Agents.—A labor agent's license cannot be required of a corporation employing a large number of laborers, who sends one of its agents out over the State to employ labor for itself.

RICHMOND, VA., May 6, 1916.

HON. JAMES B. DOHERTY,
Bureau of Labor and Industrial Statistics,
Richmond, Va.

DEAR SIR:

I am in receipt of yours of the 2d instant in which you ask if a corporation employing a large number of laborers can send one of its agents out over the State to employ labor for itself without taking out a labor agent's license?

In answer to this question, would state that I am of the opinion that no such license can be required. By reference to section 128 of the Tax Bill, as amended by Acts 1916, page 880, you will observe that a labor agent, within the meaning of the license laws, is defined as follows: "Any person who solicits, hires or contracts with laborers, male or female, to be employed by persons other than himself, and every agent of such person, except as provided in the next following section, shall be deemed to be a labor agent, and no person shall engage in such business without having first obtained a license therefor." This section, while in substantially the same form and language, was construed by the Court of Appeals in *Watt's Case*, 106 Va. 851. There it was held that an agent who in good faith employs laborers for his principal (whether a corporation or natural person) is not a labor agent within the meaning of the revenue laws of this State declaring "any person who hires or contracts with laborers, male or female, to be employed by persons other than himself, shall be deemed to be a labor agent," and requiring a license therefor. The only difference between the law as it then stood and the law as above quoted, is the insertion of the words "and every agent of such person." That this would probably make no difference in the decision of the Court of Appeals is clear from the following language used in the above cited case:

"Indeed, it would seem clear that nothing more can be predicated of the transaction than that it constituted a hiring of laborers by the Construction Company, the principal, through the medium of its own agent, for the lawful prosecution of its business. The case is controlled by the maxim, "*Qui facit per alium, facit per se*" (Broom's Max. 818), a failure to observe which, in such case, would impose impossible restrictions upon corporations and natural persons throughout the Commonwealth, whose businesses necessitate the employment of large numbers of laborers. Corporations must of necessity act through agents, and it is wholly impracticable for individuals engaged in large affairs personally to hire laborers to carry on their work. If the doctrine contended for were maintained, contractors and others of that class would be compelled either to rely on labor agents to secure necessary labor or else go out of business. It cannot be inferred that the legislature, if within its competency, intended to place such unreasonable limitations upon these essential factors in the internal improvement of the State. The purpose of the statute is to reach a class of persons, who, for compensation, conduct the business of employing laborers for other persons, with respect to whom they bear no other contractual relation, but it can have no application to a principal (whether a corporation or natural person), who, in good faith, employs such laborers for his own service by means of his own employee. In such case, under the maxim referred to, the acts of the agent are the acts of the principal."

You will, therefore, see that the question you ask is one already settled in the State by judicial construction.

Yours very truly,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

LICENSES—Taxation—Licenses—Land Agents—Real Estate Brokers—Persons Who Negotiate Loans on Real Estate Security—Virginia Tax Bill, Sections 54, 55, 75 and 77.—Since the amendment of 1915 to section 77 of the Virginia Tax Bill, it is unnecessary for a person who has a land agent's license to take out any additional license to negotiate loans on real estate security.

Same.—However, the license to the land agent authorized by sections 54 and 55 of the Virginia Tax Bill on which terms they can negotiate loans on real estate securities, does not authorize them to carry on this business other than within the district of the commissioner of revenue granting the license, as provided for by section 549 of the Code.

RICHMOND, VA., *October 17, 1916.*

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

DEAR SIR:

Acknowledgment is made of your letter to the Attorney General of October 14th, inquiring whether under sections 54, 55 and 77 of the Tax Bill a person who has a license as land agent is authorized to negotiate loans on real estate, calling my attention to the fact that section 75 of the tax laws, relating to stock brokers' license, provides that a person who negotiates loans on real estate security, except an attorney at law, shall be deemed a stockbroker.

Section 75, which relates to stockbrokers' license, where the only exception is that of licensed attorneys at law, has been in the Tax Bill in this form for many years, while section 77, which relates to a license of a private banker, was amended by an act approved March 19, 1915, so as to except licensed attorneys at law and land agents who negotiate loans upon real estate security, from the provisions of this section. Therefore, until the change effected in section 77 by the Acts of 1915, land agents who negotiated loans upon real estate security were required to take out a license as a private banker, the minimum license for which was \$50.00. It was not then necessary for land agents to take out a stockbroker's license, so that there was no necessity when the legislature desired to exempt land agents from private bankers' license to also amend section 75 so as to exempt them from stockbrokers' license.

My opinion is, therefore, that since the amendment of 1915 to section 77, it is unnecessary for a person who has a land agent's license to take out any additional license to negotiate loans on real estate security. Any other interpretation would make the exemption contained in section 77 instead of being a benefit to the land agent, work a hardship upon him by compelling him to pay a \$200.00 license required of a stockbroker.

However, it must be understood that the license to the land agent authorized by sections 54 and 55, on which terms they can negotiate loans on real estate securities, does not authorize them to carry on this business other than within the district of the commissioner of revenue granting the license as provided by section 549 of the Code.

Very truly yours,

LESLIE C. GARNETT,
Assistant Attorney General.

LICENSES—*Taxation—Peddlers—Section 50, Virginia Tax Bill.*—Section 50, Virginia Tax Bill, extends the common law acceptance of a peddler as one who sells and then and there delivers to one who without a regular place of business exposes for sale goods, wares and merchandise. In order for a person who offers

for sale goods, wares and merchandise to escape the peddler's license, he must have a regular place of business. The Virginia statute goes so far as not to require concurrent sale and delivery, but only an offer for sale with ability to then and there deliver.

Same.—The license tax imposed by section 50, Virginia Tax Bill, is not a specific property tax, but a tax for the privilege of doing a certain class of business.

Same—Construction.—While courts will construe tax laws strictly against the Commonwealth, it is the duty of the Auditor and of the Attorney General to construe them in favor of the Commonwealth.

Same—Hucksters—Dealers in Family Supplies.—A huckster who buys family supplies in the country and retails them from store to store in the city is, a peddler within the meaning of the Virginia tax law unless coming within some exemption therein.

Same—Exception.—Section 50, Virginia Tax Bill, exempts family supplies of a perishable nature grown or produced by the party selling them in person or by his employees.

Same—Persons Who Sell Farm Produce, Not Grown by Them, on Commission.—The exemption of section 50 of the Virginia Tax Bill is limited to persons who produce the goods or their employees, and the term "employee" as used in this law does not embrace a man who sells on commission; therefore, a man who sells farm produce on commission is a factor, broker, or agent and not an employee, and, therefore, is a peddler within the meaning of the provisions of section 50, Virginia Tax Bill.

Same—Words and Phrases—"Employee."—The word "employee" as used in section 50, Virginia Tax Bill, includes a special as well as a regular employee, if the employment be *bona fide*, provided the person doing the actual selling is not an agent.

Same.—It would seem under section 50, Virginia Tax Bill, that more than one farmer or producer may employ the same man to sell his goods, provided it be a *bona fide* employment.

Same—Bakers.—If a baker concurrently sells and delivers from his wagon to customers and concurrently receives payment therefor, he is a peddler within the meaning of section 50, Virginia Tax Bill.

RICHMOND, VA., July 13, 1916.

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

DEAR SIR:

Acknowledgment is made of your request for an opinion embracing various questions arising under section 50 of the Virginia tax laws as to licenses for peddlers. This office has recently given you opinions upon these propositions as they have arisen, but in accordance with your request of today will endeavor to embody these opinions in a general letter embracing questions which have already been passed upon and others which have arisen but which have not yet been decided.

1. The first question is who is a peddler. In answering this question very little assistance will be afforded by the decided cases. There are innumerable

cases in the books deciding who is a peddler under various statutes of the States of the Union, and as these statutes are varied more or less it is not safe to look to those decisions for a guide.

The specific question which you have presented to this office is whether or not a man living in the country who buys eggs, butter, chickens, and calves, and brings such produce to the city of Richmond, and sells them only to duly licensed merchants, is a peddler within the meaning of this section? In the case put by you no sales are made to the consumer but are made only to merchants.

It is well known that many hucksters go through the country and buy up farm produce as above enumerated and bring it by wagon to the city and carry it from dealer to dealer offering for sale, selling and delivering it until the supply is exhausted,

The statute provides as follows:

(1) "Any person who shall carry from place to place any goods, wares, or merchandise, and offer to sell or barter the same, or actually sell or barter the same, shall be deemed to be a peddler."

(2) "All persons who do not keep a regular place of business (whether it be in a house or a vacant lot, or elsewhere) open at all times at regular business hours, and at the same place, who shall offer for sale goods, wares, and merchandise, shall be deemed peddlers under this act."

This section of the tax law was under consideration by the Supreme Court of Appeals of Virginia in the case of *Kloss v. Commonwealth*, 103 Va. 864. In this case the facts are as follows: Kloss was a manufacturer of brooms in Manchester and sent his agent to Fredericksburg and shipped him there a large quantity of brooms which were deposited in the depot. The agent took samples of these brooms and drummed the city selling by dozen lots or more to the trade only, and after obtaining orders went back to the depot, shaped up his brooms and made delivery. The court said this method of selling was an established feature of the business of broom manufacture; that the plaintiff was merely the salesman of the manufacturer who had a regular place of business and that it was immaterial whether in a sale by sample the goods were subsequently delivered by the agent or shipped from the factory. However, the facts in the case were that he sold to the trade only and never in less than dozen lots. This fact appears from the opinion of the court. In the petition filed in the Supreme Court by counsel for Kloss, it was first contended as follows:

"The test of peddling, as already seen, is concurrent sale and delivery. All else is non-essential. A man may sell by wholesale and to the trade exclusively and not peddle, provided only he carries with him his stock and from it concurrently sells and delivers. Section 50."

It was contended by Attorney General Anderson, in his brief, as follows:

"The fact that he sold in packages of one dozen, and to merchants, has no bearing on the case as will be seen from a careful reading of said section 50 of the tax laws."

Counsel for Kloss, in his reply brief in insisting that the case was not within the spirit of the peddling act, said:

"His sales were to trade exclusively; therefore, no private homes were invaded, nor private citizens annoyed. They would be wholesale exclusively; therefore, the local merchant was not prejudiced. Many authorities hold that sales to the trade or by wholesale do not constitute peddling. See 15

Am. and Eng. Encyl. L. 291, 293; 1 Bish. Stat. Crs. Sec. 1074; *St. Paul v. Briggs*, 89 Am. St. R. 554; *State v. Fetterer*, 65 Conn. 287; *Commonwealth v. Ober*, 12 Cush., 493; *Stamford v. Fisher*, 140 N. Y. 187; *Standard Oil Co. v. Commonwealth*, 21 Ky. L. Rep. 1339."

The question, therefore, was squarely put to the court in this case to decide whether or not the fact that the sales were exclusively to the trade robbed the offense of its character of peddling. The court held that the plaintiff was not guilty of peddling because he was a salesman of the manufacturer selling by sample. If, however, the court had concurred in the contention that a sale to the trade exclusively was not peddling, it is fair to assume that they would have given this as an additional reason why the case should be reversed.

The cases above referred to in the brief of counsel for Kloss are among a number of cases decided by the various courts upon the question of who is a peddler.

In the case of *St. Paul v. Briggs*, 89 Am. St. Rep. 554, the court was called upon to pass upon the validity of an ordinance of the city of St. Paul, which provides that:

"Every person who should sell or offer for sale goods, wares, etc., at any point or place within the city of St. Paul, other than upon land owned or leased by said person, or at a store kept by him or at a stand at one of the public markets, should be known as a peddler."

The court held this ordinance void because the city council was not at liberty "to adopt such definitions as it may choose without regard to the ordinary meaning of the words." The court said that according to the Amr. Law. Reg. 569, there are four elements to constitute a peddler (1) no fixed place of dealing, (2) that he should carry with him the wares he offers, and not samples, (3) that he should sell at the time he offers them and not contract for a future sale, and (4) an immediate delivery, not merely contract for future delivery. To these elements, the court added (5) sales should be made to consumers and not confined exclusively to dealers. It will be observed from this decision that the ordinance which the court held to be void because the council did not have authority under the statute, to change the ordinary meaning of the word "peddler," is almost in the terms of the Virginia statute as above set out. The defendant in the Minnesota case was an employee of a Minneapolis firm who made periodical trips to St. Paul with a wagon load of shoemakers' supplies and sold them to shoemakers and dealers in St. Paul. The court did not for a moment consider that the defendant had not violated the city ordinance in so far as selling to the trade exclusively was concerned but held that the ordinance itself was void. It cannot be contended that the Virginia statute is void, or that the Virginia legislature did not have full power to alter the common law definition of a peddler.

The case of *State v. Fetterer*, *supra*, was another case where the defendant as agent for a wholesaler supplied the retail stores in wholesale lot so as to enable them to serve their customers. He solicited orders, and, if he could, filled them from the stock in his wagon, which the court held put him in no different position than had he delivered no goods which had not been bespoke, and that the act was one done in the natural course of wholesale trade with country merchants. The court, however, in a dictum says:

"A peddler usurps the place of a retail dealer and comes between him and the consumer who might otherwise be his customer."

It does not seem unfair to assume that the legislature intended by extending the definition of a peddler by statute not only to protect the retail dealer but to protect the commission merchant, and, therefore, made a regular place of business the test of whether or not a person was a merchant or a peddler.

The case of *Commonwealth v. Ober, supra*, was another case where the defendant delivered goods to traders in the country made by his principals in Boston which had been previously ordered by the traders, and also at times delivered a larger quantity of the same goods than had been previously ordered. The court held that the defendant was a carrier delivering goods to persons who had previously ordered them and who when the goods were brought desired to enlarge their orders upon the same terms in all respects as to price and credit. The court said:

"It was in fact a purchase of the same buyer from the same seller of the same commodity of a larger amount than previously ordered. It wants the essential characteristics of carrying about for sale, offering them to purchasers, fixing the prices and terms of sale or receiving payment, and, therefore, these acts were not within the prohibition of the statute."

The specific case presented by you for our consideration has all of the essential characteristics which the court in the Massachusetts case said that that case lacked, to-wit: (a) carrying about for sale, (b) offering to purchasers, (c) fixing the prices and terms of sale, (d) receiving payment.

The case of *Stamford v. Fisher, supra*, was another case where the defendant had a place of business in a neighboring town and transacted business in Stamford by soliciting orders, and subsequently delivering pursuant to such orders groceries for family use. In holding that such a business was not peddling, the court said:

"The dominant idea involved in such an occupation seems to be that the individual carries his stock in trade consisting of small wares, on foot or in a vehicle, about the country offering them for sale and then and there selling them."

The statute under consideration extends the common law acceptance of a peddler as one who sells and then and there delivers to one who without a regular place of business offers for sale goods, wares and merchandise. The dominant idea in the Virginia statute seems to be that in order for a person who offers for sale goods, wares and merchandise to escape a peddler's license he must have a regular place of business. In other words, the Virginia statute goes so far as not to require concurrent sale and delivery, but only an offer for sale with ability to then and there deliver.

The Kentucky case of *Standard Oil Co. v. Commonwealth, supra*, was another case where the defendant was delivering oil from his tanks to retail merchants, taxes having been paid on the tanks and oil at the place where they were situated. At times the oil would be delivered upon orders and sometimes more than was ordered would be delivered, and sometimes merchants would pay the driver at the time of the delivery, and at other times afterwards. The statute involved is as follows:

"All itinerant person vending any other thing, not hereinafter specially exempt shall be deemed peddlers."

The court having held that this was in the nature of a sale by sample and that it was not necessary for the agent, when first arranging for regular trips and regular delivery of oil, to carry samples of oils, said:

"We think that the statute means to sell to the public for the purpose of consumption by it rather than sales to a merchant for purposes of resale."

And further says that when sales are made to the retail merchants who pay their taxes, the reason for the imposition of a tax or license ceases, and that where the reason ceases, the law should also cease.

If the license tax were a specific property tax this reasoning might be regarded as conclusive. It is not a specific property tax, but a tax for the privilege of doing a certain class of business. The merchant with a fixed place of business, whether he be a retail, wholesale or commission merchant, is required to pay a license tax, and the object of the peddlers' license law is to provide that a person who has no regular place of business and yet regularly engages in selling or offering for sale from his wagon goods, wares, and merchandise, shall so far as the law is concerned be on the same footing as merchants having a regular place of business whether wholesale, retail, or commission.

It would extend this opinion beyond reason to further analyze these cases and a number of other cases defining who are peddlers under various statutes. While the Kentucky case and the Minnesota case, above, hold that in addition to the four elements usually present to constitute peddling, it must appear that the sales were made to consumers and not to retail dealers. These statements of the law in those two cases do not seem to have been necessary for the decision of the case, and even if they were, in each instance the question of who is a peddler depended entirely upon the usual definition and not upon the statute. Indeed, the ordinance of the city of St. Paul in the Minnesota case was, as has been said, almost in the terms of the Virginia statute, and the court held the ordinance void because the council did not have authority to change the usual definition of the term "peddler." Unquestionably the Virginia statute was designated to enlarge the usual definition of the term "peddler" so as to include all persons who without a regular place of business engage in the business of offering for sale goods, wares, and merchandise.

There have been no direct decisions on the question whether a huckster who buys produce in the country and carries the same by wagon from merchant to merchant in the city and concurrently sells and delivers the same is a peddler, and it may be that the courts will say that the legislature of Virginia intended by the use of the language "all persons who do not keep a regular place of business who shall offer for sale goods, etc., shall be deemed peddlers," to confine this term only to those persons without a regular place of business who offer for sale goods to the consumer, but in my judgment this is too liberal an interpretation of this statute. Such an interpretation, if carried to its furthest extent, would permit these hucksters to sell to restaurants, hotels, and boarding houses in competition with the retail merchant or the commission merchant as the case may be, for it cannot be contended that the proprietor of a restaurant or a hotel or a boarding house is any more of a consumer than the proprietor of a fruit stand, in the market or retail grocer. Of course, I recognize that the courts will construe these statutes strictly against the Commonwealth, but it is your duty and mine to construe them in favor of the Commonwealth, and hence I adhere to the

opinion heretofore given you that the huckster who buys family supplies in the country and retails them from store to store in the city is a peddler within the meaning of the Virginia tax law, unless coming within some exemption therein.

The only exemption is in the following provision:

"But this section shall not apply to those who sell or offer for sale in person or by their employees, ice, wood, meats, 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."

This proviso exempts family supplies of a perishable nature grown or produced by the party selling them in person or by their employees.

2. You also desire to know as to whether under the above-mentioned exemption a man who brings produce of farmers to town and sells the same on commission is required to take out a peddler's license. This exemption is limited to the persons who produce the goods or their employees. The term "employee" as used in this law, in my mind, does not embrace a man who sells on commission. A man who sells on commission is a factor, broker, or agent and not an employee, and I, therefore, think that where a man makes a business of gathering up from various farmers in the country country produce and brings the same to town and sells and delivers it at a profit by sale on commission or by buying outright and selling at a higher price he is a peddler within the meaning of the law and does not come within the exemption of an employee of a producer.

3. You also desire to know as to whether or not the term "employee" means a regular employee or a man casually employed for the purpose. I am of opinion that it is immaterial whether the produce of the grower is sent to town by him for sale by a regular employee or by a man specially employed for that purpose, if it is a *bona fide* employment and if the person doing the actual selling is not an agent. The usual definition of an employee is one who works for wages or a salary, and while some of the authorities hold that it implies regular and continued service, taking in consideration the fact that labor is not stable in Virginia it would seem to be a harsh construction to say that a man employed for a day on the farm of a producer could not bring the farmer's produce to town and sell it without a license. The same sentence in the act which exempts those who sell or offer for sale in person or by their employees family supplies of a perishable nature grown by them also provides that all persons who keep a regular place of business open at all times who shall elsewhere than at such regular place of business personally or through their agents sell goods, wares, or merchandise, shall be deemed peddlers. The use of the term "employees" in this sentence, therefore, in contradistinction from the word "agents," very strongly negatives the idea that any person can upon commission sell farmer's produce from place to place without a peddler's license.

Another question upon which you desire an opinion is as to whether farmers can co-operate with each other in selling and delivering their products by employing the same man to sell for them without being required to take out a license to sell and deliver. The requirement is that it shall be a *bona fide* employment and not an agency, and the law further contemplates, of course, that the produce offered for sale shall not have been purchased by the seller for sale but shall have been grown or produced by him or by his employer.

It is also clear that a merchant in town who fills his wagon up with goods, wares, and merchandise, and sends it into the country and there exchanges it for country produce or for cash is a peddler within the meaning of this act, and that nothing in the peddlers' law prohibits a merchant from sending his wagon into the country and buying up country produce and selling it through his store under his merchant's license.

The last inquiry presented by you is whether or not a baker in the city can send his wagon around town and sell bread from his wagon to parties not regular customers without taking out a peddler's license. I think this is covered by that provision of section 50 of the tax laws which provides:

"All persons who keep a regular place of business, open at all times in regular business hours and at the same place, and who shall elsewhere than at such regular place of business personally, or through their agents, offer for sale or sell, and at the time of such offering for sale, deliver goods, wares and merchandise, shall also be deemed peddlers as above."

If, therefore, a baker concurrently sells and delivers from his wagon bread to consumers and concurrently receives payment therefor, it is my opinion that he is a peddler within the meaning of the above provision and should be required to take out a license as such.

Yours very truly,

LESLIE C. GARNETT,
Assistant Attorney General. •

LUNATICS—*Virginia Home and Industrial School for Girls.*—A commission held with reference to having inmates lawfully committed to the Virginia Home and Industrial School for Girls, suspected of being feeble-minded, committed to the State Colony for the Epileptic or Feeble-minded, should be held in Chesterfield county, and the expenses of the same should be borne by that county. The commission should be composed of a judge or justice and two reputable physicians.

RICHMOND, VA., *April 14, 1916.*

REV. J. J. SCHERER, JR.,

*Secretary Board of Virginia Home and Industrial School for Girls,
Richmond, Va.*

DEAR SIR:

I have your letter of April 7th, in which you state that there are four inmates of your institution who are suspected of being feeble-minded and you desire to have them examined by a commission with reference to having them committed to the State Colony for the Epileptic and Feeble-minded. You ask me to advise you where and by whom a commission should be held, and who should bear the expenses of the commission?

The Virginia Home and Industrial School for Girls is, in pursuance of statute, located in the county of Chesterfield, Va.; and, I assume that the inmates to whom you refer were lawfully committed to that institution and do there now reside. This being the case the commission should be held in Chesterfield county, and the expense of the same should be borne by that county. The commission should be composed of a judge or justice and two licensed and reputable physicians. I am quoting the statute bearing on the subject, underscoring the provisions to which your special attention is called.

Section 4 of Acts 1912, chapter 196, supplement 1912, page 318, An Act to establish the Virginia Colony for the Feeble-minded, provides, as far as here material, as follows:

"Upon the written complaint or information of any respectable citizen that any person in his county or corporation is suspected of being feeble-minded and in need of institutional care and custody, the said judge or justice shall issue his warrant ordering the alleged feeble-minded person to be brought before him, and he shall summon two licensed and reputable physicians, one of whom shall, when practicable be the physician of the suspected person and neither of whom shall in any manner be related to such person or have an interest in his or her estate. The judge, or the justice, and the two physicians shall constitute a commission to inquire whether such person be feeble-minded and a suitable subject for an institution for the care and treatment of feeble-minded persons, and for that purpose the judge or justice may summon witnesses. The physician shall in the presence of the judge or justice (when practicable) by personal examination of such person and by inquiry satisfy themselves and the judge or justice as to the mental and physical condition of the person under examination. The deposition of all witnesses, physicians, and so forth, shall be taken under oath and in writing and signed by the judge or justice, presiding."

It must be admitted that the law with reference to the cost of the commission being borne by the county is more or less vague or indefinite. The statutes, however, bearing on the subject are, section 6 of the act, above referred to, reading as follows:

"All the provisions of chapter seventy-five of the Code of Virginia, Pollard, and the acts amendatory thereof and supplementary thereto in relation to the admission of patients to the hospitals for the insane of this State, not in conflict with the provisions of this act, and all the provisions of said Code and acts, amendatory thereof, in relation to the government and operation of the hospitals for the insane and duties of the commissioner and the boards of directors of State hospitals, so far as practicable, apply in construction, organization, maintenance, control and operation of the colony hereby created and established and all the powers and duties now conferred or devolved by law upon circuit and corporation judges and the justices of the peace and other officers and examining physicians of this State, in relation to the examination, judicial inquiries, orders, judgment and applicable to commitment of white persons committed to hospitals for the insane in this State shall, as far as practicable apply to the persons committed or to be examined for commitment to the colony hereby established, except that no feeble-minded person shall be committed to any jail."

And section 1671, Va. Code 1904, as amended Acts 1906, page 313, supplement 1910, page 248, which is a part of chapter 75, referred to in the foregoing quotation, as far as applicable, reads as follows:

"All expenses incurred in committing any party to any State hospital, including the fees aforesaid (that is, the fees of the commission) shall be borne by the county or corporation from which the patient is sent."

Very truly yours,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

NOTARIES PUBLIC—*Free passes*—*Constitution Va., Section 161.*—It is probable that a notary public could not properly accept a free pass, although the reason upon which section 161 of the Constitution is founded does not seem to apply to notaries public.

Same.—Where the pass is given in return for services as an employee, this does not render the recipient ineligible to hold office.

RICHMOND, VA., December 29, 1915.

MR. W. E. WALKER,

Care Messrs. Williams, Tunstall & Thom,

Norfolk, Va.

DEAR SIR:

Yours of December 28th received. Section 161 of the Constitution of Virginia forbids the granting of free passes "to any State, county or municipal officer," and makes the acceptance of such pass a forfeiture of the office, etc. The question as to whether a notary public is an officer within the meaning of this section has never been passed upon in Virginia, but in the case of *People v. Rathbone*, 40 N. E. (N. Y.) 395, it was held that a notary public is a public officer within the constitutional provision providing that any officer who shall travel on a free pass shall forfeit his office. There are numerous decisions to the effect that a notary public is a State officer. See *Bettman v. Warwick*, 108 Fed. 46, 47; *Governor v. Gordon*, 15 Ala. 72, 75; *Browne v. Palmer*, 91 S. W. (Mo.) 453; *Nolan v. Labatut*, 41 So. (La.) 713; *In re Opinion of the Justices* 62 Atl. (N. H.) 669; *Davenport v. Davenport*, 41 So. (La.) 240, 241. I am of the opinion that our court of last resort, under the language used in the Constitution, would probably decide that a notary public could not properly accept a free pass, although I must confess that the reason upon which the section is founded does not seem to apply to notaries public. In this connection, it is interesting to note the case of *Commonwealth v. Gleason*, 111 Va. 383, where it was held that a pass on a railroad, given in return for services as an employee, does not render the recipient ineligible to the office of city councilman.

Very truly yours,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

OFFICERS, PUBLIC—*Game Laws—Game Warden.*—It is the intent of chapter 152 of the Acts of 1916 that the regular game warden for a county shall be a resident of the county.

Statutes—Construction—Residence of Public Officers.—Where the intent that an officer be a resident of the county for which he is appointed does not clearly appear from the act creating his office, in the light of a fair interpretation of section 32 of the Constitution, which provides that every person qualified to vote shall be eligible to any office of the State, county, city or town or other sub-division of the State wherein he resides, and in the absence of an express provision to the contrary every person appointed to office in the county should reside therein.

RICHMOND, VA., July 1, 1916.

HON. JOHN S. PARSONS,

Commissioner of Game and Inland Fisheries,

Capitol Building,

Richmond, Va.

DEAR SIR:

Acknowledging your letter of June 28th, requesting the opinion of this office as to whether a game warden appointed from a list furnished by the council or similar governing body of a city could be used as a regular game warden for the

county in which the city might be situated, I beg to advise that section 14 of the game law provides that there shall be not less than one game warden in each county, appointed from a list of ten suitable persons to be furnished by the board of supervisors of such county. While there is no express provision in the law prohibiting a board of supervisors from furnishing a list of ten non-residents of the county, it is hardly possible that such a board would furnish the names of only non-residents of the county, and I can hardly see how the question you propound would be practicable. However, after a conference with the Attorney General we think that the intention of the legislature as gathered from the context of section 14 of the game law was that the regular game warden for a county should be a resident of the county. As I have said, this intention does not clearly appear from the act itself, but in the light of a fair interpretation of section 32 of the Constitution, which provides that every person qualified to vote shall be eligible to any office of the State, or of any county, city, town or other sub-division of the State wherein he resides, I take it that in the absence of an express provision to the contrary every person appointed to office in a county should reside therein.

In order that there might be no question raised about such an appointment, however, I would suggest that unless the board of supervisors of a county gave your department no option by naming a list of ten non-residents of a county, discretion would dictate that your department select from the list only residents of the county.

Yours very truly,

LESLIE C. GARNETT,

Assistant Attorney General.

OFFICERS, PUBLIC—*Roads—Highways—Engineers—Incompatibility of Offices, chapter 73, Acts 1904, chapter 84, Acts 1908 as amended by Acts 1910, page 383.*—If the Highway Commissioner in the exercise of his judgment believes that a person can properly perform the duties of a civil engineer and at the same time perform the duties of sergeant, there is no objection to the employment of such person so long as he is not paid in excess of \$1,200 per annum for the performance of his duties as civil engineer, nor more than \$75.00 per month and board for the performance of his duties as sergeant.

RICHMOND, VA., *March 21, 1916.*

HON. GEORGE P. COLEMAN,
State Highway Commissioner,
Richmond, Va.

DEAR SIR:

I am in receipt of yours of the 15th instant, in which you desire to know whether you may, under the statutes, combine the positions of civil engineer and sergeant, and pay persons performing the duties of both positions at a rate exceeding \$1,200.00 per annum?

Section 10 of an act creating your commission, chapter 73 of Acts 1906, as amended by Acts 1908, page 164, reads in part as follows:

“Whenever any county through its local road authorities shall make such last mentioned application to the Highway Commissioner, and shall agree to supply all necessary materials, tools and teams required by the plans and specifications of the State Highway Commissioner, as aforesaid, and shall

agree also to have the work performed according to the plans and specifications of the State Highway Commissioner and under the supervision of a civil engineer to be supplied by the State Highway Commissioner, whose salary shall not exceed the rate of \$1,200.00 per year, to be paid by the county having the benefit of his services," etc.

Section 7 of the act providing for the State convict road force (being chapter 84 of Acts of 1908, as amended by Acts 1910, page 383), so far as here material, reads as follows:

"The State convict road force shall be guarded when at work on the roads of the State, and in making road material, by guards detailed by the Superintendent of the Penitentiary or appointed from a list furnished by, or otherwise, with the consent and approval of the State Highway Commissioner; provided, the guards so detailed or appointed shall not exceed one guard to every eight convicts so employed on the roads, and in making such details or appointments a sufficient number of men shall be selected who are competent to supervise and direct the work under construction, and as far as may be practicable such appointees shall be required to supervise and direct such work as well as guard the convict road force. The wages of such additional guards shall be fixed by the Superintendent of the Penitentiary, with the consent and approval of the State Highway Commissioner, but shall not exceed for guards thirty-five dollars per month, and for sergeants seventy-five dollars per month and board, but may be less, and shall be paid out of the money appropriated to carry out the provisions of this act."

It is well settled that an officer or public employee may hold two or more separate and distinct public offices, not incompatible, and as a necessary corollary is entitled to the compensation attached to each.

Mechem on Public Officers, section 859.

29 Cyc. 1424.

It is further well settled that a person may hold as many offices or employments as he pleases so long as the powers and duties of these offices and employments do not so conflict as to render his holding both unconscionable.

29 Cyc. 1381.

It is, therefore, clear that the question now presented resolves itself into a consideration of whether the positions of sergeant and civil engineer are incompatible. From an examination of the statutes it is clear that they are not. Indeed, in the appointment of these sergeants the act itself contemplates that persons may perform duties other than those merely of guardian, when it provides for the selection of men "who are competent to supervise and direct the work under construction." From this provision we may be aided in reaching our conclusion that if you, in your discretion, see fit, you may appoint men so competent that they may perform duties as civil engineers, for which expert supervision additional compensation must, of course, be paid. In coming to such a conclusion, I have considered that provision, above quoted, which seems to trouble you, namely: that civil engineers are to be paid a salary not exceeding the rate of \$1,200.00 per annum, but the intent of this provision is to prevent the payment of more than \$1,200.00 per year for services rendered as civil engineer. If, therefore, you, in the exercise of your judgment, believe that a person can properly perform the duties of a civil engineer and at the same time perform the duties of sergeant, I can see no objection to the employment of such a person so

long as he is not paid in excess of \$1,200.00 per annum for the performance of his duties as civil engineer, nor more than \$75.00 per month and board for the performance of his duties as sergeant.

Yours very truly,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

OFFICERS, PUBLIC—*Constitutional Law—Public Officers—Increase of Salary During Term of Office—Constitution of Virginia, Sections 63 (14) and 83.*—These constitutional provisions have no application to the clerk and bailiff of the State Corporation Commission or to the clerks and employees thereof or to the clerk of the Superintendent of Public Printing or to the Capitol police or to the custodian of the Mineral Exhibit, for the reason that none of these officers or employees have any fixed term of office.

Same—Payment of Money Out of Public Treasury.—Where the validity of an act of the General Assembly, increasing the salary of a public officer during his term of office is doubtful, it is the duty of the Auditor to test the validity of the same by declining to issue warrants for the increased pay. While it is true that the court is doubtful as to the validity of such an act will under a well established rule solve such doubt in favor of the validity of the act of the General Assembly, the position of Auditor of Public Accounts on the one hand and that of the court on the other is quite different. If a reasonable doubt exists in the mind of an executive officer as to whether any contemplated act of his is in violation of the constitution, due regard for his oath to support that instrument, as well as his own protection under his official bond, would suggest that he seek the guidance of the courts, who are the final interpreters of the constitution.

RICHMOND, VA., April 4, 1916.

HON. C. LEE MOORE,

*Auditor of Public Accounts,
Richmond, Va.*

DEAR SIR:

I have your letters of March 30th, in which you recite that the general appropriation act, passed by the General Assembly just adjourned, was approved by the Governor March 24, 1916, and that it increased the salaries of the following officers of the State: The Auditor of Public Accounts, the Superintendent of the Penitentiary, the Commissioner of Labor and the Superintendent of Public Printing. You also state that the said act increased the salaries of the clerk and the bailiff of the State Corporation Commission and some of the clerks and employees of the said commission, as well as the clerk of the Superintendent of Public Printing and one of the Capitol police and of the custodian of the Mineral Exhibit.

I also note that said act increased the salary of the clerk of the circuit court of the city of Richmond.

These increases, other than that granted the Auditor of Public Accounts, are nowhere else provided for other than in the said general appropriation act, and in each case, except in the case of the Auditor of Public Accounts, the act increasing said salaries was approved during the term of office or during the employment of the several persons concerned.

In the case of the Auditor of Public Accounts, whose term began March 1, 1916, his increased salary was provided for not only in the appropriation act, but also by amendment to section 183, Virginia Code 1904, approved February 29, 1916. This latter amendment, however, does not, under section 53 of the Constitution, go into effect until ninety days after the adjournment of the General Assembly and after the new term of the Auditor of Public Accounts had begun.

You ask me to advise you which, if any, of the increases in salary, above stated, is contrary to the provisions of the Constitution?

Section 83 of that instrument provides as follows:

"The salary of each officer of the executive department, except in those cases where the salary is determined by this Constitution, shall be fixed by law, *and the salary of no such officer shall be increased or diminished during the term for which he shall have been elected or appointed.*"

Section 63 of the Constitution, so far as applicable to the questions now under consideration, reads as follows:

"The General Assembly shall not enact any local, *special*, or private law in the following cases: * * * (14) Creating, *increasing*, or decreasing, or authorizing to be created, increased, or decreased, the *salaries*, fees, percentages, or allowances of *public officers during the term for which they are elected or appointed.*"

I have already advised you that these constitutional provisions have no application to the clerk and bailiff of the State Corporation Commission or to the clerks or employees thereof, or to the clerk of the Superintendent of Public Printing or to the Capitol police or to the custodian of the Mineral Exhibit, for the reason that none of these officers or employees have any fixed term of office. Reason, as well as authority, clearly places these officers beyond the application of the constitutional provisions referred to.

I find in the constitutions of quite a number of the States provisions similar to section 83 of our own Constitution, above quoted. These provisions have given rise to much litigation, and there are a large number of reported cases on the subject, the opinions in which are difficult to reconcile. Some hold that the provision must be construed to apply only to such public officers as are created by the Constitution, while others hold that the provision applies to all public officers having a definite tenure of office. The question seems never to have been considered by our courts in Virginia, but my predecessor in office, Hon. Samuel W. Williams, held constitutional a similar act of 1912 increasing the salaries of the Commissioner of Labor and the Superintendent of Public Printing. In view of this fact, and of the conflict of authorities in other States, as well as in view of the consideration that the General Assembly, at almost every session, passes acts involving questions arising not only under section 83 of the Constitution, but also under section 63, above quoted, I advise you to test the questions at issue by declining to issue warrants for the increased pay in the following cases: the Auditor of Public Accounts, the Superintendent of the Penitentiary, the Commissioner of Labor, the Superintendent of Public Printing, and the clerk of the circuit court of the city of Richmond. If the court should be doubtful as to the validity of the increases involved it will, under a well established rule, solve such doubt in favor of the validity of the act of the General Assembly. But, in

consideration of this question, the position of the Auditor of Public Accounts on the one hand, and that of the court on the other, is quite different. If a reasonable doubt exists in the mind of an executive officer as to whether any contemplated act of his is in violation of the Constitution, due regard for his oath to support that instrument, as well as his own protection under his official bond, would suggest that he seek the guidance of the courts, who are final interpreters of the Constitution.

It must be admitted that the doubt concerning the validity of the increase in the salary of the Auditor of Public Accounts is not nearly so great as that presented in the case of the other officer named, but, if the question is to be submitted to the court for its consideration, it may be well at the same time to have the court pass on that less doubtful phase of the question which is involved in the case of the Auditor of Public Accounts. The interests of the officers involved and due regard and proper respect for the Constitution, make it important that these questions should be put at rest.

Yours very truly,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

OFFICERS, PUBLIC—*Public Officers—Ouster Proceedings—Chapter 451, Acts of 1916.*—An officer who has exercised his discretion is not liable criminally, provided he acts honestly; nor under such circumstances can he be removed from office by ouster proceedings under chapter 451; Acts of 1916.

RICHMOND, VA., *September 14, 1916.*

His Excellency, THE GOVERNOR OF VIRGINIA,
Richmond, Va.

DEAR SIR:

In re Ouster Proceedings against the Mayor of Smithfield.

With further reference to your request that some representative of the Attorney General's office appear at the trial of the Mayor of Smithfield, Va., in the matter of application for ouster filed by the Commissioner of Labor, I beg leave to call your attention to the law and the facts in point.

The Commissioner of Labor, through the assistant chief inspector, Mr. Cline-dinst, applied to the Mayor of Smithfield for a warrant against the Smithfield Light and Power Company for violation of chapter 106 of the Acts of 1912, known as the semi-monthly pay law, and for two warrants against the Underwood Manufacturing Company, Incorporated, one for violation of chapter 16 of the Acts of 1914, known as the Safety Appliance Law, and one for the violation of chapter 339 of the Acts of 1914, known as the Child Labor Law.

When this application was made to the Mayor of Smithfield he frankly stated that he did not think these laws were intended to apply to towns like Smithfield and if the warrants were brought before him for trial they would be dismissed. The warrants were sworn out and brought before the Mayor for trial. The proceedings were very irregular. No witnesses seem to have been sworn and no requests for the swearing of witnesses made.

The warrant against the Smithfield Light and Power Company for violation of the semi-monthly pay law was first heard. The provisions of the act, so far as necessary for this discussion, are as follows:

"Sec. 2. All persons, firms * * * engaged in any other kind of manufacture shall pay their employees * * * as provided in this act."

"All persons, firms * * * engaged in any of the business aforesaid shall settle with such employees at least twice in each month and pay them the amounts due them * * * in lawful money."

The unsworn testimony of the treasurer of the Smithfield Light and Power Company was that they paid the men off as often as they wanted it, sometimes three times a month and sometimes oftener. His books as treasurer were in the court but seem not to have been examined, although the treasurer of the company read from the books showing payments to one employee as follows: four payments in September, two in October. The treasurer, however, said that we usually settle it once a month or whenever they want it and that the pay day is whenever they call for it. The Mayor in dismissing this case said that where the employers were willing to pay off every week that he thought the law did not apply to such a case.

The next case tried was the case involving the Safety Appliance Law, in which case the Mayor construed the act to require that the notice of the dangerous condition or the improper guarding of the appliances should have been given and that the Commissioner of Labor had not complied with the law in giving the required notice, and, therefore, the case was dismissed.

The third case was the case involving the violation of the Child Labor Law. Richard Ballard, colored, was the first witness called but was not sworn. He testified that he was eleven years old and that he was working at Mr. Underwood's mill. (A colored man said to be the father of this boy interposed and said he was thirteen years old.) The next witness was Edward Moore, colored, who testified he was fourteen. The next witness, Lloyd Shivers, not sworn, testified that he was twelve years old and helped to head up barrels.

This concluded the evidence in the Child Labor Case.

It is very doubtful if the testimony of two negro boys twelve years old, unsupported, is sufficient to establish the violation of this law, but the Mayor in dismissing the case said that he regarded the work given these boys at the mill as an advantage to the boys and to be commended, and said further:

"I don't think that the intention of this law was to apply to conditions in small communities of this kind, and therefore I am going to dismiss your case."

Upon being reminded by Mr. Clinedinst that he had said in advance that he would dismiss the case, said:

"Yes, I did. I am familiar with the conditions, and I think it is absolutely necessary. There is a provision in this act by which they can get by and work (reading): 'Provided, however, that upon a petition of the parents, guardian or other person interested in such child to the circuit or corporation court the court may for good cause shown entered of record release any child, between the ages of twelve and fourteen years, or the parent or guardian of such child from the operation of this act.'"

The question to be determined in this case is, therefore, whether or not on account of the official acts of the Mayor of Smithfield in deciding these cases he "knowingly" or "wilfully" misconducted himself in office as provided in chapter 451 of the Acts of 1916.

The general doctrine is laid down in 24 Cyc. 414, as follows:

"A justice may be removed for malfeasance or misconduct in office, such as intentional violations of the laws governing magistrates, disregard of legal rules, or intoxication while in the discharge of his official duties. But to warrant the removal of the justice, the acts charged against him must have been in the discharge of his functions as a justice, and with corrupt, partial, malicious, or other improper motives, and with knowledge that they were wrong."

Taking up the three cases in the order in which they were heard, we find:

1. Case involving semi-monthly pay law. The only evidence in this case was that of the treasurer of the company, who testified that the men drew the money whenever they felt like it and were paid two and three times a month. Under these circumstances the Mayor dismissed the case. It cannot, therefore, be contended that his action in dismissing this case was done with *corrupt, partial, malicious, or other improper motives, or with knowledge that it was wrong.*

2. Case involving the Safety Appliance Law. This case was decided by the Mayor upon a consideration of the law by him which required certain notice to be put upon the machinery and this is not such a reckless construction of the law as to lend the slightest color to a charge against him that his action was taken with *corrupt, partial, malicious, or other improper motives or with knowledge that it was wrong.*

3. The case involving the child labor law. If it be conceded that the evidence of two children twelve years old as to their age, in the absence of contradictory, evidence is sufficient to establish a violation of the child labor law, is the decision of the mayor in dismissing this case upon the ground that in his judgment the law was not intended to apply to towns the size of Smithfield, so reckless a disregard of the law as to amount to knowing and wilful misconduct in office? An examination of the law in question will throw some light upon the subject. It must be remembered that the mayor of Smithfield is not a lawyer and that no lawyer appeared in the case and presented the law clearly and cogently.

Note the following provision of section 6:

"* * * provided, further, that nothing contained in this act shall apply to mercantile establishments in towns of less than two thousand inhabitants or in country districts. Provided, however, that upon petition of the parent, guardian or other person interested in such child to the circuit or corporation court the court may for good cause shown entered of record release any child, between the ages of twelve and fourteen years, or the parent or guardian of such child from the operation of this act."

The mayor dismissed this cause on the ground that it did not apply in towns like Smithfield. Can it be successfully contended that a mayor, who is not a lawyer, knowingly and wilfully misconducts his office in the interpretation of the words "mercantile establishments" to include the Underwood Manufacturing Company, Incorporated, whose business is to make and sell barrels?

I am informed by Mr. Clinedinst that no charges of corruption can be sustained against the mayor of Smithfield; he is Dr. L. C. Brock, a man of high standing in the community and accepted the office of mayor from a high sense of civic duty.

Corrupt motives aside, then, it is doubtful if the Commonwealth could in

any event convict, certainly not unless his acts themselves appeared as so reckless a disregard of well known legal rules as in themselves to amount to judicial misconduct.

There are a number of cases in point in the decisions most of which however arose in the State of New York, and at the risk of making this letter to Your Excellency very long I shall set out herein the decisions in point, found after very exhaustive research.

In the matter of *Tighe*, 97 N. Y. App. 28, application was made for removal of City Magistrate Tighe under a statute providing for his removal for cause.

The charges against him chiefly related to decisions in criminal proceedings wherein he discharged persons accused of violating laws relating to policy gambling. The proceedings were referred to a referee to take proof. He reported to the effect that while in some of the cases there seems to have been no ground on which to hold the defendants, in others the decisions were so palpably wrong as to indicate extreme bias on the part of the magistrate in this class of cases, amounting to an obstruction of the due administration of the law. He made no report, however, and the court was called upon to determine whether the facts proven were sufficient to justify the removal of the magistrate for misconduct or incompetency. The court said:

"To determine that question unfavorably to the magistrate we must find something more than mere persistence in error of judgment. There must be evidence to show that the judicial acts complained of were corrupt, or that they were inspired by an intention on the magistrate's part to violate the law, or at least that there was such a persistent and apparent intentional disregard of well known legal rules as in itself to amount to judicial misconduct."

The court also approves *matter of Quigley*, 32 N. Y. Sup. 828, *matter of Vreeland (in re Thomas)*, 2 N. Y. Sup. 38. In the last named case Vreeland petitioned for removal of Thomas, justice of the peace, for refusing to admit petitioner to bail, held upon a charge of misdemeanor. It was held by the court that denial of bail under these circumstances, though extra-judicial and unauthorized, is not a ground for removal. The court said:

"In order to justify removal * * * there must exist in the act or acts complained of, and which are said to be the basis of said removal, *clear, palpable and apparent malfeasance in office or corruption either apparent on the face of the transaction or easily inferred therefrom.*"

"Mistakes honestly made, and arising from ignorance as to what the proper steps may be in the course of a given judicial proceeding, either civil or criminal, although they, the said mistakes, may, under certain circumstances, furnish grounds for a civil action against the judicial officer so making them, can never, in the absence of affirmative proof of the corrupt motive or design prompting them, be made use of to effect the summary removal of a justice of the peace, or other judicial officer. The above conclusions are sustained and set forth in the case of *Yates v. Lansing*, 5 Johns. 282, affirmed, 9 Johns. 395.

The *Quigley Case* was upon proceedings to remove from office Quigley, police justice of the city of Brooklyn, on charges of partiality towards strikers when arraigned for assaulting policemen and for stoning cars during the strike of the Knights of Labor against the Brooklyn trolley railroad companies. The court said:

"When the court rendered a decision in the *Watson* case it considered the rules that should apply in the case. These rules were that the court thought that the evidence against the accused should show that the judicial acts were *corrupt*, or that there was *intentional violation of the laws govern-*

ing a magistrate, or that there was a *disregard of the legal rules* that amounted to legal misconduct. Applying the rules laid down in the *Watson* case, there was evidence of judicial misconduct found, but on the whole the court was unable to say that there had been an intentional violation of duty. In applying the same rule in this case the court is led to a different conclusion from that which was reached in the *Watson* case. The court still holds that a magistrate should not be removed because the court disagrees with him in the construction of the law. We recognize the fact that we must give great latitude to the magistrate in the administration of the law, and must recognize the discretion the law gives to a magistrate on matters of law. In reviewing this case we find not only one or two instances in which the accused has violated the laws—instances in which we disagreed with him—but we also find in the given period from the inception of the trials of cases that arose out of the violence that attended the strike until February 6th, when he was first notified that this action would be instituted, a *uniformity of conduct going to show that he intended to violate his duty*. And we find a total disregard of inferences that should have been drawn from the evidence in many cases that were before him."

The court quotes from the language of the police justice to the strikers: "There is no law in this State that prevents you from taking those men from the car," when to the contrary they had no right to step upon the car for that purpose and made the strikers the judges of the law. An order was entered removing the justice.

In the *Watson Case*, referred to above, Brown, P. J., said, as quoted in the *Tighe Case*:

"This is practically an impeachment of a judicial officer. We are to try him upon the charge of official misconduct. We cannot find him guilty and remove him simply because he has made an error in judgment, or has made a mistake in law, or has wrongly decided a particular case before him."

In the *Quigley Case* the court removed the official on the finding that he was guilty of "a uniformity of conduct going to show that he intended to violate his duty."

It is true that the court in rendering the opinion in *re Bolte*, 97 N. Y. App. 55, used this language:

"A judicial officer may not be removed for merely making an erroneous decision or ruling, but he may be removed for wilfully making a wrong decision or an erroneous ruling or for a reckless exercise of his judicial functions without regard to the rights of litigants," etc.

"The wilful abuse of judicial discretion is the most oppressive and injurious kind of misconduct."

However, the facts in this case showed so many cases of utter disregard of the rights of litigants and such bias and favoritism in dozens of cases as to amount to a most oppressive and injurious kind of official misconduct. The above quotation, however, is the most favorable citation in behalf of the applicant for ouster in the case at bar which we have found, and this holds that it must be the *wilful making of a wrong decision or reckless exercise of judicial functions*.

The law in England seems to be in line with the decisions in this country, as appears in the following case:

In *Queen v. Badger & Cartwright*, 4 A. & E. (N. S.), the defendants as justices of the peace wrongfully refused bail, although sufficient bond was tendered, and the court in declining a criminal information said:

"The only censurable feelings that can with any show of reason be suspected are a premeditated refusal and disregard of the just claim made by O'Neill for his liberation and a determination to keep him in prison without legal authority and in contempt of their duty. * * *

"The facts being clear, the question is whether a criminal information ought to be filed; and this *depends on our view of the motives* which influenced the magistrates. After censuring the conduct of the magistrates, but finding that they were not influenced by corrupt, perverse, vindictive, personal or partial motives, declined to interfere by criminal information."

It is true that this is not a criminal proceeding but it is in itself practically an impeachment of the judicial officer, for the mayor exercises the functions of a justice of the peace and is in its nature highly penal. In criminal proceedings the general doctrine is laid down in 1 Bishop on Criminal Law, 7th edition, section 299, which read as follows:

"Likewise in proceedings against magistrates and other *quasi* judicial and sometimes ministerial officers, for acting corruptly in their office, their misapprehensions of the law may be set up in answer to the charge of corruption; unless, perhaps, the mistake were indicated by gross carelessness or ignorance, partaking of a criminal quality."

The leading case under this doctrine is that of *Arkansas v. Prescott*, 31 Ark. 39. In this case the majority of the electors of the township had voted against license to sell whiskey. The county judge in spite of this granted a liquor license and was indicted for malfeasance in office. The court gave the following instruction, which was upheld as the court's interpretation of the law:

"In arriving at the intention of defendant, the jury will not infer or presume any wrong, illegal or wicked intention from the mere fact that said order was illegal; and unless the jury find from other facts or circumstances in proof that the defendant was, beyond a reasonable doubt, moved and instigated to the rendition of said order by some corrupt, wicked, or unlawful motive or purpose, with a full knowledge and belief that said order was contrary to law, they will acquit."

In *State v. Powers*, 75 N. C. 281, the court held that it is so well settled that there is nothing to the contrary that an officer who has exercised his discretion is not liable criminally provided he acts honestly.

In the light of the above authorities and in view of the admitted high character of Doctor Brock, I believe it impossible to secure a verdict of a jury against him, if indeed the proceedings are at all justified.

Feeling assured that these facts and authorities were not before you when request was made to this office to appear at the trial of this case, I felt constrained to lay the matter more fully before you in order that you may determine whether you still desire me to appear in these proceedings and seek to bring about the removal from office of the mayor of Smithfield.

Very truly yours,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

PARDONS—Conditional.—The Governor has the power to grant a conditional pardon, provided that the condition affixed to the pardon must not be impossible, immoral or illegal.

Pardons—Commutation of Sentence.—The right of the Governor to impose a lesser punishment than that under which a prisoner stands sentenced which is in the nature of a commutation, if done with the consent of the prisoner is a conditional pardon and not a commutation of punishment.

Pardons—Conditional—Power of Governor to Reduce Term of Prisoners.—

The Governor has the right to grant a conditional pardon to a prisoner who has been sentenced to serve a term of ninety days in jail, reducing such sentence to a lesser period and upon the condition that the prisoner present himself at a later date to the sheriff to serve the lesser jail term.

*Pardons—Violation of the Condition—Effect.—*If the condition of the pardon granted under such circumstances is not performed, the original sentence remains in full force and may be carried into effect.

RICHMOND, VA., August 17, 1916.

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

DEAR SIR:

Acknowledgment is made of the letter of the secretary to the Governor of August 15, 1916, enclosing correspondence with Mr. F. C. Baggarly, Washington, Virginia, with regard to the application for pardon of one Albert Clanagan, requesting the opinion of the Attorney General as to the authority of the Governor to act upon this application in the manner suggested by the attorney for the prisoner.

The first proposition suggested in the letter of Mr. Baggarly is that the Governor reduce the sentence of the prisoner from ninety days to thirty days in jail, and to direct that the jail sentence of the prisoner should commence on November 1st, at which time the present serious condition of his family will be somewhat relieved. The next proposition is that the Governor grant an absolute pardon. I assume that the first proposition is the one upon which the Governor desires the opinion of the Attorney General.

The right of the Governor to grant a conditional pardon has been upheld by the courts of Virginia so that the condition annexed to the pardon must not be "impossible, immoral or illegal."

The right of the Governor to impose a lesser punishment than that under which the prisoner stands sentenced, which is in the nature of a commutation, if done with the consent of the prisoner, has been held to be a conditional pardon and not a commutation of punishment.

The exact question arose in the case of *Lee, Sergeant, v. Murphy* (22-Gr.), 63 Va. 789. In that case Governor Walker issued a warrant commuting the punishment of Murphy from imprisonment in the penitentiary for a term of three years into an imprisonment in the city jail of Richmond for a term of twelve months from the date of the warrant. Judge Staples delivered a very lengthy opinion, quoting a number of authorities, holding that the original punishment is remitted and a milder sentence substituted, which amounts to the same thing as a conditional pardon, and expressly upheld the right of the Governor to pardon upon the condition of the convict's voluntarily submitting to the lesser punishment.

On the authority of this case, therefore, which has never been overruled, it is my opinion that the Governor has a right to grant a conditional pardon to the prisoner, Clanagan, upon the condition that he present himself on the first day of November to the sheriff of Rappahannock county to serve a jail sentence of thirty days from that date in the county jail of said county. If the condition of

the pardon is not performed, as was pointed out in *Lee, Sergeant, v. Murphy, supra*, the original sentence remains in full force and may be carried into effect.

Very truly yours,

LESLIE C. GARNETT,

Assistant Attorney General.

PENSIONS—*Section 6, Pension Law as Amended by Chapter 430, Acts of 1916.*—An inmate of the Home for Needy Confederate Women is not entitled to be placed on the regular pension roll of this State.

RICHMOND, VA., *July 21, 1916.*

JOHN H. JOHNSON, ESQ.,

*Pension Department, Office of Auditor of Public Accounts,
Richmond, Va.*

DEAR SIR:

Acknowledgment is made of your letter of July 1, 1916, submitting for the opinion of the Attorney General the question of whether or not, under section 6 of the pension law as amended 1916, an applicant for a pension who has never drawn a pension before and who is an inmate of the Home for Needy Confederate Women, Richmond, Va., is entitled to be placed on the regular pension roll of the State, the actual cost of supporting an inmate of that institution being as much or more than \$200 per year, under the proviso in said section 6, which is as follows:

"But no person holding a national, State, city or county office, which pays a salary or fees amounting to two hundred dollars per annum, or who receives from any source whatever money or other means of support, amounting in value to *two hundred dollars per annum*, or who owns in his or her own right, or where there is held in trust for his or her own benefit, or where the wife owns, or there is held in trust for her benefit, estate or property, either real, personal, or mixed, in fee or for life of the assessed value of one thousand dollars, or who is in receipt of a pension from any other State, or from the United States, or of *necessary aid from any source whatever*, or who is an inmate of a soldiers' home, shall be entitled to the benefits of this act."

I am of opinion that an inmate of the Home for Needy Confederate Women is not entitled to be placed on the regular pension roll of this State.

Very truly yours,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

PENSIONS—*Acts 1912, page 384.*—A Confederate soldier who resides in the State of Texas is not entitled to a pension from the State of Virginia.

RICHMOND, VA., *March 11, 1916.*

HON. S. H. LOVE,

*House of Delegates,
Richmond, Va.*

DEAR SIR:

You have requested me to inform you whether an old soldier who enlisted in the Confederate Army from West Virginia (then Virginia), but who now resides in the State of Texas, is entitled, under the laws of this State, to a pension from the State of Virginia.

An examination of the pension act (Acts 1912, page 384) shows that, in order to be entitled to the benefits thereof, the applicant must be a citizen and *bona fide* resident of Virginia, and must have actually resided in this State for five years and in the county or city from which he makes application for one year. Therefore, it is apparent that your friend from Texas would not be entitled to receive any pension under the act.

Very truly yours,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

PRINTING, PUBLIC—*Words and Phrases—Justices of the Peace.*—Under section 279 of the Code of Virginia issuing justices, trial justices, police justices and civil justices are all entitled free of charge to copies of the Acts of Assembly. They are all justices of the peace within the meaning of the said section.

PRINTING, PUBLIC—*Acts of Assembly—Who Entitled to Free of Charge.*—The clerks of the civil courts of the State are entitled to a copy for each court, for which there are clerks, of the Acts of Assembly. Chiefs of police who perform any of the functions of sheriffs are entitled free of charge to the Acts of Assembly.

Same.—The chief of police of the city of Richmond is entitled to a copy of the Acts of Assembly free of charge.

Same—Statutes—Object—Construction.—The object of section 279 of the Code is to put the statutes of the State in the hands of those charged with the enforcement of the law, and should, therefore, be liberally construed to the end that every public officer may be informed as to the duties which he is sworn to perform.

RICHMOND, VA., June 19, 1916.

HON. DAVIS BOTTOM,

*Superintendent of Public Printing,
Richmond, Va.*

DEAR SIR:

Yours of June 17th received. Under section 279 of the Code issuing justices, trial justices, police justices and civil justices are all entitled to copies of the Acts of Assembly. They are all justices of the peace within the meaning of the section referred to.

As to the gentlemen who are clerks of several courts, they are entitled to a copy for each court for which they are clerk, the purpose of the law being not to furnish the clerk with the acts for his own use only, but also for the use of all officers and citizens having business with the several courts.

As to furnishing copies to the chiefs of police, will say that while these officers are not specified by name in the act, yet in some, if not in all cases, they perform in cities a part of the functions of the sheriffs. I, therefore, repeat to you the opinion expressed to the Governor, in the letter referred to by you dated September 27, 1915. I have not examined the charters of the several cities to see whether in all cases their chiefs of police exercise duties ordinarily incumbent upon sheriffs, and, therefore, I am not prepared to say finally that all chiefs of police are entitled to the Acts of the General Assembly, free of charge, but I advise you that if any chief of police should apply to you for the acts, before they are turned over by you to the Secretary of the Commonwealth, and he can show you that he performs any of the functions of the sheriff, he would be

entitled to the acts. I have already expressed the opinion that the chief of police of the city of Richmond is entitled to a copy and you can furnish him the same without any further application.

The statute above referred to was passed evidently for the purpose of putting the statutes of the State in the hands of those charged with the enforcement of the law. It should, therefore, be liberally construed to the end that every officer may be informed as to the duties which he is sworn to perform.

Yours very truly,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

ROADS AND HIGHWAYS—*Public Property.*—It is contrary to public policy to allow liens to be acquired on public property or buildings or other structures erected by the State, city or county for public uses; therefore, whenever material delivered under a contract for the erection of a bridge on the public highway is put into the structure there can be no lien acquired thereon by any person.

Same.—Under the contract submitted with the question in this matter mere delivery of material in the public highway at or near the site of the structure to be erected cannot pass title to such material to the county or State in the absence of a contract to that effect; therefore, the contractor would have the right to remove material before it went into the building, and, in a proper case, his creditors might attach the material for debt.

Same.—The Highway Commissioner would be protected in making allowance to the contractor for the value of material delivered, provided the indemnity bond is sufficiently large to cover any loss that might be sustained by reason of creditors attaching the material or by reason of the contractor removing the same.

Same.—Form of additional words to be inserted in contract and bond suggested.

RICHMOND, VA., May 10, 1916.

HON. C. B. SCOTT,

Assistant State Highway Commissioner,

Richmond, Va.

DEAR SIR:

Acknowledgment is made of your letter to the Attorney General making the following inquiry:

“Please advise us in case steel and other material for bridge construction is delivered within the right of way of any public highway, for the purpose of constructing a bridge under contract, if the ownership of such material is vested in the county, and if we can safely make allowance to the contractor for the value of the material delivered, without danger of the manufacturer or dealer filing a lien on such material and taking possession of it to cover payments due such dealer by the contractor.”

I have examined the form of contract used by the Virginia State Highway Commission in the erection of bridges, and find that there is no provision therein for the vesting of title to material delivered at the site of the bridge to be erected upon the payment of any part of the contract price.

It is contrary to public policy to allow liens to be acquired on public property or buildings or other structures erected by the State, city or county for

public uses. *Phillips v. University of Virginia*, 97 Va. 472-474; *Manly Manufacturing Co. v. Broadbudd*, 94 Va. 547, 555; *Hicks v. Roanoke Brick Co.*, 94 Va. 741-747.

Under the above authorities, therefore, whenever the material delivered under a contract for the erection of a bridge on a public highway is put into the structure, there can be no lien acquired thereon by any person.

However, it seems to me, under the contract presented to me for consideration, that mere delivery of material in the public highway, at or near the site of the structure to be erected, cannot pass title to such material to the county or State, in the absence of a contract to that effect. Unquestionably, the contractor would have the right to remove the material before it went into the building, and I am of opinion that his creditors might, in a proper case, attach the material for debt.

While I am of the opinion that title to material delivered for the erection of a bridge upon a public highway does not vest in the county under the contract merely upon delivery, and I am further of the opinion that the county obtains no lien thereon by virtue of delivery only, I yet think that you would be protected in making the allowance, provided for in the contract, to the contractor for the value of the material delivered, provided your indemnity bond is sufficiently large to cover any loss that might be sustained by reason of some creditor's attaching the material, or by reason of the contractor's removing the same.

My suggestion, therefore, would be that you require a sufficient indemnity bond to protect the county in event that, after the fifty per cent. payment provided for in the contract "on the completion of the masonry and delivery of the steel at the site ready for erection," some attachment should be placed upon the material, or by some means the material should be removed from the premises.

Very truly yours,

LESLIE C. GARNETT,
Assistant Attorney General.

ROADS AND HIGHWAYS—*Local Road Authorities—Chapter 131, Acts 1908; chapter 209, Acts 1914 (page 373); Acts 1916, page 46; Acts 1916, page 44; chapter 46, Acts 1910—Distinction Between Board of Supervisors of a County and Local Road Authorities Thereof.*—The insertion of the word "local" in chapter 131, Acts 1908, makes it clear that the legislature had in view the road authorities of any locality or district which had special road authorities created by law, and charged with the control of the roads in the locality or district and of the funds arising from taxation for the building and maintenance of these roads.

RICHMOND, VA., May 12, 1916.

HON. C. B. SCOTT,
Assistant State Highway Commissioner,
Richmond, Va.

DEAR SIR:

Acknowledgment is made of your recent letter requesting an opinion from the Attorney General in the following terms:

"Where a county has a road board appointed to carry on the work of road construction in any district or districts, whether such district road board should be considered as the local road authorities referred to in chapter 131, Acts 1908, or whether the board of supervisors should be considered the local road authorities."

Inasmuch as you have verbally informed me that a controversy has arisen in the county of Northampton between the board of supervisors of that county and the district road commission of Capeville magisterial district, as to upon what highway in said district State aid should be expended, both the board of supervisors and the district road commission having applied for State aid, I shall answer you with regard to this specific case.

Section 9, chapter 131, Acts 1908, provides that whenever the "local road authorities" of any county proposes to improve permanently any main travelled road, or part thereof, in their county, they may apply to the State Highway Commission for an engineer to view the road, and that, when the commissioner shall be satisfied that local conditions are such as to render advisable the building of such roads, he may authorize the same.

You will observe that the act of Assembly, approved March 24, 1914 (Acts of Assembly, 1914, page 373), providing for a district road board for Capeville magisterial district in the county of Northampton, was repealed by an emergency act of the last legislature, approved February 17, 1916 (Acts of Assembly 1916, page 46); and, by an act approved the same date, a road commission was created for said district. (Acts of Assembly 1916, page 44.) This last mentioned act provides that this "commission shall have exclusive control of all roads and bridges within the limits of said district, and also of all taxes levied for road purposes and for building and repairing bridges; and of all moneys which may be borrowed by the board of supervisors, under any law now existing, or which may hereafter be enacted for the purpose of building, improving and maintaining the public roads and bridges in said Capeville magisterial district, and all taxes levied for road purposes and for building and repairing bridges within the said district, that is to say, that the taxes levied in the said magisterial district for road purposes shall be expended in said district, including its share of the county levy for road purposes."

The provisions of this special road law of Northampton county are very broad in giving to the road commission entire control of the roads in Capeville district and of the funds arising from taxation to be expended upon these roads.

The question in this case, therefore is, is the board of supervisors the "local road authorities" contemplated in section 9, chapter 131, of the Acts of 1908, or is the Capeville road commission the local road authorities contemplated by that section?

I am quite clear in my mind that the legislature intended to draw a distinction between the board of supervisors of the county and the local road authorities thereof. The insertion of the word "local" in the act makes it very clear that the legislature had in view the road authorities of any locality or district which had special road authorities created by law and charged with the control of the roads in the locality or district, and of the funds arising from taxation for the building and maintenance of these roads. If the board of supervisors were the only road authorities contemplated in the act, it would have been entirely unnecessary for the legislature to have used the word "local." This construction is given color by an examination of the various laws relating to public roads, and is concluded, I think, by reason of the provision of section 5 of the Acts of 1910, chapter 46, which provides that fifty per cent. of the expense of road improvement shall be borne by the State and fifty per cent. by the county and small road divisions thereof that may be established according to law, for the road commission of Capeville district being clothed with exclusive control of all roads and bridges

within the limits of said district, and also of all taxes levied for road purposes and for building and repairing bridges, and all money which may be borrowed for the purpose of building, improving and maintaining the public roads and bridges, no other authority exists in the Capeville district for providing the fifty per cent. of the cost which must be borne by that district in the contemplated improvement.

Very truly yours,

LESLIE C. GARNETT,
Assistant Attorney General.

ROADS AND HIGHWAYS—*Local Road Authorities of Northampton County—Chapter 46, Acts 1910.*—Capeville magisterial district, Northampton county, being the only district having a special road law in force in the county of Northampton, the county board of supervisors are the local road authorities referred to in chapter 46, Acts 1910, as to the other districts in the county.

RICHMOND, VA., May 19, 1916.

HON. C. B. SCOTT,
Assistant State Highway Commissioner,
Richmond, Va.

DEAR SIR:

Acknowledgment is made of yours of the 17th instant, inquiring as to what body constitutes the local road authorities in Northampton county under subdivision 1 of clause 1, chapter 46, of the Acts of 1910, which authorizes the local road authorities of any county to make application to the State Highway Commissioner for State aid on behalf of the counties of the State.

As suggested to you in my letter of the 12th instant, so far as the Capeville magisterial district of Northampton county is concerned, the only local road authorities for that district, who are empowered by law to appropriate money to improve the roads of that district, is the Capeville district commission, created by the last legislature.

The Capeville magisterial district being the only district, so far as I am advised, having a special road law in force in the county of Northampton, the county board of supervisors are the local road authorities referred to in the Acts of 1910, about which you make inquiry as to the other magisterial districts of the county of Northampton.

Very truly yours,

LESLIE C. GARNETT,
Assistant Attorney General.

ROADS AND HIGHWAYS—*Cities and Towns—Chapter 34, Acts 1910.*—Chapter 34, Acts 1910, which authorizes cities and towns to contribute to the building or improvement of public roads and bridges leading to such towns or cities, is constitutional.

RICHMOND, VA., December 6, 1915.

HON. C. B. SCOTT,
Assistant State Highway Commissioner,
Richmond, Va.

DEAR SIR:

In reply to your letter of December 6th, as to whether chapter 34, Acts of 1910, page 43, authorizing towns and cities to contribute to the building or

improvement of public roads and bridges leading to such towns or cities, is constitutional, I beg leave to submit that, after a careful consideration of this question, I am constrained to hold that said act does not violate any provision of the State or Federal Constitution, and that it is entirely competent and constitutional for a city or town to contribute funds or other aid towards the building or improvement of public roads leading to such city or town when, in the judgment of the council, it will tend to promote the material interest of such city or town; and provided, also, that no such contribution shall be made toward the building or improvement of any such road or bridge at any point more than ten miles beyond the corporate limits of such city or town, as measured along the route of such road.

It is proper for me to state in this connection that the city of Richmond has recently appropriated \$100,000.00 to the building and improvement of roads leading into the city of Richmond, and I am informed that a large part of this \$100,000.00 has already been expended on the roads in Henrico county leading into the city.

Very truly yours,

LESLIE C. GARNETT,
Assistant Attorney General.

REPORTS OF DEPARTMENTS—*Public Printing—Reports of Departments—Filing After Time Prescribed by Law—Duty of Superintendent of Public Printing.*—Section 280 of the Code, as amended, requiring department chiefs and heads of institutions of the Commonwealth to furnish their annual reports to the officer for whom they are required to be made on or before the 20th day of October each year is not mandatory but directory merely and if matter submitted for publication under the provision of this section is in fact properly a part of the report of such department or official, it is the duty of the Public Printer to print the same according to the provisions of the statute so far as it is possible at the time to comply with the same.

Same—Object of Reports of Departments—Duties of Officials Required to Make Reports—Effect of Failure to Make Report in Time Required by Law—Duty of Public Printer.—The object of section 280 of the Code, as amended, is to give the public information concerning the work of the several departments of the State government, and it is the duty of every public official to comply with the statute as to time. If he allows the time to elapse he is not thereby relieved of the duty. If, therefore, a public officer fails to file his report in the time prescribed by statute or files only a part thereof, it is his duty to subsequently file his report or complete it, as the case may be, and it is the duty of the Public Printer to print the same.

Same—Binding of Reports Filed After Other Reports have been Bound.—If the report or part thereof required to be made by section 280 of the Code as amended is filed subsequent to the time the reports which were properly made have been bound, the Superintendent of Public Printing cannot comply with that part of the statute which requires the reports of all departments to be bound together and distributed, as circumstances have necessarily relieved him of that duty, but it is possible for him to print and distribute the 200 separate copies provided by that act, and it is his duty to do so.

Same—Duty of Public Printer.—The fact that the Superintendent of Public Printing cannot wholly comply with the statute does not relieve him from complying with that part which it is in his power to perform and therefore it is his duty to have the report, or any part thereof, of the departments or officials required to make the same printed no matter when submitted, assuming, of course, that the Public Printer and the Governor have not exercised their discretion in eliminating the material, as provided for in said section. The inconvenience arising from such a construction does not authorize the Superintendent of Public Printing to supply the omissions of the statute and fix a certain day as a last day upon which he will comply with the mandate of the statute making it his duty to have the reports required by section 280 of the Code as amended printed.

RICHMOND, VA., August 10, 1916.

HON. DAVIS BOTTOM,

*Superintendent of Public Printing,
Richmond, Va.*

DEAR SIR:

Yours of August 1st received, together with enclosures, from which I conclude that you desire my advice as to your duty under the following state of facts:

The State Health Commissioner has submitted to the Governor, and the Governor has transmitted to you for printing, what is termed Part II of the annual report of the State Health Commissioner for the year 1915. The statute (Va. Code 1904, section 280, as amended), provides in part that,—

"It shall be the duty of the department chiefs and 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 * * * and ready for distribution on the first Wednesday in January following.

"He shall have printed in octavo form five hundred copies of each report, three hundred copies of which shall be bound in one volume, in ordinary half-binding, and distributed as follows: * * * the remaining two hundred copies of said reports shall be bound separately, in ordinary pamphlet binding with paper covers, and delivered to the various departments making such reports." * * *

As a matter of fact it appears that many of the reports are submitted after October 20th, and that it has been impossible for you to comply with the law to have the several reports bound together in one volume and ready for distribution the first Wednesday in January, and the result has been that the bound volumes of the annual reports are often delayed many months. In this case, however, the Commissioner of Health, under date of December 10, 1915, submitted a report under title "Annual Report of Health Commission to the Governor of Virginia, for the year ending September 30, 1915." In the introduction to the report the commissioner states that the mortality statistics for the year have been omitted for the reason that they are compiled annually by the Census Bureau of the United States, which bureau had not completed the work, and that the commissioner deemed it expedient to publish said mortality statistics in a separate pamphlet, which he hoped would shortly appear, and that the same might be regarded as Part II of his report. Part II of the Commissioner's report now submitted to you for printing contains the mortality statistics, above referred to,

and it is transmitted to you for printing after you have printed, bound together and distributed the reports of the heads of departments, including the annual report of the Health Commissioner for 1915. The question arises whether, under the statute above quoted, you can now be required to print the mortality statistics referred to, as a part of the annual report of the Health Commissioner for 1915.

In this connection two questions arise: First, whether said material can now be considered as a part of the Health Commissioner's annual report for 1915; and, second, whether, if a part of his report, you can now be required to print the same.

Upon the first question I cannot advise you because it is not a question of law, but a matter of discretion vested in you and the Governor. The General Assembly has provided in Virginia Code 1904, section 280, as amended, that:

"Should any department include in its report any matter which, in the opinion of the Superintendent of Public Printing, should not be included in an annual report, he shall bring the matter to the attention of the Governor, who shall have authority to eliminate such matter should he agree with the opinion of the Superintendent of Public Printing."

If you and the Governor be of the opinion that the material now submitted should not be in the annual report for 1915, you have full authority to eliminate such matter, that is to refuse to print the same as a part of said report.

But, if we assume that the matter submitted is in fact now properly a part of the report of 1915, I am of the opinion that it is your duty to print the same, according to the provisions of the statute, so far as it is now possible for you to comply with the same. It is true that the law requires these reports to be submitted on or before October 20th of each year, and also requires the printing and binding of all reports together ready for distribution by the first Wednesday in January, but this law is merely directory; and, if not complied with within the time prescribed by statute, should nevertheless thereafter be complied with as soon as may be.

"Where a statute imposes upon a public officer the duty of performing some act * * * and fixes a time for the doing of such act, the requirement as to the time is to be regarded as directory, and not a limitation of the exercise of the power, unless it contains some negative words, denying the exercise of the power after the time named, or from the character of the act to be performed, the manner of its performance, or its effect upon public interests or private rights, it must be presumed that the legislature had in contemplation that the act had better not be performed at all than be performed at any other time than that named."

Black on Interpretation of Laws, Second Edition, page 545.

The object of the statute under consideration is to give the public information concerning the work of the several departments of the State government, and it is the duty of every public official to comply with the statute as to time, yet if he allows the time to elapse he is not thereby relieved of the duty. If, therefore, a public officer fails to file his report in the time prescribed by statute, or files it only in part, it would be his duty to subsequently file his report or complete it as the case may be, and it would be your duty to print the same. It is true that you cannot now comply with that part of the statute which requires the reports of all the departments to be bound together and distributed, as circumstances have necessarily relieved you of that duty, but it is possible for you to print and

distribute the 200 separate copies and it is your duty to do so. In other words the fact that you cannot wholly comply with the statute does not relieve you from complying with that part which it is in your power to perform. Having reached the conclusion that the statute is directory as to time, it is your duty to have the report, or any part thereof, printed no matter when submitted, assuming of course that you and the Governor have not exercised your discretion in eliminating the material as above indicated. I recognize the fact that such a ruling might lead to great inconvenience by encouraging officials in delaying their reports in whole or in part, until after the other reports are bound and distributed, but in as much as the General Assembly has not, according to a well known rule of construction cited, fixed any time beyond which you are relieved of printing the reports, you are not authorized to supply its omission and fix the date of binding, or any other date as the last day upon which you will comply with the mandate of the statute making it your duty to have these reports printed.

Yours very truly,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

SCHOOLS—Public Schools—District School Boards—Member Contracting With.—A fire insurance agent who is a member of a district school board comes within the meaning of the provisions of section 1472 of the Code of Virginia as amended, which provides that it shall be unlawful for any trustee or officer to receive directly or indirectly any profit or emolument from any contract with or sale to such board or committee thereof so as to prevent him from writing contracts of insurance on school property with the district school board.

RICHMOND, VA., March 30, 1916.

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

DEAR SIR:

I have your request for my opinion on the following question: Can a fire insurance agent, being a member of a district school board, write policies of insurance on public school buildings within his district?

In reply thereto I desire to refer you to section 1472, Code of Va., as amended (Acts 1908, page 295), which, so far as directly applicable, reads as follows:

"It shall be unlawful for any such trustee or officer to sell, convey or deliver any goods, wares, merchandise, or supplies of any kind to a school board or a committee of such board, or to receive, directly or indirectly, any profit or emolument from any contract with, or sale to, such board or a committee thereof, except as provided in this section. If any such contract or sale shall be made it shall be void, and if such claim or bill be paid, the amount paid, with interest, may be recovered by any county or district within two years after payment by action or motion in the circuit court having jurisdiction over said county or district."

The exceptions referred to in the foregoing quotation are plainly inapplicable to the case under consideration, and therefore need not here be discussed.

I take it for granted that the agent in question gets a commission or receives some compensation for writing the contracts of insurance with the district school board. I am, therefore, of the opinion that in such cases the agent is, within the meaning of the statute, receiving, directly or indirectly, a "profit or emolument" from the contracts of insurance with the board of which he is a member, and that his act is unlawful.

Yours very truly,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

SCHOOLS—Public Schools—School Trustee—Electoral Board—Powers—District School Boards—School Sites.—The school trustee electoral board has no power to select a site for a school and if such board should select some other site than that selected by the district school board, the district school board cannot be compelled to purchase the same or pay for it. The school trustee electoral board has appellate jurisdiction to either approve or disapprove of the selection made by the district boards, but the jurisdiction of the school trustee electoral board is limited to this action alone.

RICHMOND, VA., June 26, 1916.

HON. R. C. STEARNES,
*Superintendent of Public Instruction,
Richmond, Va.*

DEAR SIR:

Acknowledgment is made of your letter of June 19, 1916, enclosing letters of Dr. Gavin Rawls, superintendent of public schools, Isle of Wight division, and Mr. L. T. Hall, chairman, building committee Windsor high school, the letter of Doctor Rawls requesting you to obtain from me an opinion upon the following case:

"A district school board selects a school site, five heads of families take an appeal to the electoral board. During the hearing of the appeal the five citizens submit a request for the retention of the old site, previously rejected by the school board, and a third site was also placed under consideration. After careful consideration, with full examination of the three sites, the electoral board annulled the action of the school board and selected one of the other sites, certifying its decision to the school board."

My opinion is desired as to the legality of the selection of a site by the school trustee electoral board, after the disapproval by that board of the action of the district school board in selecting some other site.

This identical question was passed upon in quite an elaborate opinion by the Hon. Wm. A. Anderson, Attorney General, in an opinion rendered to Hon. J. D. Eggleston, Jr., Superintendent of Public Instruction, on October 2, 1908, to be found in the report of the Attorney General for 1908, at page 27. In this opinion Attorney General Anderson takes the position very strongly that the sole jurisdiction of the school trustee electoral board is an appellate one to either approve or reverse the action of the district school board, and with no power to select any site in the place of the one chosen by the district school board and rejected by the electoral board. This opinion holds that the district school board

"alone can make a legal and valid selection of the site upon which the proposed school building shall be erected in the place of the site rejected by the school trustee electoral board." The opinion continues:

"My conviction, upon the most careful consideration that I have been able to give the subject, is, that it was never the design of the law. nor the purpose of the law-makers of the Commonwealth to take the power and duty of selecting the sites, for the school-houses to be erected by the taxes and contributions of the people of each school district, out of the hands of the local school authorities of such district, who are in intimate touch with the subject, and presumably more accurately informed as to the facts upon which an intelligent judgment would depend, and deeply interested in such decision of it as shall be the very best for the welfare of the district, and to vest it in a county board of appeal, which, however intelligent and competent its members may be, cannot, as a rule, be so well qualified for making such selection as the local school authorities of the district.

"The powers of such appellate board are therefore confined by the law to deciding the issue presented upon the appeal taken to it; and that issue in case of an appeal of the character here presented, is confined to either affirming or rejecting the selection already made by the local board."

This view was also sustained by the opinion of Assistant Attorney General Robert Catlett, in an opinion to the Superintendent of Public Instruction, rendered August 19, 1909, and found in the report of the Attorney General for the year 1909 at page 51. It is perhaps worthy of remark too that Assistant Attorney General Robert Catlett, on August 6, 1907, in an opinion to the Superintendent of Public Instruction, maintained the same view in the following words:

"It seems to me perfectly plain that the district school trustees alone are the authorities to select sites for schools and to acquire the same in the mode provided by law."

I would be unwilling to over-rule the opinion of my predecessors in this matter, except upon clear conviction that both opinions were erroneous. On the other hand, however, I am constrained to think that these opinions are entirely sound and I am quite sure that, should the school trustee electoral board select some other site than that selected by the district school board, the district school board could not be compelled to purchase the same or pay for it. There can be, no question, I take it, that the school trustee electoral board has appellate jurisdiction to either approve or disapprove of the selection made by the district boards, but the jurisdiction of the school trustee electoral board is limited to this action alone.

Yours very truly,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

SCHOOLS—Public Schools—Encumbrance of School Property—County School Boards—Powers.—The law does not authorize county school boards to borrow money or to encumber school property.

Same—Literary Fund—For what Purposes Loaned—School Boards.—The State Board of Education is not authorized to invest portions of the literary fund in bonds made by a county school board, even if the county school boards had power to issue bonds. Only the district school boards are empowered to

borrow from the literary fund, and the State Board of Education is authorized to loan money only to a district school board and further that in order for the State Board of Education to loan money to the several districts of a county for the county high schools, there would have to be an election in the said several districts and bonds authorized to be issued.

Same—Loans on Schools Owned Jointly by Two Districts.—The school boards of two adjacent districts (as provided in chapter 171, Acts of 1914) whether in the same or different counties, with the consent of the State Board of Education, to establish joint schools for the use of both districts where the title vests jointly in the school boards of such adjacent districts are not prohibited from obtaining from the State Board of Education a loan from the literary fund. Where the title to high school property vests in the county school board, there is no warrant in law for a loan from the literary fund to a county school board.

RICHMOND, VA., July 5, 1916.

HON. R. C. STEARNES,

*Superintendent of Public Instruction,
Richmond, Va.*

DEAR SIR:

Acknowledgment is made of a copy of the extract of minutes of meeting of the State Board of Education held on June 27, 1916, as follows:

"In the matter of applications for loans from the literary fund for the Maysville district school board and the county school board of Buckingham, the following was adopted:

"*Resolved*, first, That the loans be granted as applied for, provided this can be legally done, and, if not, that they be granted to all of the districts in interest.

"Second, That the matter be referred to the Attorney General for his opinion as to how the loans should be made."

From the above extract and the papers in the case the question presented is whether or not, where title is vested in a county school board to a lot and school building acquired for the use of a county high school, a loan could be made from the literary fund to both the county school board and the district school board in whose district the county high school is located. This is the same question presented by your former letter in the following terms:

"Please advise me whether or not under chapter 187 of the Acts of 1916, pertaining to loans from the literary fund, (1) a county school board and a district school board of the same county can borrow money from the literary fund for the same school building, and (2) whether or not a county school board can borrow money from the literary fund."

The solution of the question presented is not without difficulty for the school law with regard thereto is somewhat confusing.

By section 1441 of the Code it is true the county school board is made a body corporate with power to sue and be sued, contract and be contracted with and purchase, lease, take, hold and convey property, but no express authority is conferred by this section to encumber school property or to borrow money. Section 1447 of the Code enumerates the powers and duties of the county school board. The fourth sub-section thereof enumerates "property vested in and managed by the county board." Among the classes of property under this sub-section is the lot and school building and all the real and personal property acquired for the use of the county high school.

Section 1466a provides how county, district and city schools may sell and manage public school property, but does not expressly authorize the encumbering of said property. In fact, I can find no specific authorization for county school boards to borrow money or to encumber school property.

On the other hand, however, the provisions of Acts of Assembly 1908, page 335, authorize the county school boards in the State to *loan* money to the district school boards for the purpose of building school houses. Acts of 1908, page 106, amended by Acts 1916, page 378 (chapter 187), authorize the several school district boards to borrow money belonging to the literary fund, and authorizes the Board of Education to loan money upon the terms and conditions therein set out. This chapter of the Acts of Assembly also gives a specific lien upon the property upon which the loan is made for the payment of the principal and interest. By the provisions of Acts 1908, page 103, district school boards of the State are authorized to issue bonds and borrow money when authorized by a vote of the majority of the white voters of such district. It, therefore, appears that the district school boards are specifically authorized to borrow money from the literary fund, and, after an election, to issue bonds for the purpose of erecting and furnishing school houses.

In addition to the foregoing, section 1433 of the Code, defining the powers and duties of the State Board of Education, was amended at the last session of the General Assembly, chapter 500, Acts 1916, page 836. The eleventh subsection of this act authorizes the Board of Education to invest the capital and unappropriated income of the literary fund; enumerates the investments of this fund which the Board of Education may make, and among them is, "in bonds made by one or more of the district school boards of the different school districts of this State, and when such school bonds are purchased on account of the literary fund, a lien in favor of said fund is hereby created against all the funds and income of said district, as well as upon the property upon which *said loan is made.*"

You will observe from this that the Board of Education is not authorized to invest in the bonds made by the county school board even if the county school board had power to issue bonds.

In the absence of specific authorization, therefore, I am unwilling to say that a county school board can borrow any money from the literary fund, and the only authorization contained in the law, so far as I am advised, for the borrowing of money from the literary fund is that contained in the Acts of 1916 at page 378, which confers this authority only on the district school board.

In the absence of specific authority, I am also unwilling to say that the Board of Education can invest the literary fund in obligations of the county school board. In addition to the last mentioned act, section 1433 of the Code, amended as above set out, confers authority upon the Board of Education to invest the literary fund, and this section authorizes the investment in the bonds made by one or more of the district school boards. This section also provides that a lien in favor of the literary fund is created against all the funds and income of the district which issues the bonds. A county school board, without specific authorization of law, would certainly not be justified in creating a lien upon all of the funds and school income of said county.

I am further of opinion that the authorization of the Board of Education to invest the literary fund (contained in section 1433, amended as above set out) in bonds of one or more school districts can refer only to bonds issued after an

election in those districts as provided by Acts of 1908, page 133. It is my conclusion, therefore, that only the district school boards are empowered to borrow from the literary fund; that the Board of Education is authorized to loan money only to a district school board, and, further, that in order to loan money to the several districts of a county for the county high school there would have to be an election in the said several districts and bonds authorized to be issued, in which bonds the Board of Education would have power to invest the literary fund as set out in section 1433 of the Code, as amended by chapter 500 of the Acts of Assembly 1916, page 836.

This conclusion must not be understood to prohibit the school boards of two adjacent districts (as provided in chapter 171 of the Acts of 1914, page 278, whether in the same or different counties with the consent of the State Board of Education to establish joint schools for the use of both districts, where title vests jointly in the school boards of such adjacent districts) from obtaining from the State Board of Education a loan from the literary fund.

However, in the case presented for my opinion it does not appear that the title to the county high school property vests jointly in two adjacent districts, but that the title thereto vests in the county school board, and, as before said, there seems to be no warrant in law for a loan from the literary fund to a county board.

Yours very truly,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

SCHOOLS—Public Schools—Lease of Property for School Purposes.—Under section 1526 of the Code of Virginia 1904, as amended, a city school board can acquire jurisdiction over property contiguous to the city where the title thereto is held by a lease. By the provisions of section 1525 of the Code of Virginia 1904, a city school board is given the power to lease school property both real and personal.

RICHMOND, VA., July 18, 1916.

HON. R. C. STEARNES,

*Superintendent of Public Instruction,
Richmond, Va.*

DEAR SIR:

With reference to your letter of recent date, enclosing a letter from Hon. Harris Hart, superintendent of public schools, Roanoke city, requesting an opinion from this office as to whether or not a city school board could rent land for school purposes beyond the city limits and pay the lease out of the city school funds, I beg to say that I communicated with Hon. Everett Perkins, Commonwealth's attorney of Roanoke city, with regard to his views in the premises. You readily understand that this office does not care to usurp the functions of the legal adviser of the city school board of Roanoke, and we are very unwilling in any way to even appear to do so.

Of course, the Attorney General is the legal adviser of the Superintendent of Public Instruction, and, therefore, I give my conclusions as to the general proposition contained in Mr. Hart's letter, without in any manner attempting to pass upon the proposed contract between the city school board and the land company in Roanoke, which contract Mr. Perkins declined to approve.

Section 1526 of the Code, as amended by the Acts of 1914, page 498, extends the territorial jurisdiction of the city school board so as to

“cover all school property located without and contiguous to the corporate limits of such city or town, when the title to said property is vested either in the school board of such city as a body corporate, or in the city.”

It is my opinion that under this section the city school board can acquire jurisdiction over property contiguous to the city where the title thereto is held by a lease, and, of course, the city school board, under section 1525 of the Code, is given power to lease school property, both real and personal. Mr. Perkins holds that under section 1538 of the Code, which provides that the school board shall manage and control the school funds of the city and that such funds shall be used to provide for the pay of teachers, and

“for the cost of providing school houses and the appurtenances thereto, and the repairs thereof * * * and for any other expenses attending the administration of the public free school system, so far as the same is under the control or at the charge of the school officers,”

does not warrant the school board in maintaining an athletic park and school farm. Of course, I would not attempt to advise the city school board in the premises, and I hesitate to differ with Mr. Perkins' construction of this section even for the guidance of the State Board of Education, but it does seem to me that this construction is too literal and narrow and that an athletic field and school farm may be a very necessary appurtenance to a public school. Certainly it is a very desirable one.

Very truly yours,

LESLIE C. GARNETT,

Assistant Attorney General.

SCHOOLS—*Public Schools—County School Funds.*—Under the provisions of sections 1490, 1520 and 1521 of the Code and section 103 of the Regulations of the State Board of Education (page 193 of the school laws), county school funds cannot be used for district school purposes.

RICHMOND, VA., *July 18, 1916.*

HON. R. C. STEARNES,

*Superintendent of Public Instruction,
Richmond, Va.*

DEAR SIR:

Acknowledgment is made of your letter of July 8, 1916, directing the attention of the Attorney General to the following extract from the minutes of the meeting of the State Board of Education, held on February 28, 1916:

“A communication asking the State Board of Education to approve the issuance of the warrant dated August 16, 1915, and drawn on the Fairfax county school funds for district purposes (payment of balance due on sewerage amounting to \$178.00), was referred to the Attorney General with the request that he report at the next meeting of the board.”

With your letter is enclosed the correspondence between your department and the Vienna school board of Fairfax county, in which it appears that the

Fairfax county school board passed a resolution transferring all balances in the county school funds to the district school fund, and that thereupon the Vienna school board used \$178.00 of county school funds to pay for a sewerage contract. Upon this state of facts the board of education desires the opinion of this office as to its power to approve the issuance of a warrant drawn on the county school funds for district purposes.

By section 1520 (or 1521) of the Code, it is provided that:

"All sums derived from county or district funds unexpended in any year shall remain a part of the county or district funds, respectively, for use the next year."

By section 103 of the Regulations of the State Board of Education, page 193 of the school laws, it is provided that:

"The proceeds of State and county school funds must be used exclusively for the pay of teachers and that if after a fair scale of salaries for teachers has been provided, there remain any residue, the same may be used for the pay of drivers of school wagons."

Section 1490 of the Code provides that:

"No district shall receive a part of the county funds until it has made proper provision for school houses, furniture, etc."

Under these sections of the Code and Regulations of the Board, it is apparent that county school funds cannot be used for district school purposes, and especially under section 1520 it is provided that any unexpended county balance shall remain a part of the county funds. It is my opinion, therefore, that the unexpended balance of the county funds in the hands of the Vienna school district board cannot be lawfully expended to pay for a sewerage contract.

Very truly yours,

LESLIE C. GARNETT,

Assistant Attorney General.

SCHOOLS—*Literary Fund—Recall of Loans.*—The State Board of Education is authorized to loan district school boards making application therefor money belonging to the literary fund, and where it has done so taking bonds issued before an election the board has plenary power to recall the loans so made and re-invest in the bonds of such districts as the board may deem advisable.

RICHMOND, VA., July 15, 1916.

HON. R. C. STEARNES,

Superintendent of Public Instruction,

Richmond, Va.

DEAR SIR:

I beg to acknowledge letter of the State Board of Education, enclosing letters relating to the refunding of school loans in Lochleven district, Lunenburg county, and Cobham district, Surry county. This letter informs me that the State Board of Education, at its meeting held on June 27, 1916, directed that the requests from the school boards of these two districts to permit them to cancel the present bonds and issue new bonds were granted, subject to the opinion of the Attorney General as to the legality of the bonds involved.

In view of the fact that the State Board of Education is authorized to loan the district school boards, making application therefor, money belonging to the literary fund, and the further fact that these loans were made from the literary fund and not by bonds issued after an election, it is my opinion that the board has plenary power to recall the loans to the two districts aforesaid and re-invest in the bonds of these districts as the board may deem advisable. The provisions of section 1433 of the Code, as amended, chap. 500 of Acts of 1916, page 836, would seem to fully authorize such a procedure in the following proviso:

“The said board (of education) may call in any such investments, or any heretofore made, and re-invest the same as aforesaid whenever deemed proper for the preservation, security or improvement of the said fund.”

Yours very truly,

LESLIE C. GARNETT,

Assistant Attorney General.

SCHOOLS—Public Schools—Pupils—Section 1498, Code Virginia.—The provision of section 1498, Code Virginia, requiring payment in advance for pupils, is merely directory and no delinquent patron can avoid payment of fees on the ground that the school board did not collect them in advance.

RICHMOND, VA., *September 16, 1916.*

HON. R. C. STEARNES,

*Superintendent of Public Instruction,
Richmond, Va.*

DEAR SIR:

I have request from your office for my opinion upon a question arising under section 1498 of Virginia Code 1904, appearing as section 89 of 1915 edition of Virginia school laws. Under that section it is provided, among other things, that any county or district school board may require a fee, to be paid monthly or quarterly in advance, not to exceed two dollars and fifty cents per month for each pupil for instruction in higher branches of learning.

It appears that certain district boards conducting a high school have, in pursuance of the section above referred to, required a fee for such instruction within the limits prescribed by the statute and that certain patrons are now refusing to pay the fees for tuition of past sessions on the ground that the school boards did not collect the fees in advance as required by law. It also appears that said boards solicited from the now delinquent patrons the payment of the fees in advance and have frequently, through statements and otherwise, solicited payment of the same.

I consider as merely directory the provision of the statute requiring payment in advance, and I am clearly of the opinion that no delinquent patron can avoid the payment of the fees on the ground that the board did not collect them in advance. Any other construction would be putting a premium on their delinquency and rewarding them for their default.

Yours very truly,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

STATUTES—*Fish and Game—Oysters—Chapter 343, Acts 1910—House Bills 109 and 124—General Assembly 1916.*—The legislature of Virginia has the power to change the cull line in the James river from the point designated in the original act to some other point.

Same.—The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action dependent; therefore, the legislature has the power to enact laws, the effect and operation of which is made dependent upon certain contingencies, and that the conditions or contingencies selected may be the ascertainment of particular facts by executive or other officers, but the facts which are to determine the executive acts must be such as may be precisely stated by the legislature and may be certainly ascertained by the executive or other officer, and if the facts are not such as may be certainly ascertained by the executive officer, then the officer entrusted with the execution of the law is necessarily vested with independent judgment as to how and when the law is to be executed, and whenever this independence of judgment is considerable there is a good ground to hold that the law is not simply a law *in presenti* to take effect *in futuro*, but that it is a delegation by the law making power of its legislative discretion.

RICHMOND, VA., February 4, 1916.

HON. HARRY R. HOUSTON,
Speaker, House of Delegates,
Richmond, Va.

DEAR SIR:

On Saturday evening, January 29, 1916, I received from Hon. John W. Williams, Clerk of the House of Delegates, a copy of the following resolution:

"Whereas, Some doubt has arisen as to the constitutionality of House Bills Nos. 109 and 124, as to the establishment of a cull line in the James river and the sale of seed oysters out of the State;

"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 or not, in his opinion, said proposed bills are constitutional."

The object of House Bill 109, referred to in the aforesaid resolution, is to amend and re-enact section 26 of the oyster laws of Virginia, as found in chapter 343 of the Acts of 1910. The only changes made by House Bill 109 in said section are as follows:

(1) On page 2 of House Bill 109, lines 13 and 14, the cull line is changed from "a line drawn from Day's Point, in the county of Isle of Wight, to Deep creek, in the county of Warwick," to "a line drawn from Cooper's creek, in the county of Isle of Wight, to Finch's pier in the city of Newport News."

As to the constitutionality of this change, I conceive that there can be no question, for if the legislature had the authority to draw a line in the original act, it certainly has the authority to change the line in the amended act.

(2) On page 3 of House Bill 109, line 36, there has been omitted from the original act the word "proving," the provisions of the original act reading as follows: "The burden of proving that fact shall be upon him;" whereas the bill as amended reads as follows: "The burden of that fact shall be upon him." This change I conceive was merely a clerical error and should be cured by amendment.

(3) The principal change made by House Bill 109 in the said section is contained in the proviso on page 3, beginning at line 47, and reading as follows:

"Provided, however, that if at any time it shall appear, or be made to appear to the Commission of Fisheries, that the natural rocks, beds and shoals in James river below a line drawn from Day's Point, in the county of Isle of Wight, to Deep creek, in the county of Warwick, or the oyster industries of the State, are being jeopardized or injuriously affected, then and in that event the said Commission of Fisheries may, by such rules and regulations as it may prescribe, suspend the taking of oysters from said natural rocks, beds and shoals below said line, whose shells measure less than three inches from hinge to mouth, for such time as may appear to said Commission of Fisheries to be right and proper, and when such taking is so suspended it shall be unlawful to take said oysters from the waters below Day's Point, in the county of Isle of Wight, to Deep creek, in the county of Warwick."

The evident object of the aforesaid amendment is to allow the Commission of Fisheries to suspend the taking of seed oysters below the old cull line established by the original act for such time as may appear to the Commission of Fisheries to be right and proper, whenever it shall be made to appear to the Commission of Fisheries that the natural rocks, beds and shoals in James river below the old cull line, or the oyster industries of the State are being jeopardized or injuriously affected.

This power to restore the old cull line is made to depend, it will be noted, upon the happening of two contingencies,—(1) whenever it appears to the commission that the natural rocks, beds and shoals in James river below the old cull line are being jeopardized or injuriously affected, then the Commission of Fisheries may restore the old cull line; and (2) whenever it shall appear that the oyster industries of the State are being jeopardized or injuriously affected, then the Commission of Fisheries may restore the old cull line. The bill provides that the old cull line may be restored by such rules and regulations as the commission may prescribe, and for such time as may appear to said Commission of Fisheries to be right and proper; and it is further provided that when such taking is so suspended, it shall be unlawful to take seed oysters from the waters below Day's Point, in the county of Isle of Wight, to Deep creek, in the county of Warwick.

The main question involved by the proposed amendment is whether, in empowering the Commission of Fisheries to restore the old cull line, under the contingencies named in the act, the bill delegates to the Commission of Fisheries legislative power.

The question is not entirely free from doubt. As was said by Mr. Justice Lamar, in *United States v. Grimaud*, 220 U. S. 517, 55 L. ed. 567, "it must be admitted that it is difficult to define the line which separates legislative power to make laws from administrative authority to make regulations * * *. It will not be contended that Congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others powers which the legislature may rightfully exercise itself * * *. The line has not been exactly drawn which separates those important subjects which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details."

In many cases under the federal Constitution, Congress has made it unlawful to obstruct navigable streams, to sell unbranded oleomargarine, to import

unwholesome teas, or to carry out some further general policy of the law. With this unlawfulness as a predicate, executive officers are authorized to make rules and regulations appropriate to the several matters covered by the various acts, and a violation of these rules is made an offense punishable by law. "But in making these regulations the officers did not legislate. They did not go outside of the circle of that which the act itself had affirmatively required to be done, or treated as unlawful if done. But confining themselves within the field covered by the statute, they could adopt regulations of the nature they had thus been generally authorized to make, in order to administer the law and carry the statute into effect." *U. S. v. Grimaud*, 220 U. S. 518, 55 L. ed. 568.

The distinction seems to be that the legislature cannot delegate its power to make a law, but it can make a law to delegate, a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend.

In *United States v. Grimaud*, 220 U. S. 506, 55 L. ed. 563, the constitutionality of an act of Congress, authorizing the President to set apart forest reservations, was in question. Under authority of that act, the Secretary of Agriculture was authorized to make rules and regulations, and it was provided that a violation of such rules and regulations should be a penal offense. The purpose of the forest acts, relating to the establishment and maintenance of forest reservations, was to improve and protect the forests and to secure favorable conditions of water flow. Carrying out this purpose, and the provision of the law authorizing him to make rules and regulations governing the reservations, the Secretary of Agriculture promulgated a rule or regulation requiring that, before grazing any stock in a forest reserve, all persons must secure permits. Grimaud was indicted for grazing his stock on a forest reservation without a permit. It was held that the act was not a delegation of legislative power.

2 Willoughby on the Constitution, page 1318, section 775, states the general doctrine as follows:

"The qualifications to the rule prohibiting the delegation of legislative power * * * are those which provide that while the real law-making power may not be delegated, a discretionary authority may be granted to executive and administrative authorities; (1) to determine when and how the powers conferred are to be exercised; and (2) to establish administrative rules and regulations binding both upon their subordinates and upon the public, fixing in detail the manner in which the requirements of the statute are to be met and the rights therein created to be enjoyed.

"The principle which permits the legislature to provide that the administrative agent may determine when the circumstances are such as require the application of a law is defended upon the ground that at the time this authority is granted the rule of public policy, which is the essence of the legislative act, is determined by the legislature. In other words, the legislature, as it is its duty to do, determines that, under given circumstances, certain executive or administrative action is to be taken, and that under other circumstances different, or no action at all, is to be taken. What is thus left to the administrative official is not the legislative determination of what public policy demands, but simply the ascertainment of what the facts of the case require to be done according to the terms of the law by which he is governed. Thus in *Locke's Appeal*, 72 Pa. St. 491, the court said: 'To assert that a law is less than a law, because it is made to depend on a future event or act, is to rob the legislature of the power to act wisely for the public welfare whenever a law is passed relating to a state of affairs not yet developed, or to things future and impossible to fully know. The court cannot delegate its power to make a law, but it can make a law to delegate a

power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation.’”

I conceive, therefore, that the legislature has the power to enact laws the effect and duration of which is made dependent upon the happening of certain contingencies, and that the conditions or contingencies selected may be the ascertainment of particular facts by executive or other officers. 6 R. C. L., page 175. But the facts which are to determine the executive acts must be such as may be *precisely stated* by the legislature and may be *certainly ascertained* by the executive or other officer; and if the facts are not such as may be certainly ascertained by the executive officer, then the officer entrusted with the execution of the law is necessarily vested with an independent judgment as to when and how the law shall be executed; and whenever this independence of judgment is considerable, then there is good ground to hold that the law is not simply a law *in presenti*, to take effect *in futuro*, but that it is a delegation by the law-making power of its legislative discretion.

Thus, in *Field v. Clark*, 143 U. S. 649, 693, 36 L. ed. 294, the court, in sustaining the constitutionality of the McKinley Tariff Act, and holding that it did not invest the President with the power of legislation, said that “nothing involving the expediency or the just operation of such legislation was left to the determination of the President.”

If the legislature were to see fit to entrust to the Commission of Fisheries the power to restore the cull line upon the ascertainment of certain physical facts, then I have no doubt that such a statute would be constitutional; but in the act here in question the power of the commission to restore the old cull line is not made to depend upon the ascertainment of physical facts, for if it is made to appear that the oyster industries of the State are being jeopardized or injuriously affected, then the commission is given the power to suspend the taking of seed oysters below the old cull line. This does not seem to be the determination of a question of a physical fact, but rather a question of public policy about which there may be variety of opinion and which will not be possible to be ascertained definitely. Therefore, I am forced to conclude that this provision of the bill makes the same unconstitutional.

The object of House Bill No. 124, referred to in the above resolution, is to amend section 31 of the oyster laws of the Commonwealth, chapter 343 of the Acts of 1910. The object of the original provision of section 31 was to prevent the carrying out of the State of so-called seed oysters, which are oysters taken from the natural rocks, beds or shoals whose shells measure less than three inches, or if taken from the estuaries of the Potomac river, oysters whose shells measure less than two and one-half inches.

By the terms of the amendment provided in House Bill 124, the aforesaid object of section 31 is entirely done away with, and the effect and purpose of the amendment seems to be to allow seed oysters to be taken out of the State until such time as it shall be made to appear to the Commission of Fisheries that the natural oyster rocks, beds or shoals in the waters of the Commonwealth are being depleted, or are about to be depleted, so that there will not be upon said natural rocks, beds and shoals sufficient seed oysters to supply the demand of the lawful

renters of oyster planting grounds in the waters of the Commonwealth. In other words, it would not be an offense to take such seed oysters out of the State unless and until the Commission of Fisheries shall ascertain that the natural oyster rocks are being depleted, or about to be depleted, in which case the bill provides that the Commission of Fisheries may prescribe rules and regulations prohibiting the taking of seed oysters out of the State.

2 Willoughby on the Constitution, section 781, page 1327, discussing penal ordinances, uses the following language:

"The courts scrutinize with especial care those cases in which a criminal action is based upon the violation of an administrative order. It is not questioned that the legislature may attach a criminal liability to the violation of an administrative order, but in each case it must clearly appear that the order is one which falls within the scope of the authority conferred. Thus, while there are many cases in which it has been held that the delegation of an ordinance-making power to the executive is not a delegation of legislative power, there are comparatively few cases in which it has been sustained the right of an administrative officer to establish an ordinance the violation of which will be punished criminally."

It will be noted that the effect of the bill is to give the direction and power to the commission to declare in the future an act to be criminal which the bill itself recognizes at this time to constitute no offense.

It must be admitted that the case of the *United States v. Grimaud*, 220 U. S. 506, 55 L. ed. 563, quoted above, stretches, if it does not overturn, the doctrine that the legislature cannot delegate to an administrative board or officer the power to make an act an offense which was not theretofore criminal, and it may well be that the court, if it can see its way clear to declare that the purpose of this bill is to protect the oyster rocks, beds and shoals, will hold that the power here given to the board falls within the scope of the authority conferred; but it would seem that the main purpose of the bill is to open for export territory heretofore closed, and therefore the court would hold that the power given to the board to close the territory does not fall within the scope of the bill; and while my opinion is not without some hesitation, I think it probable that the courts would declare the bill unconstitutional.

I hope it may not be considered amiss for me to say, however, that the purpose of the bill can be effected by an amendment of the present section so as to prevent the taking of seed oysters from the seed area without a permit from the Commission of Fisheries, but, at the same time, granting to the Commission of Fisheries the power to permit such seed oysters to be taken from said seed area upon the ascertainment of certain definite facts. See *Henrico County v. Richmond*, 106 Va. 282, 294; 6 R. C. L., sections 175 to 181.

Respectfully submitted,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

STATUTES—*Virginia Home and Industrial School for Girls—Chapter 170, Acts 1914—Statutes—Repeal of.*—A statute or a part thereof is never impliedly repealed by the failure of the legislature to act. On the contrary it is clear that the will of the legislature, as expressed in the statute remains the law of the land until it is expressly or impliedly repealed by some other act of the legislature.

REV. J. J. SCHERER, JR.,

RICHMOND, VA., January 25, 1916.

Secretary, Board of Management,

Virginia Home and Industrial School for Girls,

Richmond, Va.

DEAR SIR:

In response to your request that I write you expressing an opinion as to whether chapter 170, Acts of 1914, page 276, relating to the Virginia Home and Industrial School for Girls and the control thereof by the State, should be amended for the purposes which you have in mind, I beg leave to submit as follows:

Sections 4 and 5 of said act, in effect, provides nothing in the act, or the acceptance of the deed therein mentioned, "shall be construed to prevent the sale of said property and change of the location of the home," and further that the Governor of Virginia and the board of directors "be and they are hereby authorized to make said sale and the location of the home elsewhere if, in their judgment, the same shall be advisable." The question which you submit is whether this provision will remain a part of the law if not repealed by the present or some subsequent legislature, or whether it will be necessary, in order for the Governor and the board to make a sale of the property and the location of the home elsewhere, to have another act for the purpose.

I can find no provision of the Constitution nor principle of law under which it could be held that the aforesaid provisions of the statute are impliedly repealed by the failure of the legislature to act. On the contrary, the principle is clear that the will of the legislature as expressed in a statute remains the law of the land until it is expressly or impliedly repealed by some other act of the legislature. Therefore, it does not seem necessary to have the above provisions re-enacted at this session of the legislature in order for the Governor and the board to take the steps authorized by the original act.

Very truly yours,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

SUPERVISORS—Game Laws, Chapter 152, Acts 1916, Section 14—Board of Supervisors, Chapter 451, Acts 1916.—A board of supervisors of a county which fails to furnish a list of persons from which the game-warden of such county is to be appointed by the commissioner, may be compelled to give such information by mandamus proceedings. Such board of supervisors may also be proceeded against for such failure under chapter 451, Acts 1916, commonly known as the Ouster Law.

RICHMOND, VA., October 23, 1916.

HON. JOHN S. PARSONS, *Commissioner,*

Department of Game and Inland Fisheries,

Richmond, Va.

DEAR SIR:

Acknowledgment is made of your communication of October 21, in which you request the Attorney General to advise you as to your rights on the following state of facts:

"The board of supervisors of one of the Virginia counties although repeatedly requested to furnish the information, decline to furnish the Department of Game and Inland Fisheries with a list of ten suitable persons as provided for by section 14 of chapter 152 of the Acts of 1916."

Section 14, so far as is applicable to this inquiry, reads as follows:

"The commissioner shall appoint from a list of ten suitable person to be furnished to him by the board of supervisors of each county or the council or similar governing body of each city, such regular and special game-wardens in each county and city of this State, as he may deem necessary." * * *

This section, therefore, imposes a duty on the board of supervisors of the county to furnish the commissioner with a list of ten persons suitable to be appointed game-wardens, and if such board fails to comply with its duty in this respect after demand by you I am of the opinion that a mandamus proceeding would lie against such board to compel it to designate the requisite number of persons in its county as provided for in section 14.

I am further of the opinion that you could also proceed against such supervisors under chapter 451 of the Acts of 1916, commonly known as the Ouster Law which, so far as is applicable to this question, reads as follows:

"* * * That every person holding any office of trust or profit under and by virtue of any of the laws of the State of Virginia, either State, county or municipal, except such officers as are by the Constitution removable only and exclusively by methods other than those provided by this act, who shall knowingly or willfully misconduct himself in office or who shall knowingly or willfully neglect to perform any duty enjoined upon such officer by any law of the State of Virginia, or who shall in any public place be in a state of intoxication produced by ardent spirits voluntarily taken, * * * shall forfeit his office and shall be ousted from office in the manner hereinafter provided."

Of course, before instituting either of the proceedings above outlined, demand should be made upon the board of supervisors that they perform the duty imposed upon them by law.

Yours very truly,

LESLIE C. GARNETT,

Assistant Attorney General.

TOWELS, PUBLIC—Chapter 160, Acts 1916—Chapter 278, Acts 1916—*Statutes—Construction*.—Repeals by implication are not favored, and two acts dealing with the same subject must be read together and harmonized where possible. Viewed, in this light, chapter 160, Acts 1916, and chapter 278, Acts 1916, are both in force.

Same.—Although these statutes are penal in their nature, having been passed for the protection of the public health, they are to be liberally construed to the end that the purpose of the acts may be accomplished.

Same.—These statutes taken together prohibit the use of roller towels in public lavatories located in (1) any building, (2) railroad station, (3) railroad train, (4) steamboat, (5) hotel, (6) office building, (7) public and private schools, and it is apparent from the reading of the acts that it is unlawful to allow the use of such towels in public lavatories in any building of any character, and it was not the intent of the legislature to limit the operation of these statutes to buildings of like nature with those specifically enumerated.

Words and Phrases—*Public Lavatory*.—All factories, workshops and mercantile establishments maintaining lavatories for the use of their employees alone or for the use of their customers alone or for use of both employees and customers come within the meaning of the phrase "public lavatory."

Same.—Under the terms of the statutes here under construction the prohibition is placed not only upon roller towels but upon all towels intended or available for common use by more than one person without being laundered after such use.

RICHMOND, VA., June 16, 1916.

HON. JAS. B. DOHERTY, *Commissioner,*
Bureau of Labor and Industrial Statistics,
Richmond, Va.

DEAR SIR:

Replying to your inquiry as to the effect and construction of the statutes known as "the Roller Towel Acts," will say that at the last session of the General Assembly there were passed two acts on the subject, one appearing as chapter 160, Acts 1916, page 321, approved March 11, 1916, and another appearing as chapter 278, Acts 1916, page 496, approved March 17, 1916. Both of these acts go into effect on June 17th.

You ask whether the last mentioned statute repeals or supersedes the earlier one or whether they are both in force. According to a well known rule of statutory construction, repeals by implication are not favored and two acts dealing with the same subject must be read together and harmonized where possible. An examination of these two acts leads me to the conclusion that they are both in force.

Both acts prohibit the use of roller towels in public lavatories. You ask whether the term "*public lavatory*" is to be construed to include lavatories located in factories, workshops and mercantile establishments where the use of lavatories is limited to employees alone, or to customers alone, or for the use of both employees and customers. The conclusion which I have reached makes it unnecessary for me to separate the question into its several parts. Both of the acts referred to are for the protection of the public health and are based upon the belief that the use of roller towels causes the spread of disease. It is well established that acts for the protection of the public health, although penal in their nature, are to be liberally construed to the end that the purpose of the acts may be accomplished. The question turns upon the proper construction to be put upon the term "*public lavatory*."

The acts taken together expressly prohibit the use of such towels in public lavatories located in:

- (1) any building,
- (2) railroad stations,
- (3) railroad trains,
- (4) steamboats,
- (5) hotels,
- (6) office buildings,
- (7) public and private schools.

It is apparent from the reading of the acts that it is unlawful to allow the use of such towels in public lavatories in any building of any character for the context plainly shows that it is not intended to limit the operation of the statute to buildings of like nature with those specifically enumerated.

Keeping in mind that the purpose of the statute is the prevention of the spread of disease, there would seem no reason for prohibiting the use of such towels in lavatories of private schools, while permitting the use of such towels in workshops, factories and mercantile establishments employing thousands of

men and women; and, while it would be perfectly competent for the General Assembly to limit the operation of the acts to one class of buildings, and permit such towels to be used in places where the danger of the spread of disease is much greater, yet the statutes should not be so limited unless the language used therein compels such limitation.

It is unfortunate that the statute is not more plainly expressed, and it must be admitted that the questions you propound are not entirely free from doubt, but in such cases I think it is the duty of the executive officers to place such construction on the law as would seem to effectuate its purposes. It is for this reason that I would advise that, until some court of competent jurisdiction has decided to the contrary, all factories, workshop and mercantile establishments maintaining lavatories for the use of their employees alone, or for the use of their customers alone, or for the use of both employees and customers, be required to comply with the provisions of the acts.

It might be well to add that under the terms of the acts referred to, the prohibition is placed not only upon roller towels, but all towels intended or available for common use by more than one person without being laundered after such use.

Yours very truly,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

TAXATION—Capitation Taxes—Collection of Delinquent Capitation Taxes, Chapter 488, Acts 1916.—For the 1916 list of delinquent capitation taxes to be made up under the provisions of chapter 488, Acts 1916, the first capitation taxes which are three years delinquent are those which were payable December 1, 1912.

Same.—The capitation taxes that were delinquent December 1, 1910, are more than five years delinquent; therefore, only the capitation taxes delinquent for the years 1911 and 1912 come within the provisions of chapter 488, Acts of 1916.

RICHMOND, VA., *July 18, 1916.*

HON. C. LEE MOORE,

Auditor of Public Accounts,

Richmond, Va.

DEAR SIR:

Acknowledgment is made of your letter of even date, requesting an opinion as to what delinquent capitation taxes should be included in the list required to be made out by clerks of courts on or before the first of October, as provided by the Act of March 22, 1916, chapter 488, page 823, Acts 1916, as follows:

“On or before the first day of October of each year the clerk of the court appointing the delinquent capitation tax collector, shall make out a duplicate list of all persons within his county or city who shall be as much as three (3) and not exceeding five (5) years delinquent in payment of capitation taxes.”

The first capitation taxes which are three years delinquent are those which were payable December 1, 1912.

The capitation taxes which were delinquent December 1, 1910, are more than five years delinquent. It follows, therefore, that only the capitation taxes delin-

quent for the years 1911 and 1912 come within the provisions of the section above that such taxes shall be as much as three and not exceeding five years delinquent.

This conclusion is strengthened by an opinion rendered by Attorney General Anderson, report 1902, page 16, holding that capitation taxes are due December 1st of the year in which they are assessable, and, further, by his opinion found on page 22 of the report of 1914, holding that in January, 1904, the only poll taxes then three years past due were those for years prior to 1901.

Yours very truly,

LESLIE C. GARNETT,

Assistant Attorney General.

TAXATION—Capitation Taxes—Section 1, Tax Bill—When Due.—Capitation taxes are due at the date when they are payable and not at the date when they are assessed, which means that they are due as of the first day of December and not the first day of February.

Same—Constitution of Virginia—Section 22—When Delinquent.—Capitation taxes do not become delinquent until the first day of December. Therefore, capitation taxes for 1913 not being payable until December 1, 1913, will not be three years past due on October 1, 1916. On October 1, 1916, the first capitation taxes which are as much as three years delinquent are those which were assessable February 1, 1912.

Same—Chapter 488, Acts 1916.—The list of delinquent capitation taxes provided for in chapter 488, Acts 1916, includes the persons delinquent not exceeding five years. Capitation taxes for the year 1910 were delinquent on December 1, 1910, and, therefore, on October 1, 1916, they are five years and several months overdue, but since 1911 taxes are not payable until December 1, 1911, they will not on October 1, 1916, be delinquent exceeding five years; therefore, the clerk's list made up under the provisions of chapter 488 of the Acts of 1916 should contain the names of those who are delinquent for the years 1911 and 1912, or those who are delinquent for either of those years.

RICHMOND, VA., June 29, 1916.

T. W. CARPER,

*Clerk Franklin County,
Rocky Mount, Va.*

DEAR SIR:

I am in receipt of yours of the 29th ultimo, and have discussed the question with the Auditor of Public Accounts, who desires that I answer you directly and merely give him a copy of the opinion rendered you.

Your question with reference to chapter 488 of the Acts 1916, providing for the collection of delinquent capitation taxes, which, so far as here material, reads in part as follows:

“On or before the first day of October of each year the clerk of the court appointing the delinquent capitation tax collector, shall make out a duplicate list of all persons within his county or city who shall be as much as three (3) and not exceeding five (5) years delinquent in payment of capitation taxes.”

You desire to know under this statute, first, what year you are to commence in making out the required lists, and, second, whether when you find a man on the list for just two years you are required to place him on the list that you make out.

Answering these questions in their proper order, you will observe that the act requires you to make a list of persons "who shall be as much as three * * * years delinquent in payment of capitation taxes."

Section 1 of the tax bill states that capitation taxes are assessable as of the first of February annually, and by section 603 of the Code, as amended by Acts 1916, page 515, they are payable not later than December first annually. Naturally, the first question to be determined is when taxes are delinquent. By an opinion rendered by Attorney General Anderson in report of 1902, page 16, it was decided that capitation taxes are due at the date when they are payable and not at the date when they are assessable. Which, of course, means that they are due as of the first of December and not the first of February, and I take it to be true that they would not be delinquent until the first of December. Such being the case, we begin by saying that the last poll taxes prior to October 1, 1916, which are delinquent, are the poll taxes for 1915. Therefore, considering the question of when they are as much as three years delinquent, we find that the first poll taxes which are three years delinquent are those which were payable December 1, 1912. Those for 1913 not being payable until December 1, 1913, will not be three years past due on October 1st. It follows, therefore, that I am of the opinion that on October 1, 1916, the first capitation taxes which are as much as three years delinquent are those which were assessable February 1, 1912. This construction also accords with section 22 of the Constitution, which lays down the following mandate:

"The collection of the State poll tax assessed against any one shall not be enforced by legal process until the same has become three years past due."

I may also add that Attorney General Anderson, in an opinion found on page 22 of the report of 1904, held on January 9, 1904, the only poll taxes then three years past due were those for years prior to 1901. This is in exact accord with the opinion which I have above expressed to you.

In regard to the second question, I may say that I am not entirely clear as to just the information you desire. You will observe that the list should include persons delinquent not exceeding five years. In addition to the three-year requirement above discussed, capitation taxes for the year 1910 were delinquent on December 1, 1910, it follows that on October 1, 1916, they are five years and several months over due, but since 1911 taxes are not payable until December 1, 1911, they will not, on October 1, 1916, be delinquent exceeding five years. I am, therefore, of the opinion that your list should contain those who are delinquent for the years 1911 and 1912, or who are delinquent for either of those years.

Hoping that this covers your inquiries, I am,

Yours very truly,

LESLIE C. GARNETT,
Assistant Attorney General.

TAXATION—Public Schools—Taxes—Rate of Levies—How Determined.—The aggregate rate of levies of the district and county school funds of the Commonwealth for the purposes provided for in chapter 520 of the Acts of 1916 are to be

determined by the levies for the year 1915 and not by the levies for the year 1916. In apportioning the 1917 fund, the 1916 levies are to be taken as a basis, it being the intention of the law that the last available preceding levy should be taken as the basis.

RICHMOND, VA., *June 26, 1916.*

HON. R. C. STEARNES,
*Superintendent Public Instruction,
Richmond, Va.*

MY DEAR SIR:

Acknowledgment is made of your letter of June 19, 1916, asking for a construction of the terms of the appropriation bill of 1916 (Acts of Assembly 1916, page 899), appropriating money to be used for the maintenance and development of rural schools of one and two rooms, especially with reference to the following provision:

"But no part of said fund shall be apportioned or paid to any rural school, unless the levies for district and county school purposes in which said school is situated aggregate a sum equal to or greater than the average rate of the levies of the district and county school funds of the Commonwealth."

You desire to be advised especially as to whether or not in determining the aggregate rate of levies of the district and county school funds of the Commonwealth, the levies for the year 1915 or the levies for the year 1916 shall be made the basis. You will observe that the appropriation bill is an emergency act and went into effect immediately upon its approval on the 24th day of March, 1916. This was prior to the levies made by the boards of supervisors in the various counties for the year 1916, and I take it that the only practical basis for determining this average is to take the levies for the year 1915. In apportioning the 1917 fund it would seem that you would then have to take the 1916 levies as a basis, it being the intention of the law, I think, that the last available preceding levy should be taken as the basis.

Yours very truly,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

TAXATION—*Tax on Deeds of Trust—Section 13, Virginia Tax Bill.*—Where a deed of trust secures payment of a particular sum, and also the payment of interest notes, the tax should be based upon the total amount of principal notes and interest notes.

Same.—Where a debt secured by deed of trust is evidenced by one promissory note with interest payable semi-annually, the obligation secured by said deed of trust is the principal sum, together with interest thereon, and the tax on such deed of trust should be based on the principal and interest combined. The interest obligation is just as much secured as the principal, whether it be evidenced by a note or not.

RICHMOND, VA., June 27, 1916.

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

DEAR SIR:

Acknowledgment is made of your request for an examination of the correspondence between you and Messrs. Nelms, Colonna and McMurran, attorneys at law, Newport News, Va., and an opinion as to what amount the clerks of courts should collect for taxes on deeds of trust under the circumstances as enumerated in a letter of these attorneys to you, as follows:

"First. In trust to secure the payment of \$1,000.00 and interest, evidenced by five promissory, negotiable notes, the first four being interest notes each in the sum of \$30.00, payable six, twelve, eighteen and twenty-four months after date respectively, and the fifth being the principal note in the sum of \$1,000.00.

"Second. In trust to secure the payment of \$1,000.00 and interest, evidenced by one promissory, negotiable note in the sum of \$1,000.00, payable two years after date, with interest from date payable semi-annually."

I note in your letter that you make a distinction between these cases and hold that in the first case the amount of the obligations (notes) secured is \$1,120.00 and in the second case is only \$1,000.00.

I agree with you in your conclusion that where the deed of trust secures the payment of the principal sum and also the payment of the interest notes, the tax should be based upon the total amount of the principal notes and interest notes. This matter is set at rest, so far as this office is at present concerned, by an opinion of the Attorney General, rendered you on September 14, 1915, in the matter of the tax to be charged by the clerk of the circuit court of Russell county for recording the agreement between the Clinchfield Coal Corporation and the New York Trust Company, in which case the Attorney General held as follows:

"The amount of obligation secured by this agreement are principal \$1,200,000.00 and coupons representing interest (these coupons are as much obligations as are the notes representing the principal) \$144,000.00, total \$1,344,000.00; therefore, the tax for recording the agreement should be based upon the amount \$1,344,000.00, which makes the tax at \$1.00 per \$1,000.00, \$1,344.00."

I cannot agree with your construction of the law in regard to the second case where the debt is evidenced by one promissory note in the sum of \$1,000.00, payable two years after date with interest from date, payable semi-annually, that the obligation secured thereby is only \$1,000.00. I am of opinion that the total obligation secured thereby is identical with that in the first case, to-wit: \$1,120.00. You will note that the terms of section 13 of the tax law are as follows:

"On deeds of trust or mortgages the tax shall be upon the amount of bonds or other obligations secured thereby."

The interest obligation is just as much secured in the one case as the other, whether it be evidenced by a note or not, and the total amount secured is identical. My opinion, therefore, is that where a deed of trust secures the pay-

ment of a principal sum with interest, whether or not either the principal or interest is represented by notes, both the principal and interest are to be considered as the amount secured by the deed of trust for the purpose of fixing the tax on the deed.

Yours very truly,

LESLIE C. GARNETT,

Assistant Attorney General.

(But see *Virginia Blue Ridge Ry. Co. v. Kidd, Clerk*, 120 Va.)

TAXATION—Delinquent Taxes—Sale of Real Estate for Delinquent Taxes—Section 622, Code Virginia 1904.—There is no exception in section 622, Code Virginia 1904, when real estate has been previously purchased in the name of the Auditor, and it cannot be subsequently re-purchased at a sale for current taxes, but "it must be sold for such price as it will bring." This statute, therefore, authorizes the sale of real estate for current taxes heretofore bought in in the name of the Auditor, and the county treasurer is required by the statute to put up at public auction lands heretofore bought in the name of the Auditor which are delinquent for current taxes.

Same—Treasurer—Board of Supervisors—Duty Thereof.—If there is upon such real estate green timber of the value of the current taxes, costs of sale, advertising, etc., or if such real estate has a yearly rental value equal to the amount of the current taxes, costs of sale, advertising, etc., it is not only the duty of the county treasurer to sell the timber or lease the land, but the board of supervisors of the county is not warranted in permitting him to return such land as delinquent for current taxes, since current taxes can be secured by such distress and sale.

RICHMOND, VA., *June 13, 1916.*

HON. C. LEE MOORE,

Auditor of Public Accounts,

Richmond, Va.

DEAR SIR:

Acknowledgment is made of your letter, enclosing a letter from Wm. M. Smith, Commonwealth's attorney, Cumberland county, Virginia, making inquiry as to the power or duty of a county treasurer to lease or sell timber from lands returned delinquent and sold to the Commonwealth, in the following words:

"Whether he should advertise and sell standing timber on such lands or rent them out when they are the property of the Commonwealth and have been such for several years by virtue of such previous sales thereof to the Commonwealth?

"When the lands have been returned delinquent and sold to the Commonwealth for say the taxes for 1910, 1911, 1912, and so on, can the treasurer rent out those same lands, or sell the timber thereon for the taxes for 1915?

"The rule adopted as far as I have been informed by the treasurers heretofore has been to continue to return such lands delinquent for the accruing taxes. Are they right to do so?

"If the lands have been sold to the Commonwealth as above stated, but have been transferred on the land books to a different name from that in which it has previously been returned delinquent and sold, should not make it proper for the treasurer to make sale of the timber or rent out the land, would it, if he did not have authority to do so if it had not been thus transferred?"

The fact that the rule seems to have been uniformly adopted by county treasurers heretofore to continue to return lands delinquent for current taxes which have been heretofore sold and bought in by the Auditor of Public Accounts, has caused me to give very careful consideration to the statutes involved and to reluctantly come to the conclusion herein set out.

Section 622 of the Code provides that any timber or wood growing on land assessed with taxes may be distrained and sold, so far as necessary, to pay such taxes and expense of sale; and, further, that any real estate assessed with taxes may be rented or leased by the treasurer for a term not exceeding one year and for cash sufficient to pay the taxes due on said real estate and the costs and charges for advertising and leasing. It will be noted that there is no exception in this statute of lands sold by the treasurer and bought in in the name of the Auditor of Public Accounts.

Section 662 of the Code provides as follows:

"When any real estate is offered for sale as provided in section six hundred and thirty-eight and no person bids the amount chargeable thereon, the treasurer shall purchase the same in the name of the Auditor of Public Accounts for the benefit of the State and county, city or town, respectively, unless such real estate has been previously purchased in the name of the Auditor, in which case it shall be sold for such price as it will bring."

It will be observed that this last named section provides that when such real estate has been previously purchased in the name of the Auditor, it shall not be subsequently repurchased at a sale for current taxes, but that "it shall be sold for such price as it will bring." Unquestionably, therefore, this statute authorizes a sale of real estate for current taxes heretofore bought in in the name of the Auditor, and the county treasurer is undoubtedly required by the statute to put up at public auction lands heretofore bought in in the name of the Auditor, which are delinquent for current taxes. If there is upon such real estate growing timber, of the value of the current taxes, cost of sale, advertising, etc., or if such real estate has a yearly rental value equal to the amount of the current taxes, cost of sale, advertising, etc., it is not only the duty of the county treasurer to sell the timber or lease the land, but the board of supervisors of the county is not warranted in permitting him to return such land as delinquent for current taxes since the current taxes can be secured by distress and sale.

Yours very truly,

LESLIE C. GARNETT,

Assistant Attorney General.

TAXATION—Vessels Registered in United States Custom House.—The State of Virginia has a right to assess with taxes vessels registered in United States Custom House.

Same—Right to Levy on Such Vessels for Taxation.—A proper officer of the State has the right to levy upon such vessels and sell same for unpaid taxes.

RICHMOND, VA., June 12, 1916.

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

DEAR SIR:

You have referred to this office letter of W. W. Pitt, treasurer of Middlesex county, making the following inquiry: "Can a county treasurer enforce sale of a boat registered in the Custom House for taxes on said boat under legal levy and advertisement, when there is no libel registered against the boat at the Custom House? Can he put purchaser in legal possession of boat?"

It seems perfectly clear to me that if the State of Virginia has the right to tax a vessel registered in the United States Custom House, the proper officer of the State would have a perfect right to levy upon such a vessel and to sell the same for unpaid taxes. There can be no question about the right of Virginia to assess such vessel with taxes, and I know of no law which prevents a county treasurer from recovering these taxes by distress, as provided by statute. In the case of *Jackson Coal Co. v. Phillips' Line*, 114 Va. 40, 50, the Supreme Court of Appeals held that the State had a right, one year from the date on which the tax in her favor was assessed, to levy upon the steamer Pokanoket, which was assessed with taxes, and that the city of Petersburg had a right of distress against the property assessed with taxes in its favor. This decision also holds that the lien of a State for current taxes was superior to the lien of creditors who had perfected liens under section 2963 of the Code for supplies furnished. If, as aforesaid, the State has a right to levy and the city has a right to distress, there can be no reason why a county treasurer cannot under distress proceedings and sale make title. The registration of a vessel in the Custom House does not prevent the owner of the vessel from delivering a bill of sale therefor to a purchaser, and upon receipt of such bill of sale a purchaser may go to the United States Custom House and have the vessel reregistered in his name. Such a vessel being subject to levy or distress, after proper advertisement and sale, the treasurer can put the purchaser in possession with the proper evidence of the sale to such purchaser under his distress proceedings, and the purchaser can then have the boat reregistered in the Custom House.

I am returning herewith the letter of the treasurer of Middlesex county and a carbon of this letter which you may forward to him.

Yours very truly,

LESLIE C. GARNETT,
Assistant Attorney General.

TAXATION—Corporations—Corporation Franchise Tax—Lien.—Where a corporation in the fall of 1915 sells its property and business to a new company which obtains a charter, the property of the old company, which was taken over by the new corporation, is not liable for the franchise tax of the old corporation for the year 1916. At the time of the sale the franchise tax and registration fee for 1915 were not due, and, therefore, when they became due they could not be a lien upon the property which the old company had previously sold to the new company.

Same—Liability of Corporation for Franchise Taxes and Registration Fee.—In such a case the only redress against the old company, if it has not assets, is the forfeiture of its charter.

RICHMOND, VA., May 29, 1916.

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

DEAR SIR:

Acknowledgment is made of the letter of J. N. McFarland, treasurer of Augusta county, to you in the following terms:

"You sent me a few days ago a bill for \$132.30 registration fee and franchise tax against the Price Electric & Mfg. Co, Inc. This company sold out last fall to a new company and I am told a charter has been applied for in the name of the Price Electric & Devices Co. This being a new company, is the property of the old company which was taken over by the new, liable for this bill of yours which is for 1916? The old company owned no real estate but did own some machinery and other property which my deputy has a levy on for the tax on itself for 1915 for which of course it is liable."

and of your request for an opinion thereon.

I am informed by the State Corporation Commission that the second company mentioned in the above letter, to-wit: the Price Electric & Devices Company, was incorporated November 12, 1915, for the purpose of taking over the business of the old company, as the commission is informed, but that the Price Electric & Manufacturing Company, Inc., has not been dissolved. I note that the letter of the treasurer says that the old company sold out to the new company last fall, At that time, the franchise tax and registration fee for 1916 were not due, and, therefore, when they became due they could not be a lien upon the property which the old company had previously sold to the new company. Of course, the new company is liable for the registration fee and franchise tax; and, as I understand the law, the only redress against the old company, if it has no assets, is a forfeiture of its charter.

Very truly yours,

LESLIE C. GARNETT,
Assistant Attorney General.

TAXATION—Section 492, Code of Va. 1904—Trusts Assets.—Where a trustee is domiciled in Virginia and has in his possession a chose in action, the property of a non-resident *cestui que trust* under the provisions of section 492 of the Code of Va. 1904, the property of such non-resident is subject to tax in the county or corporation wherein it is or the trustee resides.

RICHMOND, VA., May 9, 1916.

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

DEAR SIR:

Acknowledgment is made of an attested copy of the order entered by the circuit court of Rockbridge county, November 10, 1915, in the matter of the correction of the assessment of taxes against Lennox B. Turnbull, trustee for M. H. Ryerson. It appears from said order that the said trustee was directed to be

refunded the sum of \$17.50 State taxes; and it further appears that the said trustee qualified as such in Newton, N. J., and that the said M. H. Ryerson is a non-resident of the State of Virginia. It does not appear that the trustee is a resident of the State of Virginia, or that the \$5,000 chose in action was in the possession of the said trustee residing in Virginia.

Assuming, however, that the said trustee is domiciled in Virginia and has in his possession the \$5,000 chose in action, upon which this State tax was levied, section 492 provides that property of a non-resident of Virginia shall be listed and taxed in the county or corporation wherein his or her trustee resides. Therefore, if the assumptions above made are correct, the order refunding the State tax is erroneous.

Very truly yours,

LESLIE C. GARNETT,

Assistant Attorney General.

TAXATION—Tax on the Probate of Wills or Granting of Administration—Section 12, Va. Tax Bill—Construction.—Under the provisions of section 12 of Virginia tax bill, providing that "on the probate of a will or the granting of administration not exempt by law, there shall be a tax of \$1.00," etc., it is proper to levy and collect only one tax therefor where a will is probated and the executor qualifies at some later time, or a will is probated and the executor named in the will does not qualify but afterwards an administrator with the will annexed qualifies.

Same—Construction.—In construing statutes relating to taxation every doubt is to be resolved against the government and in favor of the taxpayer.

RICHMOND, VA., *April 15, 1916.*

HON. C. LEE MOORE,

*Auditor of Public Accounts,
Richmond, Va.*

DEAR SIR:

You have referred to this office certain questions as to the proper construction of section 12 of the tax bill. That section, as amended by Acts of 1914, page 487, providing for a tax upon wills and administrations, provides in part as follows:

"On the probate of every will or grant of administration, not exempt by law, there shall be a tax of one dollar, where the estate, real or personal or mixed, passing by such will or by intestacy of the decedent, shall not exceed one thousand dollars, and for every additional one hundred dollars, or fraction of one hundred, an additional tax of ten cents; and no one shall be permitted to qualify and act as executor or administrator until said tax shall have been paid; and should it thereafter appear that on the probate of said will or grant of administration the estate has been under-valued, the commissioner of accounts before whom the appraisement is directed to be filed, shall report such fact to the court, whereupon the said tax shall forthwith be paid to the clerk of the court in which said will was admitted to probate or letters of administration granted, and said estate shall not be distributed until such inventory has been filed and the tax paid."

Two concrete cases have been suggested by you, both of which involve the same question of construction: first, suppose a will is admitted to probate and the executor qualifies at some later time, should one tax or two be collected? Second,

a will is admitted to probate and the executor named in the will does not qualify, but afterwards an administrator, with will annexed, qualifies, and a tax is collected when the will is admitted to probate, should another tax be collected when the administrator is appointed?

It is obvious that the sole question involved is as to the proper meaning of the first portion of the above section, to-wit: "On the probate of every will or grant of administration, not exempt by law, there shall be a tax of one dollar," etc. From the use of the term "probate of every will or grant of administration" in other statutes (sections 2639, 2640 and 2646), and from the definition of the word "or" as generally construed (Webster's Dictionary; *Austin v. Oaks*, 1 N. Y. S. 307, 310; *Third National Bank v. Bond*, 67 Pac. (Kan.) 818, 819), I would conclude that, in the aforesaid cases, it is proper to levy and collect only one tax. And this construction is borne out by the well known canon of construction of statutes relating to taxation, that every doubt is to be resolved against the government and in favor of the taxpayer. *Combined Saw & Planer Co. v. Flournoy*, 88 Va. 1029; *Brown's Case*, 98 Va. 336.

Very truly yours,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

TAXATION—*Delinquent Taxes—Powers of Judges—Section 645, Code Va. 1904.*—The power conferred by section 645 of the Code on the court is not given to the judge in vacation, and, therefore, the court has no authority to enter in vacation the order provided for by section 645 of the Code.

Same—Powers of Judges.—Judges have no power in vacation other than that which is given them by law.

RICHMOND, VA., March 15, 1916.

HON. C. LEE MOORE,

Auditor of Public Accounts,

Richmond, Va.

DEAR SIR:

You have referred to this office the question as to whether, under section 645 of the Code, a judge in vacation may enter the order provided for by that section. Section 645 provides as follows:

"The court, if it finds said list to be correct or having corrected the same when there is error, shall confirm the report and order it to be recorded and properly indexed in a book kept for the purpose and to be known as the delinquent land book."

It is clear from the authorities that a power given to the court is not, necessarily, given to the judge in vacation. It is also clear that he can have no other power in vacation than what is given him by law. *Dawney v. Wright*, 2 Hen. & M. 12; *President, &c. of William and Mary College v. Hodgson*, 2 Hen. & M. 558. See, also, *Patterson v. Eakin*, 87 Va. 49; *Chase v. Miller*, 88 Va. 791.

Under these authorities, therefore, I hold that the court has no authority to enter in vacation the order provided for by section 645 of the Code.

Very truly yours,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

TAXATION—Recordation Deeds of Trust—Taxes—Section 13, Schedule D of the Virginia Tax Laws.—Under the provisions of section 13, Schedule D, Virginia tax laws, all taxes on deeds of trust or mortgages are upon the amount of bonds or other obligations secured thereby.

Same—Taxation—Deeds of Trust—Instruments Which Should be Taxed as Deeds of Trust.—An instrument, the language of which is that the grantors “do hereby grant, convey and confirm unto B, trustee, the said real estate described in and conveyed to him in and by said deed of trust of January 7, 1916, heretofore recorded as aforesaid to be held by him, the said B, trustee, upon the same trust created by and set out in said deed to him and especially in trust to secure the payment of the sum of \$3,450.00,” etc., is a deed of trust and should be taxed as such.

RICHMOND, VA., *March 14, 1916.*

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

DEAR SIR:

You have referred to this office the deed of Richard S. Wolfe and wife to Irwin Bain, trustee, which has been recorded in the clerk's office of New Kent county, in deed book 14, pages 418 to 421, with the request that we inform you whether said deed is subject to a fee for recordation as provided by section 13 of the tax laws.

After carefully considering this instrument, I am convinced that it is a deed of trust, for the language in the deed is that the grantors “do hereby grant, convey and confirm unto the said Irwin Bain, trustee, the said real estate described in and conveyed to him in and by said deed of trust of January 7, 1916, heretofore recorded as aforesaid, to be held by him, the said Irwin Bain, trustee, upon the same trusts created by and set out in said deed to him, and especially in trust to secure the payment of the sum of \$3,450.00,” etc. And the deed further provides that the grantors “do hereby grant, convey and confirm unto the said O. D. Pitts and Robert Gaede, trustees, the said real estate described in and conveyed to them in and by said deed of trust of January 10, 1916, heretofore recorded as aforesaid, to be held by them, the said O. D. Pitts, and the said Robert Gaede, trustees, upon the same trusts created by and set out in said deed to them, and especially in trust to secure the payment of the sum of \$9,440.00,” etc.

Practically the same question was involved in the opinion rendered by me to you, dated September 17, 1915, found in the report of the Attorney General for the year 1915, page 142; and, following said opinion, I am constrained to hold that the instrument aforesaid is subject to the provisions of section 13 of schedule D of the tax laws, which provide that “on deeds of trust or mortgages, the tax shall be upon the amount of bonds or other obligations secured thereby.”

Very truly yours,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

TAXATION—State School Funds—Section 1507 of the Code of Virginia 1904 as Amended.—The Auditor of Public Accounts in making his calculation of State school funds must base such calculation upon State taxes derived for school pur-

poses from taxation, on the following six subjects: 1, persons; 2, real estate; 3, tangible personal property; 4, property of public service corporations other than rolling stock of steam railroads; 5, rolling stock of steam railroads (ten cents on \$100); 6, intangible personal property (ten cents on \$100).

Same.—Section 1507 of the Code further provides that from the credit thus ascertained the Auditor shall deduct as an allowance for delinquents ten per cent. of the State tax for school purposes upon: 1, persons; 2, real estate; 3, tangible personal property, and 4, intangible personal property.

Same—Construction of Section 1507.—It was the purpose of the General Assembly not to allow any deduction whatsoever for delinquents on the two classes of property not specifically enumerated in the clause of this section dealing with deductions, viz: 1, property of public service corporations other than rolling stock of steam railroads, and, 2, rolling stock of steam railroads.

RICHMOND, VA., December 18, 1915.

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

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

GENTLEMEN:

In response to your request for my construction of section 1507, Code of Virginia, as amended by Acts 1915, page 137, in the particular hereinafter indicated, will say that an analysis of that section shows that the Auditor of Public Accounts, in making his calculation of State school funds, must base such calculation upon the State taxes derived for school purposes from taxation on six subjects following, to-wit, upon:

- (1) Persons;
- (2) Real estate;
- (3) Tangible personal property;
- (4) Property of public service corporations other than rolling stock of steam railroads;
- (5) Rolling stock of steam railroads (ten cents on \$100), and
- (6) Intangible personal property (ten cents on \$100).

The section further provides that, from the aggregate thus ascertained, the Auditor shall deduct, as an allowance for delinquents, ten per cent. of the State tax for school purposes upon the following subjects, to-wit, upon:

- (1) Persons;
- (2) Real estate;
- (3) Tangible personal property, and
- (4) Intangible personal property.

I am, therefore, of the opinion that it was the purpose of the General Assembly not to allow any deduction whatsoever for delinquents on the two classes of property not specifically enumerated in the clause of the statute dealing with deductions. The two classes of property there significantly omitted are

property of public service corporations other than rolling stock of corporations operating railroads by steam and rolling stock of corporations operating railroads by steam.

Very truly yours,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

TAXATION—Corporations—Situs of Corporate Property for Taxation.—The intangible personal property of a resident private corporation is taxable at the situs of its principal office, although all of its executive and financial business is done elsewhere.

Same—Evidence of Situs of Principal Office of Domestic Corporation.—The certificate of incorporation of a corporation incorporated under the laws of this State, is conclusive as to the location of its principal office.

RICHMOND, VA., December 8, 1915.

HON. C. LEE MOORE,

Auditor of Public Accounts,

Richmond, Va.

DEAR SIR:

In reply to your letter of November 24th, referring to us correspondence with Hon. Geo. Mason, examiner of records, and inquiring whether the construction of Hon. Geo. Mason is correct, to the effect that intangible personal property of a private corporation is taxable at the situs of the principal office, I beg leave to state that, on the authority of *Lloyd v. City of Lynchburg*, 113 Va. 627, it is clear that as to a resident private corporation its intangible personal property is taxable at the situs of its principal office, although all of its executive and financial business be done elsewhere, and it is also clear that the certificate of incorporation of a corporation incorporated under the laws of this State, as to the location of its principal office, is conclusive on that point.

Very truly yours,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

TAXATION—Deeds—Tax on Recordation Thereof—Section 13 of the Tax Bill as Amended.—Where the title to real estate, the consideration of which moves from a company not incorporated, pending its incorporation, is conveyed to A, and upon the completion of the incorporation of the company A makes a deed conveying title to the corporation, the law requires a tax on both deeds and on the deed from A to the corporation the clerk should determine the tax by the actual value of the property conveyed. The fact that A held the property merely as trustee for the corporation which was being organized, does not exempt the deed from A to the corporation from the tax required by law.

RICHMOND, VA., November 17, 1915.

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

DEAR SIR:

You have referred to this office letter of C. W. Smith, deputy clerk, circuit court, Appomattox, Virginia, in regard to the proper tax to be charged on two deeds sent to the clerk's office of Appomattox county by Messrs. McNutt & Walker, attorneys at law, Charlottesville, Va.

It appears from copies of the deeds submitted that, by deed dated October 4, 1915, J. E. Hartsook and others conveyed to P. H. Faulconer certain property described in said deed, in consideration of \$12,000.00 and for other considerations mentioned in the deed.

By another deed, dated the 10th day of November, 1915, the said P. H. Faulconer and wife conveyed to the Faulconer Lumber Company, Inc., the same property, the consideration being the nominal one of \$1.00, and it being recited in the deed that "the purchase money for the said tract of land was furnished by the said Faulconer Lumber Company, Inc., and title to the said tract of land taken in the name of P. H. Faulconer because and by reason of the fact that the incorporation and organization of the said Faulconer Lumber Company, Inc., had not been completed at the time of the said conveyance of the said land to the said P. H. Faulconer."

The tax on these instruments is governed by the provisions of section 13 of the tax bill, as amended by Acts of 1910, page 488, in which it is provided, among other things, 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 three hundred dollars or less; where the consideration of the deed or the actual value of the property conveyed is over three hundred dollars and does not exceed one thousand dollars, the tax shall be one dollar; where the consideration of the deed or the actual value of the property conveyed exceeds one thousand dollars, there shall be paid ten cents additional on every hundred dollars or fraction thereof of such consideration or actual value. * * * 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 * * *."

It cannot be claimed, of course, that either one of these deeds is exempt from taxation by law, but it seems to be claimed in the correspondence sent to this office that because P. H. Faulconer held the property as trustee for the lumber corporation which was being organized, therefore his deed is not subject to taxation. I can find nothing in the law which would justify such a conclusion, but, on the contrary, I am forced to conclude that on the second deed, as well as on the first deed, the law requires a tax, and that in the case of the second deed the clerk should determine the tax by the actual value of the property conveyed.

Very truly yours,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

TAXATION—Virginia Corporation Law, Sections 41, 42, 43—Taxation—Corporations—Registration Tax and Franchise Fee—Bankruptcy—Priority.—The Virginia corporation franchise tax and registration fee, with penalty and interest thereon, is such a tax as would have priority under section 64 of the bankruptcy act.

RICHMOND, VA., September 20, 1916.

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

DEAR SIR:

Acknowledgment is made of your communication *in re* Suffolk Drug Corporation, bankrupt, as to whether the State franchise tax and registration fee, with penalty and interest thereon, is such a tax as would have priority under section 64 of the bankruptcy act.

In the matter of Co-operative Supply Company, Inc., bankrupt, it was held by the district court of the United States for the eastern district of Virginia that the registration fee and franchise tax, which are assessable as of January 1st, take priority to the claim of general creditors of the corporation which was adjudicated a bankrupt on February 20th and prior to March 1st, when said registration fee and franchise tax are collectible. The question has, therefore, already been decided in favor of the State.

Yours very truly,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

TAXATION—Corporations—Bankruptcy—Landlord and Tenant—Distress—Section 2792, Code Virginia 1904.—Under the provisions of section 2792, Code Virginia 1904, the lien given the landlord is subordinated and inferior in dignity to any claim for taxes or levies due the State.

Same—Sections 64a and 64b, United States Bankrupt Act.—Under the provisions of the United States bankruptcy act, even in the absence of such a provision in section 2792, Code Virginia 1904, the taxes of the State would take priority over the claim of the landlord for rent.

RICHMOND, VA., September 25, 1916.

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

DEAR SIR:

Acknowledgment is made of your communication, enclosing a letter of William M. Crumpler, Esq., referee in bankruptcy *in re* Suffolk Drug Corporation, bankrupt.

In his letter the referee says:

"I am entirely familiar with the citation in the Attorney General's letter, this issue having arisen before me, but that is, in no wise, in point with the proposition now before me. You will notice from the Attorney General's letter that this ruling referred only to *general* creditors. I had

no doubt in my mind as to this proposition. The fact in the case now before me is that the only funds in hand were derived from assets on the leased premises and the claim of the landlord exceeds the amount in the hands of the trustee. The question, therefore, arises not whether your claim has priority to a general creditor, but whether or not it can have priority over the statutory lien of the landlord, who is a special statutory creditor with a fixed statutory lien."

Section 64a of the bankruptcy act reads as follows:

"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 tax, the same shall be heard and determined by the court."

Section 64b proceeds to enumerate the debts which are to have priority "except as herein provided." The last enumerated class under this section is No. 5, and reads:

"Debts owing to any person who by the laws of the States or the United States is entitled to priority."

It is, therefore, the contention of the referee in bankruptcy that a debt classified under heading No. 5 of sub-section *b* of section 64 of the bankruptcy act should take priority over a claim given priority by sub-section *a* of section 64. This construction of the act is, in my opinion, clearly erroneous.

It is to be observed that sub-section *a* of section 64 of the bankruptcy act provides that all State taxes shall be paid in advance of the payment of dividends to creditors. This section is very clear and provides beyond dispute, it seems to me, that before any creditor, regardless of his security or priority, is entitled to payment of a dividend that all taxes enumerated in sub-section *a* of section 64 must be paid by the trustee. Remington, in his work on Bankruptcy, section 703, page 423, says:

* * * "There is no obligation upon the tax officers to present the claim at all, the obligation resting upon the trustee to search out and pay the taxes."

Discussing section 64 of the bankruptcy act, the same learned author says, in volume 2, section 241, pages 1319, 1320 and 1321:

"The first creditor to be taken care of is, of course, the State."

"The act prescribes 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." * * *

"It is incorrect to say, as was said in *re Veitch*, 4 A. B. R. 112 (D. C. Conn.), that taxes come under section 64 (b) (5) in the order of priority."

"Debts owing to any person who by the laws of the State or United States is entitled to priority."

"On the contrary, section 64 (2) specifies a distinct order of priority. That section of the statute would be deprived of all significance if taxes were comprehended within section 64 (b) (5). Moreover, the other paragraph of section 64, paragraph (b), refers to the order of priority 'except as herein otherwise provided,' clearly indicating that the only remaining paragraph 'herein' was meant to prescribe a priority."

"Again, taxes from their nature ought to come next to costs in the order of priority, for without taxes the general government would fail; as, also, without costs the particular protection of the State in the immediate property concerned could not be afforded. The State must not be delayed nor hindered in its collection of taxes and it is this urgency that lies at the basis of the priority given to taxes." * * *

"The statute, in section 64 (b), provides, as the item entitled to the next place in the order of distribution after costs of administration, 'wages due to workmen, clerks and servants'; nevertheless, section 64 (a) provides that taxes are to be paid before creditors. So, the proper order of priority is for taxes next after costs of administration. And it seems improper in theory and unnecessary from the point of view of statutory construction to place taxes in advance of costs of administration."

The District Court of the United States, for the M. D. of Pennsylvania, said, in *re Prince & Walter*, 131 Fed. 546, that taxes are to be paid before even costs of administration. In so holding, Archibald, J., said:

"* * * The order of priority in which debts or charges against the estate of a bankrupt are to be met is established by section 64 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 563, U. S. Comp. St. 1901, p. 3448), by sub-section 'a' of which it is provided 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 by sub-section 'b' that the order of payment, except as so provided, shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing fees paid in involuntary cases, and the reasonable expenses of creditors in recovering property transferred or concealed by the bankrupt; (3) the costs of administration; (4) wages due to workmen, clerks, or servants, earned within three months, and (5) debts owing to any person entitled by the laws of the States or the United States to priority. Taxes, as a class, are thus put at the head of everything, even above the expense of preserving the estate, or the cost of administering it. Brandenburg, section 1008; Collier (4th ed.) 459. This is explicit and decisive." * * *

Loveland, in his work on Bankruptcy (3d edition), section 267a, page 769, states the law thus:

"Taxes are put at the head of everything payable out of the general fund in the hands of the trustee. The taxes due by the bankrupt should be paid in full before paying debts entitled to priority under section 64b, as well as in advance of all debts of general creditors."

This position is further sustained by *City of Chattanooga, et al. v. Hill*, 139 Fed. 600, 71 C. C. A. 584, 585, decided by the Circuit Court of Appeals, Sixth Circuit. In the course of the opinion, which was written by Mr. Justice Lurton, the court said:

"* * * Section 64b deals with the order of payment, and does not mention taxes. Clause 5 of section 64b (30 Stat. 563 [U. S. Comp. St. 1901, p. 3448]), which is supposed to cover taxes, refers only to 'debts' owing to any person who by the laws of the States or United States is entitled to priority. A tax due to the United States or a State is not a debt owing to 'any person,' within the meaning of this clause. The priority of taxes is provided for by section 64a. If paid only as a secured debt of the kind referred to in 64b, taxes would be postponed not only to costs of administration, but to workmen, clerks and servants' wages. Congress evidently meant that the sovereign should neither be postponed nor delayed in the collection of taxes, and, therefore, provided that the trustee should pay all taxes due and owing by the bankrupt in advance of dividends." * * *

Aside from the foregoing authorities, the question is concluded in this State by the very provision of the Code under which the landlord claims his lien. The law governing this phase of the matter is very clearly stated in 7 Corpus Juris, section 555, page 333, where it is said:

"The effect of the provision giving priority to debts entitled to priority under the laws of a State is to adopt the State law and make it the applicable federal law in determining priorities, and it does not operate to place all preferred claims upon a plane of equality, but gives them priority in the same relative rank and order in which they are fixed by the State statute."

Section 2792 of the Code of Virginia, under which section the landlord in the present case claims a lien on the assets in question, in its concluding sentence provides as follows:

"* * * Neither this nor the preceding section shall affect any lien for taxes, levies, or militia fines."

Therefore, by express provision of the very statute creating the priority which enables the landlord to take precedence over the general creditors of the bankrupt, his claim is made subordinate and inferior in dignity to any claim for taxes or levies. This is absolutely conclusive of the question.

Yours very truly,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

TAXATION—*Virginia Corporation Law—Sections 41, 42, 43—Taxation—Corporations—Registration Tax and Franchise Fee—Bankruptcy Priority.*—The corporation franchise tax and registration fee are assessable on the capital stock of corporations as of the first day of January in each year.

RICHMOND, VA., *October 17, 1916.*

WILLIAM M. CRUMPLER, ESQ.,

Referee in Bankruptcy,

Suffolk, Va.

DEAR SIR:

Your letter of October 16th to the Auditor of Public Accounts, with reference to the claim of the Commonwealth for \$86.20, covering registration fee and franchise tax of the Suffolk Drug Corporation, for the year 1916, has been referred to me for attention.

It will be impossible for any representative of the Attorney General's office to be present to represent the Commonwealth before you on Saturday, when you pass upon the claim for taxes.

Permit me to say that in the opinion of the Attorney General, rendered the Auditor on September 25, 1916, the authorities there cited, it seems to me, are absolutely conclusive of the priority of the claims of the State for taxes over both the general creditors of the bankrupt and the creditors with the statutory lien, and I take the liberty of again referring you in this behalf to that opinion, copy of which the Auditor has forwarded you.

I note that in your letter to the Auditor you state that your decision will

be largely dependent upon whether this tax is for the year beginning the first day of March, 1916, and ending the first day of March, 1917, for the reason, I assume, that the parties were thrown in bankruptcy on the 8th day of February, 1916.

I beg to enclose you, under separate cover, copy of the Virginia corporation law, and to call your attention especially to sections 41-43, inclusive. By section 41 it is provided that an annual registration fee shall be assessed on the capital stock of corporations "as of the first day in January in each year." By section 43 it is provided that the annual franchise tax shall be assessed and that the State Corporation Commission shall ascertain the amount of the authorized maximum capital stock of each corporation as of the first day of January in each year, and shall assess against such corporation the State franchise tax herein imposed. These sections seem to answer your suggestion that your decision will be dependent upon whether this tax is for the year beginning on the first day of March, 1916, and ending on the first day of March, 1917.

In addition to the corporation law of Virginia, I beg to call your attention to section 5, sub-section 7, of the Code of Virginia 1904, which provides that wherever a year is mentioned in the statutes it means calendar year, unless otherwise expressly provided.

With these citations before you, it must be impossible but that you will hold that the claim of the State for the current taxes of 1916 is superior to that of the landlord. However, in the event that you cannot see this matter in the same light in which it appears to me, I would be glad to be promptly advised of your decision, in order that we may file exceptions to your report.

Very truly yours;

LESLIE C. GARNETT,

Assistant Attorney General.

TAXATION—Capital—Section 8, Virginia Tax Laws as Amended by Chapter 382, Acts 1916—Section 508 of the Code Virginia 1904 as Amended—Omitted Taxes.—Real estate is not capital, but must be listed and taxed as real estate. Therefore, real estate should be excluded in determining the omitted capital of a manufacturer subject to taxation.

Same.—Section 8, Virginia tax bill, defining capital makes clear the definition of liabilities as set out in section 508 of the Code as amended.

Same.—The true construction of the word "liabilities" as set out in the amendment of section 508 of the Code is to be found in the deductions allowed by section 8 of the Virginia tax bill.

RICHMOND, VA., October 24, 1916.

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

DEAR SIR:

Acknowledgment is made of your letter in which you say that being of the opinion that section 8 of the tax laws, as amended by chapter 382 of the Acts of 1916, legally defined net capital for all purposes of taxation, both current and omitted, in the preparation of the forms for the use of taxpayers and taxing

officers in assessing omitted taxes, you so instructed the taxing officers, and asking me to advise you if your instructions were, in my opinion, according to law, and, if not, as to what other instructions you should now issue to the officers engaged in assessing omitted taxes.

You call my attention to the amendment of section 508 of the Code, found in chapter 491 of the Acts of 1916, which contains the following provisions:

"(5) In assessing under this act omitted capital of manufacturers, capital shall be defined to be net capital, to-wit: gross assets less liabilities."

Section 8 of the tax laws, as amended by chapter 382 of the Acts of 1916, provides:

"‘Capital,’ as used in the tax laws, shall be construed ‘net assets,’ as hereinafter defined.

"‘Net assets’ with reference to persons, firms and corporations engaged in a business subject by the laws of this State to a tax on capital, shall be construed to mean the gross assets of such person, firm, company or corporation less such deductions as are hereinafter set out."

This section, after defining gross assets, says:

"The deductions which may be allowed in ascertaining ‘net assets’ are as follows:

"(1) Salaries due officers and employees on the pay-roll.

"(2) Interest charges due and accrued.

"(3) Money borrowed represented by notes or other obligations contracted within the period of six months prior to February first, may be allowed as a further reduction, provided that all money so borrowed can be clearly shown to be represented by property enumerated in the return of gross assets."

The question you submit is, therefore, as to the construction of the word *liabilities* in the amendment to section 508 of the Code, providing that in assessing omitted capital, capital shall be defined to be "net capital, to-wit: gross assets less liabilities."

It is a cardinal rule of construction that statutes *in pari materia* are to be construed together and that each legislative act is to be interpreted with reference to other acts relating to the same matter or subject, Black on the Interpretation of Laws, section 104.

The reasons which support this rule are that enactments on the same general subject (1) are regarded as parts of one uniform system, and (2) the rule is supported by the principle that the interpretation of a given statute shall be such as to avoid any repugnance or inconsistencies between different enactments of the legislature; therefore, in construing the meaning of the term *liabilities* as applied to omitted capital we must consider the other enactments of the legislature defining capital. It would, therefore, seem to be the duty of the courts to define the term *liabilities* as affecting the net capital of corporations, so that it shall not be inconsistent with the specific definition of net capital as set out in section 8 of the tax laws as amended, and to treat the words "liabilities" and "deductions" as convertible.

In support of this construction, it might be well to trace the history of the law. Prior to the year 1915 the definition of capital as contained in the tax laws allowed no deductions, and it was determined by the Supreme Court of Appeals of Virginia in the case of *Bridgewater Manufacturing Company v. Funk-*

houser, 115 Va. 476, that the deductions allowed in clause one of section 8 could not be allowed under the definition of capital in clauses 2, 3 and 4 of section 8, as it then stood, and that, therefore, a person or corporation subject to a tax on capital under the laws of Virginia was not entitled to deduct therefrom borrowed money.

In the extra session of 1915 the definition of capital as theretofore contained in the tax laws was amended so as to allow a deduction of moneys on hand received from loans made for a period of not more than four months. The definition contained in that statute is as follows:

"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 Commonwealth 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 the State for the government of cities and towns."

When the regular session of the General Assembly met in 1916 an effort was immediately made to further change the definition of capital so as to allow a deduction of borrowed money whether on hand or not, since in an opinion rendered by the Attorney General in 1915 it was held that borrowed money could not be deducted where it was utilized in the business, since such money was not on hand within the meaning of the Acts of 1915. (See opinions of Attorney General 1915, p. 137.)

The General Assembly finally amended section 8 of the tax laws so as to allow a deduction of money borrowed on two conditions: First, that it was represented by notes or other obligations contracted within a period of six months, and, second, provided it was represented in the return of gross assets.

In amending section 508 with reference to omitted taxes, manufacturers realizing that as to their *omitted* capital the old law would govern and that they could be allowed no deductions therefrom for their borrowed money, induced the General Assembly to amend that statute so as to allow them the benefit of deductions for omitted years.

It must be remembered that the omitted tax statute, defining capital as *gross assets less liabilities* and section 8 of the tax laws defining capital as *gross assets less deductions*, were both passed by the same session of the General Assembly, one approved March 20, 1916, the other March 22d, both passed practically the same day, and each taking effect on the same day.

I have called attention to the necessity of construing all acts *in pari materia* together, and if we do not follow this principle and consider the term *gross assets* and *liabilities* as used in the omitted tax statute as independent of any other portion of the tax law, then *gross assets* would include real estate, and *liabilities* would include all forms of liabilities, both direct and collateral. Under such construction in assessing omitted capital of manufacturers their real estate would have to be included.

In construing the omitted tax statute with reference to the other tax laws which are to be regarded as parts of one uniform system, we find from section 8 of the tax laws, amended as aforesaid, that real estate shall not be held to be capital, but shall be listed and taxed as real estate. Therefore, by construing these statutes together, it is clear that we should exclude real estate in determining the omitted capital of a manufacturer subject to taxation.

Immediately following the declaration in section 8 that real estate shall not be held to be capital, follows the definition heretofore stated, which provides that the word "capital," as used in the tax laws, shall be construed as *gross assets* less specific *deductions*, as therein set out. In order, therefore, for manufacturers to claim the benefit of the provisions of section 8, which declares that real estate shall not be held to be capital, they are bound by the specific definition of capital as therein set out.

In other words, section 8 of the tax laws, defining capital, makes clear the definition of *liabilities* as set out in section 508 of the Code as amended.

To put any other construction upon these sections of the tax laws than that above given would put a premium upon fraud and deception by making it greatly to the advantage of the manufacturer to have his capital taxed as omitted capital rather than current. For instance, if a manufacturer was doing business in 1916 with a taxable capital of \$300,000 with \$200,000 outstanding in bonds not contracted within six months, and secured on its real estate and plant, it would be taxable under section 8 of the tax laws on \$300,000 of capital with no deduction for its bonds for the reason that bonds under the circumstances above set out are not one of the deductions provided by law. However, if this company did not report and pay on its capital in 1916 and was reported next year for omitted capital, it would only have to pay on \$100,000 of capital, since by escaping taxation in 1916 it could claim the benefit of \$200,000 in bonds as a *liability*. As above stated, this would encourage fraud and deception and destroy the uniformity of taxation of capital, and would, therefore, be unconstitutional.

It is hardly probable that the legislature intended to draw a distinction in favor of those who by accident or design have escaped taxation and against the manufacturer who performed the duty imposed upon him by law to list his capital for taxation. I am of the opinion, therefore, that the true construction of the word *liabilities*, as set out in the amendment of section 508 of the Code, is to be found in the deductions allowed by section 8 of the tax laws, as aforesaid.

Under the authority of the *Funkhouser Case*, 115 Va. 476, no deductions were allowed for capital until the legislature provided therefor in the Acts of 1915. I do not desire to be understood as holding that as to omitted capital prior to 1915, the Acts of 1915 or 1916 have any retrospective effect.

Very truly yours,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

TAXATION—*Virginia Tax Bill, Section 10, Clause 2; Federal Income Tax Law, October 3, 1913, Section 2, Sub-section 2b—Taxation, Exemption—State Bonds, Income from.*—Holders of the bonds of the State of Virginia are not required to pay either the State or the Federal income taxes on the income arising from said bonds.

RICHMOND, VA., September 25, 1916.

HON. C. LEE MOORE,

*Auditor of Public Accounts,
Richmond, Va.*

DEAR SIR:

Acknowledgment is made of your communication of September 25, 1916, in which you request me to advise you whether the English holders or owners of Virginia State bonds are required to pay the State or the United States income tax of one per cent. on interest payments arising from said bonds.

The question as to their liability for a State income tax is fully answered by section 10, clause 2, of the Virginia tax bill, which reads as follows:

"All interest upon notes, bonds, or other evidences of debt of every description, including those of other States or other countries (except bonds of this State and bonds of the United States) of any corporation, company, partnership, firm or individual, all dividends derived from stocks or other evidences of ownership or interest in property, but not including dividends paid in stock; all royalties derived from mines, patents, copyrights, or the possession or use of franchises or legalized privileges of any kind, and all annuities from invested funds or trusts; provided, that the proceeds of life insurance policies paid upon the death of the person insured or payments made by or credited to the insured on life insurance, endowment, or annuity contracts, upon the return thereof to the insured at the maturity of the term mentioned in the contract, or upon surrender of contract, shall not be included as income." (Va. Code, vol. 4, p. 553.)

The question as to the liability under the federal income tax law, of October 3, 1913, is also fully answered by the last paragraph of section 2, sub-division 2-b, of said federal act, which reads as follows:

"That in computing net income under this section there shall be excluded the interest upon the obligations of a State or any political sub-division thereof, and upon the obligations of the United States or its possessions; also the compensation of the present President of the United States during the term for which he has been elected, and of the judges of the supreme and inferior courts of the United States now in office, and the compensation of all officers and employees of a State or any political sub-division thereof except when such compensation is paid by the United States government."

I am, therefore, clearly of the opinion that holders of the bonds of the State of Virginia are not required to pay either the State or the federal income taxes on the income arising from said bonds.

Very truly yours,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

TAXATION—Income Tax Returns—Chapter 524, Acts 1916.—Under the provisions of chapter 524, Acts 1916, it is not contemplated that a copy of the income tax book shall be delivered to the clerks of courts, but that a copy shall be delivered only to the Auditor and Treasurer, and these officers are required to keep these books under lock and key when not in their personal possession.

Same—Interrogatories and Statements of Income Return by Taxpayer.—It is the intention of chapter 524, Acts 1916, that interrogatories and statements of income returns by taxpayers are by law required to be certified by the local

board of review and filed in the clerk's office, that they be kept under lock and key and clerks of courts should keep the same open only for the inspection of those authorized under the terms of chapter 524, Acts 1916.

RICHMOND, VA., *September 15, 1916.*

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

DEAR SIR:

In response to your request for an opinion as to whether or not a copy of the income tax book should be made out by the commissioner of the revenue and delivered to the clerk of the circuit court, I beg to advise that under the provisions of the act of March 24, 1916 (page 24 of the tax laws), it is not contemplated that a copy of the income tax book shall be delivered to the clerk of the court, but that copy shall be delivered only to the Auditor and Treasurer, and these officials are required to keep this book under lock and key when not in their personal possession.

In response to your inquiry as to whether or not the interrogatories and statements of income returned by taxpayers, and by law required to be certified by the local board of review and filed in the clerk's office, shall be open to public inspection, I beg to advise that it is the spirit of the above act of March 24, 1916, that they shall be kept under lock and key, and I would, therefore, advise the various clerks of the courts to keep these income tax returns open only for the inspection of those authorized under the terms of the last-named act.

Yours very truly,

LESLIE C. GARNETT,
Assistant Attorney General.

TAXATION—*Inheritance Tax—Bonds, State and Federal—Virginia Tax Bill, Section 44.*—The Virginia inheritance tax is a tax upon the right to transmit securities and not upon securities themselves; therefore, the State may lawfully measure or fix the amount of tax by referring to the value of bonds whether State or Federal, even though the bonds themselves are exempt from taxation as property. The imposition of the inheritance tax measured as above in no way impairs the obligation of the contract involved in the bonds.

RICHMOND, VA., *September 12, 1916.*

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

DEAR SIR:

I have before me your letter of the 11th instant to the Attorney General, requesting to be advised as to whether or not an estate or part of an estate which consists of bonds of the United States or bonds of the State of Virginia is exempt from the inheritance tax imposed by section 44 of the tax laws, or whether the imposition of the inheritance tax, under these circumstances, in any way impairs the obligation of the contract in the bonds.

This identical question has been frequently passed upon by the courts of various States and by the United States Supreme Court. The general doctrine is laid down in *Blakemore* and *Bancroft on Inheritance Taxes*, 212, as follows:

“Under the prevailing theory that the inheritance tax is a burden on the succession and not on the property, the tax may be levied, although the funds of the estate may be invested in government bonds of various kinds. Thus United States bonds may be taxable under a State tax, or under the federal tax. State and municipal bonds are also taxable under State law. Such taxation does not constitute a breach of the obligation of the contract of exemption in the bonds under the federal constitution.”

This authority cites a number of cases in point, and from these cases it is clear that the right to tax property by will or descent is derived from and regulated by municipal law; that, in assessing a tax upon such right or privilege, the State may lawfully measure or fix the amount of the tax by referring to the value of the property passing; that the tax is not upon the bonds, nor upon the United States, but upon the right to transmit the securities, and that the incidental fact that such property is composed, in whole or in part, of federal or State securities, does not invalidate the tax or the law under which it is imposed.

Knowlton v. Moore, 178 U. S. 41;
Plummer v. Coler, 178 U. S. 115;
Murdock v. Ward, 178 U. S. 139;
Orr v. Gilman, 183 U. S. 278;
Cohen v. Brewster, 203 U. S. 252;
Strode v. Commonwealth, 52 Pa. St. 181.

In *Plummer v. Coler*, *supra*, the question involved was the validity of the inheritance tax law of the State of New York when applied to a legacy consisting of United States bonds containing a clause of exemption from State and federal taxation, and the validity of the inheritance tax law was upheld.

In *Murdock v. Ward*, *supra*, the imposition of a tax upon the transmission of federal bonds by the war revenue act of 1898 was held valid, notwithstanding the declaration in the federal statutes and on the face of the bonds to the effect that they are exempt from taxation, the court holding that the tax is not upon the bonds, but upon the right to transfer.

In *Orr v. Gilman*, *supra*, it was held that the transfer or succession tax of the State, not being a direct tax upon property, but a charge upon the privilege exercised or enjoyed under the law of the State, does not, when imposed in cases where the property passing consists of securities exempt from taxation by statute, impair the obligation of the contract.

Under the above decisions, the tax is upon the right to transmit the securities and not upon the securities themselves, and the State may lawfully measure or fix the amount of tax by referring to the value of the bonds, whether State or federal, even though the bonds themselves are exempted from taxation as property, and the imposition of the tax, measured as above, in no way impairs the obligation of the contract involved in the bonds.

Yours very truly,

LESLIE C. GARNETT,

Assistant Attorney General.

TAXATION—License Taxes—Peddlers—Sections 50 and 51 of the Tax Bill as Amended.—A company which has a fixed place of business and operates commissary supply depots which except in cases of emergency like a wreck are never moved to a temporary stand, and usually keep the same place for from two weeks to twelve months cannot be required to take out a peddler's license, as required by sections 50 and 51 of the tax bill.

Same—Merchants.—As the company is engaged in business as a merchant doing business at each separate stand in each county in which such trade is carried on, it should be taxed accordingly.

Same—License Tax.—The license tax in such case should be estimated according to the provisions of section 46 of the tax laws on mercantile purchases or goods purchased for each camp during the preceding year.

Same—Changing Place of Business—Section 561, Code of Va. 1904.—When such a company has obtained a license to carry on its business at a definite place in a county by application to the commissioner of revenue in accordance with the provisions of section 561, Code of Va. 1904, its license may be altered so that it may carry on business at another place in the same county under the same license provided, however, that such company shall at all times have a separate license for the business carried on at the same time at each different place.

RICHMOND, VA., May 17, 1916.

HON. C. LEE MOORE,

*Auditor of Public Accounts,
Richmond, Va.*

DEAR SIR:

With further reference to your request for an opinion as to how the Virginia Supply Company, of Roanoke, Va., should be taxed in the counties in which it carries on business, I beg to advise that I have today had a conference, at your suggestion, with Mr. Johnson, manager of the company, Morton C. Goode, Esq., Commonwealth's attorney, Dinwiddie county, and Judge W. R. Staples, of Roanoke, counsel for the Virginia Supply Company. It seems agreed that this company, which for the year 1915-16 took out a license in the city of Roanoke based upon its entire purchases in the State of Virginia, maintains commissary camps in practically all of the counties through which the Norfolk and Western Railway runs. In the county of Dinwiddie, wherein this question arose, the company maintained as many as seven camps, commissaries or stores simultaneously during the past year, and paid no taxes for carrying on business in that county, nor in any of the other counties in which it maintained these places of business. These camps, commissaries or stores are moved from place to place, as the work on the road necessitates. In addition to carrying a commissary, which sells to the employees engaged in the construction work of the road (and in some instances it seems to other parties), this company, under contract with the railroad, boards the employees of the railroad at these camps.

In an opinion rendered you on March 14, 1916, by C. B. Garnett, Esq., then Assistant Attorney General, the position is taken that these people can *probably* be taxed as peddlers. Under the additional facts now before this office, and which seemed to be admitted in the conference held this morning, it appears that this company always has a fixed place of business. Unless in cases of an emergency, like a wreck, these commissaries are never moved to a temporary stand and usually occupy the same place for from two weeks to twelve months. Under these circumstances, I do not think that they can be required to take out a

peddler's license, as required by sections 50 and 51 of the tax laws, as amended by Acts of 1915, page 232. Nor do I think that they were justified in paying in the city of Roanoke a merchant's tax, based upon their entire purchases in the State of Virginia. My opinion is that they are merchants, doing business at each separate stand in each county in which they ply their trade, and should be taxed accordingly. For instance, in the county of Dinwiddie, they have had in the past year, as before said, simultaneously in operation seven different camps, commissaries or stores. For each of these camps they should be required to take out a separate merchant's license for the current year, if they are to be continued or have been continued since May 1st. The license tax in each case should be estimated according to section 46 of the tax laws on mercantile purchases of goods purchased for each camp during the preceding year.

Where a new camp or store is opened up by this company, a license should be taken out, under the aforesaid section of the tax law, as for a merchant beginning business, based upon the goods, wares and merchandise in the place of business to commence business with and an estimate of purchases which the merchant will make between the date of his license and the 31st of March following.

However, in accordance with section 561 of the Code, when this company has obtained a license to carry on its business at a definite place in the county, by application to the commissioner of revenue, its license may be altered so that it may carry on business at another place in the same county under the same license; provided, however, that it shall at all times have a separate license for the business carried on, at the same time, at each different place. Under this construction, I do not think that this company can be required to take out a license in the city of Roanoke, based upon all of its purchases in the State of Virginia, or any license in that city unless it actually does business there as a merchant. The only other question at issue is as to what license this company shall be required to pay for the past year in the various counties wherein it maintained camps, stores or commissaries. It is my opinion that they should be required, in so far as they can, to report to the commissioners of the revenue the amount of the purchases for each of the definite places of business occupied during 1915 by them in each county, and should pay a license tax according thereto, with this provision, of course, that they shall take out, at least, the minimum license of \$5.00 for each store, stand, or place of business which they conduct simultaneously in any county during the year.

I may add that since this company has paid, in the city of Roanoke, for the past year taxes based upon purchases in the entire State of Virginia, which purchases amounted to \$122,000, and shows no disposition to evade the law, I can see no good reason why they should be subjected to a criminal prosecution, provided they agree, as they do, to pay to the counties the taxes estimated as above set out.

Very truly yours,

LESLIE C. GARNETT,

Assistant Attorney General.

TAXATION—Merchants.—A company under contract with a railroad, which utilizes certain cars of the railroad for the purpose of furnishing supplies and food to the employees of the railroad who are engaged in operations on the track of said railroad by selling to the employees articles consisting of supplies and food

to any of the workmen who desire to purchase from the company and which cars are moved about from time to time as the work of the railroad company changes from place to place and are run in on a siding where they stay until the work in that vicinity is completed, when they are moved to some other convenient place, is not a merchant within the meaning of the Virginia tax laws as one of the necessary ingredients of a merchant's business is that it should be at a fixed and definite place.

Peddlers—License Tax—Section 50 of the Tax Bill.—It would seem that such company might be taxed under section 50 of the tax laws as amended.

Peddlers.—A person is a peddler when he travels from place to place with goods or merchandise for sale without regard to the mode of conveyance, nor is it of the slightest consequence whether the conveyance is drawn by horses, mules, canal or propelled by steam.

RICHMOND, VA., March 14, 1916.

HON. C. LEE MOORE,

*Auditor of Public Accounts,
Richmond, Va.*

DEAR SIR:

You have referred to this office the letter of Morton G. Goode, Commonwealth's attorney, Dinwiddie county, and carbon copy of a letter from Judge W. R. Staples, Roanoke, with reference to the question of the taxation of the Virginia Supply Company, and request us to inform you whether, under the laws of this State, any additional license tax may be required of this company.

I learn from the aforesaid correspondence that the Virginia Supply Company, under contract with the Norfolk and Western Railway, utilizes certain cars of that company for the purpose of furnishing supplies and food to the employees of the Norfolk and Western Railway who are engaged in operations on the track of said railroad. It is not quite clear in what method the company does business, but apparently it sells its products, consisting of supplies and food, to any of the workmen who desire to purchase from the company. These cars are moved about from time to time, as the work of the railroad company changes from place to place, and are run in on a siding where they stay until the work in that vicinity is completed, when they are moved to some other convenient place.

It also appears that this company has its principal place of business in the city of Roanoke, where it pays taxes as a merchant, both State and local.

As one of the necessary ingredients of a merchant's business is that it should be at a fixed and definite place, it seems impossible to tax this company as a merchant for doing business in the various localities where it conducts its operations. It would seem, however, that the company might be taxed under section 50 of the tax laws, as amended by Acts of 1915, page 232, which provides as follows:

"Any person who shall carry from place to place any goods, wares, or merchandise, and offer to sell or barter the same, or actually sell or barter the same, shall be deemed to be a peddler, and any person licensed as a peddler may sell any personal property a merchant may sell, or he may exchange the same for other articles," etc.

It has been held that the manner of traveling, whether on foot or horseback, in wagons, carts, sleighs or canal boats, does not enter into the definition of a peddler, and that a person is to be considered a peddler when he travels from place to place with goods or merchandise for sale, without regard to the mode of

conveyance. Nor is it the slightest consequence whether the conveyance is drawn by horses, mules, canal or steam propeller. *Fisher v. Patterson*, 13 Pa. 336, 338; *Stella Block v. Parish* (of Richland), 26 La. Ann. 642; *Cole v. Randolph*, 31 La. Ann. 535, 537.

While, therefore, it seems probable that the company could be required to take out a license as a peddler in each place where it does business, the question is not without doubt and I would advise that the matter be tested in the courts in a proper proceeding for the purpose.

Very truly yours,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

TAXATION—Chapter 148, Acts 1915—Virginia Tax Laws 1915—Section 45—Merchants Licenses—Manufacturers.—A manufacturing company is not required to take out a merchant's license for the sale of its products simply because it has one jobbing house through which all of the goods of its factories in the same city are sold. So far as such company sells products of its own factories it is not to be distinguished from other factories in Virginia selling their own products simply because it assembles in one house and sells through one department all of the products of its factories in the same city.

Virginia Tax Laws 1915, page 1, Virginia Tax Laws 1915, Section 7, Sub-section 6, Virginia Tax Laws 1916, page 1.—Where a manufacturing company has been erroneously assessed for taxation against the interest of the State, the State Tax Board or the Auditor of Public Accounts may apply to the circuit court of the county or the corporation court or hustings court of the city for the correction of any erroneous assessment of license taxes or any erroneous assessment of lands or other property either as to over or under valuations in the same manner as provided by law for the erroneous assessment of property of persons who are aggrieved thereby.

RICHMOND, VA., May 8, 1916.

HON. JNO. GARLAND POLLARD,

*Attorney General of Virginia,
Richmond, Va.*

DEAR MR. POLLARD:

On October 28, 1915, the State Advisory Board on Taxation wrote you the following letter:

"At a meeting of the State Advisory Board on Taxation, held in the Governor's office, Richmond, Va., on Wednesday, October 27, 1915, the following resolution was unanimously adopted:

"It being suggested to the board that there has been an erroneous assessment for the year 1915 of the capital of the Craddock-Terry Company, of Lynchburg, Va., whereby the revenue of the Commonwealth is affected injuriously, therefore the Attorney General of Virginia is hereby requested to investigate such suggestion and if of the opinion that the interests of the Commonwealth have been injuriously affected by such assessment to take such legal steps for correction and increase of the same as he may be advised."

Acting upon the aforesaid letter, you instructed me to go to Lynchburg and examine the status of the matter. I accordingly made a trip to that city, where I had interviews with the examiner of records for that circuit, the commissioner of revenue and with Mr. John W. Craddock.

I found that for the year 1916 the Craddock-Terry Company reported for taxation as capital the sum of \$200,000; that the examiner of records added to this the sum of \$2,113,110, and that the local board of review, on appeal reduced the amount of capital subject to taxation to the sum of \$348,025.

In the investigation of this matter, I have procured from Mr. John W. Craddock, president of the Craddock-Terry Company, a memorandum statement as to the assessment of the Craddock-Terry Company for 1915, which is in the files. From this memorandum statement, it will appear that the Craddock-Terry Company was incorporated in 1898 under the laws of Virginia, to take over the business of Craddock-Terry & Company, who had since 1888 been engaged as a partnership in the wholesale shoe merchant business. By the terms of its charter, the Craddock-Terry Company was to continue the business of wholesale shoe merchants, with the privilege of engaging in the manufacture of shoes. In 1901, the company built its first shoe factory and engaged in the manufacture of shoes. In 1906, it built the second factory, and in 1911 acquired, by lease, its third factory. Before engaging in manufacturing at all, the company had already established a mercantile business of over \$1,500,000 and was traveling thirty-five salesmen.

I also procured the balance sheet of the Craddock-Terry Company as of December 31, 1914, copy of which is in the files. There was also procured a copy of the Craddock-Terry jobbing house purchases from April 1, 1914, to March 31, 1915, a copy of which is in the files.

From these papers, it will be seen that the claim of the Craddock-Terry Company is that, because it has in Lynchburg three separate factories and does a jobbing house business, it can arbitrarily assign to its jobbing house department all of its accounts receivable, bills receivable, finished goods and all its stocks and bonds, and by paying a merchant's license tax on all goods passing through its jobbing house department, reduce the amount of capital which should be returned by it for taxation as a manufacturer. This claim is based upon that provision of the amendment of the merchant's license tax found for the first time in Acts 1915, chapter 148, page 233 (Virginia tax laws 1915, section 45, page 52), which provides that all goods, wares and merchandise manufactured by the merchant and sold or offered for sale in this State at a place other than the place of manufacture shall be considered as purchases within the meaning of that section. In other words, the question involved is whether a manufacturer who has three factories in the same city, and who maintains a jobbing house department for the distribution of the goods manufactured by himself, as well as for the distribution of goods purchased from other manufacturers, is required to return as purchases the goods manufactured by him in his factories and passing through his jobbing house department.

It may be well to note that before the amendment of 1915, referred to above, a merchant, who was also a manufacturer, could not be compelled to return as purchases goods manufactured by him and offered for sale at a place other than the place of manufacture. *Commonwealth v. Morris & Company*, 116 Va. 912.

The above section of the tax laws, relating to merchants and requiring a merchant to return as purchases, goods, wares and merchandise manufactured by him and offered for sale at other places than the place of manufacture, was construed in the cases of *Armour & Company v. Commonwealth*, 11 Va. App. 199, so as to require Armour & Company, a manufacturer, with its place of manufacture out of the State of Virginia, to return as purchases, goods manufactured by it out

of the State and offered for sale at depots or stores in this State. The question here to be considered is whether the decision in that case is decisive in this. The court in this suit used the following language, page 210:

"The statute was intended to reach the merchant who is also a manufacturer, and to protect the manufacturer in so far as he does not engage in the business of a merchant in competition with other merchants. The legislature, therefore, required a manufacturer who is also a merchant, to take out a merchant's license for doing the business of a merchant at a fixed place apart from the place of manufacture, and to return as purchases, not only goods bought from others, but also goods manufactured by the merchant and offered for sale at his store, the same being separate and apart from the place of manufacture."

It is perfectly clear from the above decision that if the Craddock-Terry Company were to establish in Lynchburg a retail store in competition with the retail merchants, then the company would be required to take out a merchant's license, but a careful consideration of the facts and circumstances under which the business of the Craddock-Terry Company is conducted, in the light of the above decision, leads me to believe that it is not necessary for a manufacturing company to take out a merchant's license for the sale of its products simply because it has one jobbing house department through which all of the goods of its factories in the same city are sold. In other words, in so far as the Craddock-Terry Company sells the products of its own factories, it is not to be distinguished from other shoe factories in Virginia selling their own products, simply because it assembles in one house and sells through one department all of the products of its factories in the same city.

This being true, I am constrained to hold that the Craddock-Terry Company has not been correctly assessed by the local board of review for the year 1915.

This leads us to consider the question as to what remedy the Commonwealth has on the premises. It is doubtful whether, under the act creating the State Advisory Board on Taxation, etc., approved March 17, 1915, found in Virginia tax laws 1915, page 1, the State Advisory Board on Taxation is given the power to apply to the court for a correction of this erroneous assessment. Some color is laid for such action, however, in the provisions of section 7, sub-section 6 thereof. I take it that this question is laid at rest by the provisions of the act amending the aforesaid act creating the State Advisory Board of Taxation, found on page 1 of the Virginia tax laws 1916, which provides that the "State Tax Board or the Auditor of Public Accounts * * * may apply to the circuit court of the county, or the corporation court and hustings court of the city * * * for the correction of any erroneous assessment of license taxes or any erroneous assessment of lands and other property, either as to over or under valuations, in the same manner as is provided by law for the erroneous assessment of property as for persons who are aggrieved thereby." The above act becomes a law on June 17, 1916, and it would seem to be applicable to this case.

There is another matter, however, which I desire to call to your attention. From the report of capital made by the Craddock-Terry Company for the year 1915, I take it that this company is liable for the erroneous assessment of its capital for years prior to 1915, and under the policy of the act amending section 508 of the Code, the State may inquire into such assessments as far back as the year 1903.

In addition, I would call to your attention the act of 1916, chapter 425, page 729, which amends the act providing additional remedies for the collection of

taxes, State, county and municipal. Under the amended act, which becomes a law on June 17, 1916, the State may file a bill against any taxpayer for the recovery of any taxes, State, county or municipal, both those which have been assessed and those which ought to have been assessed. In such proceedings the court has all the powers of the commissioner of the revenue under section 508, as amended by the Acts of 1914, page 486, and under section 509 of the Code, as amended by Acts of 1912, page 212, to the end that the court may enter an order in such proceeding requiring the taxpayer to pay all taxes with which he is chargeable under a correct assessment of his property.

I would suggest, therefore, that the terms of this opinion be brought to the attention of the Craddock-Terry Company with a view of procuring said company to report for assessment all of its omitted capital commencing with the year 1903, to the present time, including the capital omitted in the year 1915. If the matter cannot be amicably adjusted, the State has a complete remedy under the aforesaid Acts of 1916, page 749.

Very truly yours,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

TAXATION—*Banks and Banking—Section 150, Code Va.—House Bill 565.*—Amendment to section 150, Code Va., contained in House Bill 565, General Assembly, Va. 1916, is constitutional so far as it requires banks to furnish to local boards of review the names of its depositors, or in lieu thereof to pay the State all taxes assessable against such depositors by the laws of this State.

RICHMOND, VA., March 8, 1916.

HON. R. H. WILLIS,

*House of Delegates,
Richmond, Va.*

DEAR SIR:

Referring to your inquiry this morning, as to the constitutionality of House Bill No. 565, amending section 150 of the Code of Virginia, so as to require banks to furnish to the local boards of review the names of its depositors, or in lieu thereof to pay the State all taxes assessable against such deposits by the laws of this State, I beg to say that this amendment was evidently taken from a similar statute in effect in the State of Vermont, and since the Supreme Court of the United States, in *Clement National Bank v. the State of Vermont*, 231 U. S. 120, declared the Vermont statute constitutional, I am of opinion that House Bill No. 565 is also constitutional as to the provisions mentioned.

Very truly yours,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

TREASURERS — *Statutes — Construction — Treasurer's Commissions.*—Chapter 348, Acts of 1912, is not retrospective in its operation and can furnish no basis for computing treasurer's commissions earned before said act became effective, to-wit: June 14, 1912.

RICHMOND, VA., *January 8, 1916.*

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

DEAR SIR:

I have received through your department a request for my opinion as to whether chapter 348 of the Acts of 1912 is retrospective in its effect. The chapter referred to is entitled "An act to construe and make plain how treasurers' commissions are to be paid" under certain sections of the Code.

So far as said act affects county and district school levies, it presents purely a local question concerning which the local authorities should be advised by the Commonwealth's attorney; but, inasmuch as said act also deals with State revenues, I feel at liberty to express to you my opinion that said act is not retrospective and can furnish no basis for computing treasurers' commissions earned before said act became effective, to-wit, on June 14, 1912.

Very truly yours,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

VITAL STATISTICS—*Physicians—Chapter 181, Acts 1912—Venue of Prosecution—Section 4106, Code Va. 1904.*—A physician who resides in one district and who is in professional attendance at the birth of a child in another magisterial district which birth he fails to report in accordance with statute, commits the offense therein provided for in the district where the child is born, and, therefore, should be prosecuted before a justice of the peace of the magisterial district wherein the birth occurred.

Same.—Jurisdiction of justices of the peace in misdemeanor cases discussed.

RICHMOND, VA., *February 19, 1916.*

W. A. PLECKER, M. D.,
Registrar of Vital Statistics,
Richmond, Va.

DEAR SIR:

I have your inquiry relative to the jurisdiction of justices in imposing penalties upon physicians for failure to report births to local registrars under provisions of section 13 of chapter 181, Acts 1912, providing for the registration of births, deaths, etc. Your inquiry is based on a case where a physician residing in one magisterial district was in professional attendance at the birth of a child in another magisterial district, which birth he failed to report in accordance with statute, and who is, therefore, guilty of a misdemeanor under section 21 of said act.

The question arises as to whether the offending physician should be prosecuted in his own magisterial district or in the magisterial district where the birth occurred.

Section 4106 of Va. Code 1904, provides, among other things, "except when it is otherwise specially provided, (justices of the peace) shall have exclusive original jurisdiction for the trial of all other misdemeanor cases occurring within

their jurisdiction in their respective magisterial districts." There being no specific provision to the contrary the question, therefore, arises as to where this misdemeanor was committed.

Section 13 of the act referred to makes it the duty of the attending physician to "file the certificate of birth * * * with the local registrar of the district in which the birth occurs"; and in as much as it is contemplated that the duty required by the statute should be performed within the district in which the birth occurred, the failure to perform that duty is an offense committed in that district, regardless of where the physician may reside. It, therefore, follows that in the case you have under consideration complaint against the offending physician should be made before the justice of the peace of the magisterial district wherein the birth occurred.

Yours very truly,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

VITAL STATISTICS—*Registrars of Births and Deaths—Chapter 181, Acts 1912 as Amended.*—Under the provisions of chapter 181, Acts 1912, as amended by Acts 1914, page 140, it was the intention of the General Assembly to make justices of the peace *ex-officio* registrars of vital statistics subject to the exception that the State registrar may appoint others to perform the duties of that office in the following cases only:

(1) Where a justice of the peace refuses to act; (2) Where there is no acting justice of the peace; (3) Where the justice of the peace fails or neglects to discharge his official duties as local registrar of vital statistics as laid down in the act, or who fails to make prompt and complete returns of births and deaths as required thereby. It, therefore, follows, that when a newly elected justice of the peace qualifies he becomes *ipso facto* legal registrar of vital statistics and the duty and authority of the former registrar thereupon ceases.

RICHMOND, VA., December 15, 1915.

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

DEAR SIR:

Yours of December 13th received. I understand that there are now acting as local registrars of vital statistics quite a number of men who have performed efficient service and whose services you wish to continue, but you are in doubt as to whether the statute requires that the duties of the local registrars of vital statistics shall be performed by the new justices of the peace who may have been elected at the election held November 2d last.

Section 4 of chapter 181, Acts 1912, as amended by Acts of 1914, page 140, provides as follows:

"That in cities and towns the principal executive officer of the local board of health shall be the local registrar of vital statistics, and that in magisterial districts justices of the peace shall be local registrars of vital statistics for such portions of the districts as the State registrar shall designate, provided, however, that if any justice of the peace refuses to act as

local registrar, or where there is no acting justice of the peace, that, in such event, the State registrar shall appoint a suitable and proper person to be the local registrar for such district, or portion of such district as said registrar may designate. Any local registrar who fails or neglects to discharge efficiently the duties of his office, as laid down in this act, or who fails to make prompt and complete returns of births and deaths, as required thereby, shall be therewith removed from his office of registrar by the State registrar, and his successor appointed in addition to any further penalties that may be imposed under other sections of this act for failure or neglect to perform his duty."

From the above, it is apparent that it was the intention of the General Assembly to make justices of the peace *ex-officio* local registrars of vital statistics, subject, however, to the exception that the State registrar may appoint others to perform the duties of that office in the following cases only: (1) Where a justice of the peace refuses to act; (2) where there is no acting justice of the peace; and (3) where the justice of the peace fails or neglects to discharge efficiently the duties of local registrar of vital statistics as laid down in the act, or who fails to make prompt and complete returns of births and deaths as required thereby.

I am, therefore, of the opinion that when the newly elected justices of the peace qualify they become *ipso facto* local registrars of vital statistics, and the duties and authority of the former registrars thereupon cease.

If you think that the good of the service requires your retaining any of your local registrars who were not elected as justices of the peace at the November election, an amendment of the law is advisable.

Very truly yours,

JNO. GARLAND POLLARD,

Attorney General of Virginia.

WEIGHTS AND MEASURES—*Conflict of Laws—Section 1913(b), Code Va. 1904—Act of Congress Approved March, 1915, Fixing Standard Barrel—Constitution of the United States, Article 5, Section 8.*—The power to fix the standard of weights and measures having been conferred upon Congress by section 8, article 5 of the Federal Constitution, the laws passed by Congress under this section of the Constitution are paramount to a State law.

RICHMOND, VA., July 5, 1916.

MR. JNO. W. RICHARDSON,
Register of the Land Office,
Richmond, Va.

DEAR SIR:

Acknowledgment is made of your letter of July 5, 1916, asking the opinion of the Attorney General as to whether the State Superintendent of Weights and Measures and the city and county sealers of Virginia should enforce the provisions of section 1913(b) of the Code of 1904 with regard to the size of the standard barrel to be used in this State, or the provisions of the act of Congress approved March, 1915, fixing the standard barrel for fruits, vegetables and other dry commodities.

Among the powers expressly conferred by the United States Constitution upon Congress in article 5, section 8 is the following:

"To coin money, regulate the value thereof and of foreign coin, and fix the standard of weights and measures."

The power to fix the standard of weights and measures having been conferred upon Congress by the Constitution the laws passed by Congress under this section of the Constitution are paramount to the State law, and therefore the Federal law should be enforced in Virginia.

Very truly yours,

CHRISTOPHER B. GARNETT,

Assistant Attorney General.

Statement

*Showing the Current Expenses of the Office of the Attorney General from
November 1, 1915, to March 1, 1916.*

1915.			
Nov.	1.	Balance to credit of contingent fund.....	\$140 66
	2.	Miss L. M. Krouse, drinking water.....	\$ 2 00
	4.	Jno. Garland Pollard, stamps.....	5 00
	30.	Jno. Garland Pollard, stamps.....	5 00
Dec.	6.	Western Union Telegraph Company, telegrams.....	2 30
	6.	Bancroft-Whitney Company, vol. 9 Ruling Case Law.....	6 00
	10.	J. A. Skinner, repairs to window shades.....	3 00
	22.	Jno. Garland Pollard, stamps.....	5 00
1916.			
Jan.	4.	Virginia Law Review Association, subscription and vols. 1 and 2.....	9 50
	4.	Lawyers Co-operative Publishing Company, vol. 59 United States Supreme Court Reports.....	6 00
	6.	Western Union Telegraph Company, telegrams.....	2 66
	8.	Jno. Garland Pollard, stamps.....	5 00
	26.	Chesapeake and Potomac Telephone Company, messages.....	4 02
	29.	Jno. Garland Pollard, stamps.....	5 00
Feb.	14.	L. C. Garnett, one typewriter.....	40 00
	21.	Jno. Garland Pollard, stamps.....	5 00
	28.	Jno. Garland Pollard, stamps.....	5 00
	28.	Everett Waddey Company, part payment on furniture.....	30 18
			<u>\$140 66</u>

Statement

*Showing the Current Expenses of the Office of the Attorney General from
March 1, 1916, to October 31, 1916.*

1916.			
Mar.	1.	Appropriation to defray current expenses to March 1, 1917.....	\$1,200 00
	27.	Bobbs-Merrill Company, law books.....	\$ 18 50
	27.	Richmond Press, Inc., 100 extra copies annual report.....	34 18
	27.	Miss L. M. Krouse, drinking water.....	2 00
	27.	S. B. Adkins Company, 1 number Virginia Law Register.....	50
	27.	Bancroft-Whitney Company, 4 volumes Ruling Case Law.....	24 00
	27.	Western Union Telegraph Company, telegrams.....	88
	27.	Appeals Press, Inc., subscription to Virginia Appeals to February 28, 1917.....	5 00
	27.	Hill Directory Company, Inc., Richmond City Directory.....	7 00
	27.	American Law Book Company, second payment on Cyclopedia and Corpus Juris.....	50 00
	27.	Jno. Garland Pollard, stamps.....	5 00
	27.	M. A. Powers, box for storing old records.....	50
	27.	Everett Waddey Company, part payment on furniture.....	122 67
	27.	Chesapeake and Potomac Telephone Company, rental of two extension sets for year ending February 28, 1917.....	24 00
Apr.	6.	West Disinfecting Company, drinking cups and cabinet.....	5 75
	6.	Western Union Telegraph Company, telegrams.....	86
	6.	Jno. Garland Pollard, stamps.....	5 00
	12.	C. B. Garnett, expenses to Lynchburg, Bonsack Mch. Company case.....	13 40
	12.	M. L. Hunter, laundering towels.....	1 25
	15.	C. B. Garnett, expenses to Manassas in Commonwealth tax cases.....	18 10
	21.	Morris Hunter, repairs to buzzers.....	75
	21.	Jno. Garland Pollard, stamps.....	5 00
	28.	C. B. Garnett, expenses to Alexandria and return in Doubleday, Rosselyn Packing Company (and others) cases.....	16 40
	28.	Jno. Garland Pollard, expenses to Washington in West Virginia debt case..	12 89
			<u>373 63</u>
		Balance brought down.....	<u>\$ 826 37</u>

STATEMENT SHOWING CURRENT EXPENSES—CONTINUED.

1916.	Balance carried forward.....		\$826 37
May	2. The Michie Company, subscription to Virginia Law Register.....	5 00	
	2. Bell Book and Stationery Company, waste baskets.....	1 60	
	2. C. B. Garnett, expenses to Norfolk, Va., in Kernochan case.....	6 37	
	6. J. A. Skinner, placing awnings and repairing window shades.....	3 00	
	6. Western Union Telegraph Company, telegrams.....	1 80	
	8. Jno. Garland Pollard, expenses to Washington in case of <i>Durant v. Tinsley</i>	14 49	
	8. C. B. Garnett, expenses to Lexington in Heck case.....	16 25	
	11. Jno. Garland Pollard, stamps.....	5 00	
	12. Jno. Garland Pollard, expenses to Philadelphia in West Virginia debt case.....	28 89	
	19. Sydnor & Hundley, window shades.....	5 25	
	20. Everett Waddey Company, balance on furniture.....	123 42	
	23. Leslie C. Garnett, expenses to Fairfax, Va., in tax matters, Willard, et al.....	15 60	
	29. Jno. Garland Pollard, stamps.....	5 00	
June	2. Miss L. M. Krouse, drinking water.....	2 00	
	2. Bell Book and Stationery Company, desk baskets.....	2 55	
	8. Leslie C. Garnett, expenses to Staunton in case of <i>Smith-Courtney Company v. Commonwealth</i>	5 60	
	8. Leslie C. Garnett, expenses to New York in Kernochan case.....	32 05	
	8. Leslie C. Garnett, expenses to Wytheville, to attend court.....	19 60	
	8. Jno. Garland Pollard, expenses to Washington in West Virginia debt case.....	15 09	
	14. Jno. Garland Pollard, stamps.....	5 00	
	24. Leslie C. Garnett, expenses to Salem, Va., in Bonsac Mch. case.....	21 95	
	28. Jno. Garland Pollard, stamps.....	5 00	
	29. Leslie C. Garnett, expenses to Mathews, Va., in case of <i>Commonwealth v. N. E. Miller and Illinois Surety Company</i>	10 20	
July	6. M. L. Staples, making four keys.....	1 60	
	18. Jno. Garland Pollard, stamps.....	5 00	
	27. S. B. Atkins & Co., binding Virginia Law Register.....	1 00	
	27. Western Union Telegraph Company, telegrams.....	5 59	
	27. Chesapeake and Potomac Telephone Company, messages.....	4 65	
	29. West Publishing Company Sup. West Virginia Digest.....	7 50	
Aug.	10. Jno. Garland Pollard, stamps.....	5 00	
	30. Leslie C. Garnett, stamps.....	5 00	
Sept.	5. Miss Edna Malcolm, reading proof of election laws.....	1 50	
	14. Leslie C. Garnett, expenses to Staunton, Supreme Court of Appeals.....	13 80	
	14. Jno. Garland Pollard, expenses attendance upon Commission to formulate judgment docket.....	5 30	
	18. Jno. Garland Pollard, stamps.....	10 00	
	25. Leslie C. Garnett, expense to Staunton in case of <i>Moran v. Gilmer</i>	6 10	
	26. Sydnor & Hundley, desk clock.....	4 50	
	26. Remington Typewriter Company, adjusting typewriter.....	90	
	26. Bancroft-Whitney Company, vols. 11, 12 and 13, Ruling Case Law.....	18 00	
	26. West Disinfecting Company, drinking cups.....	4 50	
	26. American Law Book Company, 1916 Annotations to Cyclopaedia and Corpus Juris.....	8 80	
	27. Leslie C. Garnett, trip to Fairfax, Va., in <i>Commonwealth v. Marshall</i> case.....	13 05	
	27. S. E. Cleage, Clerk Supreme Court, Knoxville, Tenn., copy of opinion in <i>Tennessee v. Cumberland Club</i>	6 00	
	29. Leslie C. Garnett, expenses to Norfolk, Va., in Twohy case.....	9 45	
	30. Western Union Telegraph Company, telegram.....	35	
Oct.	13. Jno. Garland Pollard, stamps.....	10 00	
	17. Miss Consuelo Green, work on election laws.....	25 00	
	30. Miss L. M. Krouse, drinking water.....	3 00	
	30. Western Union Telegraph Company, telegrams.....	2 25	
	30. Bell Book and Stationery Company, pins.....	50	
	30. Chesapeake and Potomac Telephone Company, messages.....	60	
	30. Balance to credit of contingent fund.....		529 65
			\$826 72

Statement

Showing Amounts Expended from the Appropriation for Traveling Expenses from November 1, 1915, to March 1, 1916.

1915.			
Nov.	1.	Balance to credit of appropriation for necessary traveling expenses.....	\$157 73
	23.	Jno. Garland Pollard, expenses two trips to Prince George Court-house in connection with law violations.....	\$10 70
	26.	Jno. Garland Pollard, expenses trip to Hopewell, Va.....	5 00
Dec.	15.	C. B. Garnett, expenses to Lynchburg in United Cigarette Company and taxation of Craddock-Terry Shoe Company.....	12 40
	20.	C. B. Garnett, expenses to Fredericksburg in case of Bartele & Moore.....	3 62
1916.			
Jan.	13.	C. B. Garnett, expenses to Washington in matter of <i>Durant v. Commonwealth</i>	10 75
	14.	Jno. Garland Pollard, expenses to Montross, Va., in matter of prosecutions for violating liquor laws Colonial Beach.....	13 23
	21.	Wheeler & Thompson, hire of automobile January 9-12, Colonial Beach cases.....	40 00
	22.	C. B. Garnett, expenses trip to Williamsburg and Norfolk in Kernochan and Twohy cases.....	12 19
Feb.	3.	C. B. Garnett, expenses to New York in Kernochan case.....	37 05
	8.	M. L. Wallerstein, expenses to Norfolk in Ferries Company case.....	7 75
	17.	C. B. Garnett, expenses to Norfolk in Twohy case.....	8 52
			<hr/> 161 21
		Balance to credit of appropriation.....	<hr/> \$296 52

Statement

Showing Amounts Expended from Appropriation for Additional Clerical and Stenographic Services in the Office of the Attorney General, from November 1, 1915, to March 1, 1916.

1915.			
Nov.	1.	Balance to credit of appropriation.....	\$500 00
	1.	M. L. Wallerstein, services as law assistant.....	\$50 00
	1.	Miss M. L. Hunter, services as stenographer.....	50 00
	30.	M. L. Wallerstein, services as law assistant.....	50 00
	30.	Miss M. L. Hunter, services as stenographer.....	50 00
1916.			
Jan.	3.	M. L. Wallerstein, services as law assistant.....	50 00
	3.	Miss M. L. Hunter, services as stenographer.....	50 00
	31.	M. L. Wallerstein, services as law assistant.....	50 00
	31.	Miss M. L. Hunter, services as stenographer.....	50 00
Feb.	29.	M. L. Wallerstein, services as law assistant.....	50 00
	29.	Miss M. L. Hunter, services as stenographer.....	50 00
			<hr/> \$500 00

Statement

Showing Amounts Expended from Appropriation for Stenographic and Clerical Help for Attorney General and Assistant Attorney General.

		Amount of appropriation.....	\$2,700 00
Apr.	1.	M. L. Wallerstein, services, law assistant.....	\$50 00
	1.	Miss M. L. Hunter, services, stenographer.....	50 00
	15.	M. A. Powers, services, secretary.....	62 50
May	1.	M. L. Wallerstein, services, law assistant.....	50 00
	1.	Miss M. L. Hunter, services, stenographer.....	50 00
	1.	M. A. Powers, services, secretary.....	62 50
	29.	M. L. Wallerstein, services, law assistant.....	50 00
	15.	M. A. Powers, services, secretary.....	62 50
	29.	Miss M. L. Hunter, services, stenographer.....	50 00
June	1.	M. A. Powers, services, secretary.....	62 50
	16.	M. A. Powers, services, secretary.....	62 50
	30.	M. L. Wallerstein, services, law assistant.....	50 00
	30.	Miss M. L. Hunter, services, stenographer.....	50 00
July	15.	H. L. Ducker, services, secretary.....	50 00
Aug.	1.	Miss M. L. Hunter, services, stenographer.....	57 50
	1.	H. L. Ducker, services, secretary.....	50 00
	15.	Leon M. Bazile, services, law assistant.....	50 00
	18.	Miss J. E. Swann, services, stenographer.....	15 00
	25.	Miss J. E. Swann, services, stenographer.....	15 00
Sept.	1.	Miss J. E. Swann, services, stenographer.....	15 00
	1.	Leon M. Bazile, services, law assistant.....	50 00
	8.	Miss J. E. Swann, services, stenographer.....	15 00
	11.	Miss M. L. Hunter, services, stenographer.....	57 50
	15.	Leon M. Bazile, services, law assistant.....	50 00
	15.	J. Sydney Fitzgerald, services, secretary.....	37 50
	30.	Miss M. L. Hunter, services, stenographer.....	57 50
Oct.	1.	Leon M. Bazile, services, law assistant.....	50 00
	1.	J. Sydney Fitzgerald, services, secretary.....	37 50
	15.	Leon M. Bazile, services, law assistant.....	50 00
	15.	J. Sydney Fitzgerald, services, secretary.....	37 50
			<u>\$1,407 50</u>
			<u>\$1,292 50</u>

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.			
Dec.	6.	Bancroft-Whitney Company, vol. 9 Ruling Case Law.....	\$ 6 00
1916.			
Jan.	4.	Virginia Law Review Association, vols. 1 and 2 Virginia Law Review.....	9 50
	4.	Lawyers Co-operative Publishing Company, vol. 59 United States Supreme Court Reports.....	6 00
Mch.	27.	Bobbs-Merrill Company, law books.....	18 50
	27.	Bancroft-Whitney Company, 4 volumes Ruling Case Law.....	24 00
	27.	Appeals Press, Inc., Virginia Appeals.....	5 00
	27.	American Law Book Company, second payment Cyclopedias and Corpus Juris.....	50 00
May	2.	The Michie Company, Virginia Law Register.....	5 00
July	29.	West Publishing Company, Sup. Virginia-West Virginia Digest.....	7 50
Sept	26.	Bancroft-Whitney Company, vols. 11, 12, 13 Ruling Case Law.....	18 00
	26.	American Law Book Company, 1916 Annotations Cyclopedias and Corpus Juris.....	8 80
			<u>\$158 30</u>

List of Books in Attorney General's Office—November 1, 1916.

	VOL.		VOL.
<i>Encyclopedias:</i>			
"Cyc," Vol. 1 to 40	40	Randolph	6
Index and Concordance	1	Leigh	11
Annotations, 1901-1913	1	Robinson	2
Annotations, 1914-1916	1	Grattan	33
Corpus Juris, Vol. 1 to 8	8	Va. Reports, Vol. 75-118	48
Ruling Case Law, Vol. 1-14	14	Va. Colonial Decisions	2
Citations to Ruling Case Law (pamphlet)	1	<i>Miscellaneous Reports, etc.:</i>	
American & Eng. Encyclopedia of Law, 1st ed., Vol. 1-31	31	United States Supreme Court Reports (L. Ed.), Vol. 1 to 241, inclusive	60
Encyclopedia of Pleading and Practice, Vol. 1-3	3	Virginia Law Register, Vol. 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 20	18
Encyclopedia of Evidence, Vol. 1-14	14	Virginia Law Review, Vol. 1-2	2
U. S. Encyclopedia, Vol. 1-11	11	Virginia Appeals, Vol. 1-9	9
Supplement U. S. Ency.	1	United States Compiled Statutes, Vol. 1-3	3
<i>Digests:</i>			
Ency. Digest Va. & W. Va. Reports (Michie), Vol. 1-15	15	Supplement U. S. Comp. Stat. (1903)	1
Va.-West Va. Digest (Am. Digest Class.), Vol. 1-7	7	Supplement U. S. Comp. Stat. (1909)	1
Virginia Corporation Digest (Diggs & Barrett)	1	Virginia Law Journal, Vol. 1, 2, 3, 4, 5, 6, 13, 14, 15, 16	10
Danforths Digest U. S. Sup. Ct. Rep.	2	Table of cases and index to notes of American Decisions and Reports	1
Lomax Digest (Va.), Vol. 1-3	3	Southeastern Reporter, Vol. 7-8	2
Mathews Digest, Vol. 1-2	2	Liability of Officers and Agents of Corporations, Thompson	1
American Digest 1886-1896 (antiquated)	10	Black's Dillon on Removal of Causes	1
Brightley's Fed. Digest	1	Broom's Legal Maxims, 8th ed.	1
Digest of Decisions under Act to regulate commerce, 1887-1908 (Pierce)	1	Rose's Notes U. S. Reports, Vol. 1-13	13
Digest of U. S. C. C. A. Rep. for Vol. 1 to 10	1	Rose's Notes U. S. Sup. Ct. Rep., supplement, Vol. 1, 2, 3, 4, 5	5
Words and Phrases, 1st series, Vol. 1-8	8	U. S. Statutes at Large, 2d ed. 1878	1
<i>Reports:</i>			
L. R. A., Vol. 1-70	70	Supplement to the Rev. Stat. U. S., 2d ed. 1874-1891	1
L. R. A. (N. S.), Vol. 1-38	38	Charters and Constitutions, parts 1 and 2	2
L. R. A. Digest, Vol. 1-70	3	Notes on revised stat. U. S., Gould & Tucker	1
L. R. A. Digest, Vol. 1-50	1	Documentary History of Constitution of U. S., 1786-1870	3
L. R. A. (N. S.) Digest, Vol. 1-24	1	Dacey on Parties to Actions	1
L. R. A. (N. S.) Digest, Vol. 25-36	1	Beach on Law of Insurance	2
L. R. A. (N. S.) Digest, Vol. 25-30	1	Leading Cases in Equity	1
L. R. A. Index to Notes, Vol. 1-70	1	Chitty on Pleadings (16th Am. Ed.)	2
<i>Virginia Reports:</i>			
Washington, Vol. 1 and 2	1	Chitty on Pleadings (10th Am. Ed.)	3
Va. Cases, Vol. 1 and 2	1	Spence on Equitable Jurisdiction of the Court of Chancery	2
Hening & Munford	4	Abbott's Trial Evidence	1
Munford	6	Blackwell on Tax Titles	1
Gilmer	1		

LIST OF BOOKS—CONTINUED.

	VOL.		VOL.
<i>Miscellaneous Reports, etc.—Con.:</i>		Dillon's Municipal Corporations ..	2
Addison on Contracts (Am. Ed.)..	2	Jarman on Wills, Vol. 1	1
Barton's Chancery Practice	2	Hawkins Pleas of the Crown, Vol.	
Martin's Index to Va. Reports....	1	1-2	2
Continuation of Martin's Index to		Burroughs on Taxation	1
Va. Reports	1	Seligman's Essay on Taxation ...	1
Virginia Criminal Procedure, 1878	1	Beale on Foreign Corporations ...	1
Russel on Crimes, 4th Am. Ed....	2	Burroughs on Public Securities... 1	
Wharton's Commentaries on Amer-		Lewis' Sutherland Statutory Con-	
ican Law	1	struction	2
Bishop on Criminal Procedure....	2	Minor on Real Property	2
Philips on Evidence	1	Benjamin on Sales	2
Wills on Circumstantial Evidence..	1	Gray's Limitations of Taxing	
Lindley on Partnership (Ewell)..	2	Power	1
Fell's Law of Guaranty and Surety-		Cook on Corporations, 6th ed....	4
ship		Greene's Bryce's Ultra Vires.....	1
Fox Digest of Partnership	1	Ivins & Mason on Control of Pub-	
Barton's Law Practice (1877)....	1	lic Utilities	1
Wharton's Criminal Evidence (9th		Story on Agency, 9th ed.	1
ed.)	3	Lawson's Concordance	1
Wharton's Criminal Pleading and		Merrill on Mandamus	1
Practice (8th ed.)	1	Page and Jones on Taxation by As-	
Chitty on Criminal Law	4	essment	2
Clarke & Marshall on the Law of		Hening's Statutes, Vol. 1-13	13
Crimes	2	Hening's Digest	1
Mathews Criminal Digest, 3d ed..	1	East's Crown Law	2
Minor's Synopsis of Criminal Law	1	Cases on Motion U. S. Sup. Court—	
Davis on Criminal Law	2	Armes	1
Bishop on Statutory Crimes.....	1	Addison on Contracts, Am. Ed.,	
Wigmore on Evidence	4	3 vol.	3
Philips on Evidence	4	Addison on Torts (Wood), 2 vol..	2
Best on Evidence (Am. Ed.).....	2	Addison on Contracts, Am. Ed.,	
Starkie on Evidence	3	Vol. 3	1
Hageman on Privileged Communi-		Cobbey on Chattel Mortgages	2
cations	1	Thompson and Merriam on Juries..	1
Harrison's Legislation on Insanity	1	Robinson's Practice, Vol. 5	1
Cooley's Constitutional Limita-		Pierce on Railroads	1
tions, 4th ed.	1	Drake on Attachment, 6th ed....	1
Cooley's Constitutional Limita-		Annotations to Code of W. Va.	
tions, 6th ed.	1	(Justice)	1
Story on the Constitution, 5th ed..	2	Code of W. Va. 1870	1
Foster's Federal Practice	1	Digest of Decisions under act to	
Debates Va. Constitutional Conven-		regulate commerce, 1887-1908 ..	1
tion, 1901-1902	2	Records, briefs and opinions in	
Taylor's Jurisdiction and Proce-		cases argued by R. Taylor Scott,	
dure of U. S. Supreme Court....	1	1894	1
Battel & Polson's International		Throop on Public Officers	1
Law	1	Black on Interpretation of Laws..	1
Desty's Federal Procedure	2	Mathews' Forms	1
Bump's Notes of Constitutional		Robinson's Practice, Vol. 1-5 (1860)	5
Decisions	1	Robinson's Practice, Vol. 1-3 (1832)	3
Rose's Code of Federal Procedure..	3	Maryland & Va. Boundary Line,	
American Constitutions, Vol. 1,		Report of 1872	1
1894	1	Report State Corporation Com.,	
Pomeroy's Constitutional Law, 7th		Va., 1915	1
ed.	1	Appendix Report Va. Corporation	
Potter's Dwaris on Statutes and		Com., 1915	1
Constitutions	1	Constitution of Va.	1

LIST OF BOOKS—CONTINUED.

	VOL.		VOL.
<i>Miscellaneous Reports, etc.—Con.:</i>		Supplement to Revised Code 1883..	1
Senate Journal, 1874	1	Supplement Code Va. 1898.....	2
Senate Journal, 1912	1	General Laws Va. 1887-1894	1
Senate Journal, 1914	1	Va. Code, 1904-1916, 2 sets, 4 vol.	
Senate Journal, 1915, extra session	2	each	8
Senate Journal, 1916	1		
House Journal, 1912	1		
House Journal, 1915, extra session	2	<i>Miscellaneous:</i>	
<i>Acts of Assembly, as follows:</i>		Laws of Vermont, 1915	1
1829-1834	1	Va. Tax Laws, 1914	1
1831	1	Internal Revenue Laws, 1911	1
1855-1856	1	Federal Food and Drugs Act and	
1857-1858	1	decisions	1
1859-1860	1	Va. Schools, 1911 and 1915, 2 vol.	2
1861-1862	1	Georgia Laws, 1915	1
1862	1	Insurance Laws, Va.	1
1863	1	Report Attorney General Illinois,	
1865-1866	1	1914	1
1869-1870	1	Report Attorney General, Ohio,	
1870-1871	1	1915, 3 vol.	3
1871-1872	1	Report Attorney General Utah,	
1872-1873	1	1914	1
1874	1	Report Attorney General Ken-	
1874-1875	1	tucky, 1914-1915	
1875-1876	1	Report Attorney General Maine,	
1876-1877	1	1911-1912	1
1877-1878	1	Report Attorney General Nebraska,	
1878-1879	1	1913-1914	1
1879-1880	1	Report Attorney General Illinois,	
1883-1884	1	1915	1
1884, extra session	1	Report Attorney General W. Va.,	
1884-1886	1	1915-1916	1
1887, extra session	1	Reports Attorney General Va.,	
1887-1888	1	1880-1913	2
1889-1890	1	Reports Attorney General Va.,	
1891-1892	1	1883-1913	1
1893-1894	1	Report Special Tax Com. State of	
1895-1896	1	Ky., 1912-1914	1
1897-1898	3	Report Joint Committee on Tax	
1899-1900	1	Revision, Va., 1914	1
1901, extra session	1	Report Board Public Works, 1867-	
1901-1902	1	1870	1
1904	2	Report Supt. Pub. Ins. Va., 1913-	
1902-1904, extra session	1	1914	1
1906	3	Report Adj. General of Va., 1915..	1
1908	1	Report of Committee of House and	
1910	1	Senate on revision of corpora-	
1912	3	tion and revenue laws	1
1914	3	Report of commission to investigate	
1915, extra session	2	tax assessment New Jersey, 1912	1
1916	3	Report Tax Commissioner, Ken-	
Revised Code of 1814, 2d ed.....	1	tucky, 1911-1912	1
Revised Code of 1819, Vol. 1 and 2	2	Report of Bureau of Labor, Va.,	
Code of Va. 1849	1	1913	1
Code of Va. 1860	2	Report State Corporation Commis-	
Code of Va. 1873	1	sion, 1914	1
Comparison Va. Codes 1873-1887..	1	Appendix to Report State Corp.	
		Com., 1914	1

LIST OF BOOKS—CONTINUED.

	VOL.		VOL.
<i>Miscellaneous:</i>		Norfolk City Code, 1902	1
Report Secretary of Common-		Abridgement of public acts of As-	
wealth, 1915	1	sembly Va., in force Jan. 1, 1758,	
Report Superintendent Pub. Ins.,		1 vol.	1
1913-1914	1	Index and digest reports and rul-	
Report Librarian State Library,		ings Interstate Commerce Com-	
1915	1	mission	1
Appendix to Report State Corp.		Mayo's Guide	1
Com., 1915	1	Legislative Manual, 1915	1
Acts Legislature of West Va., 1870		Abridgement of Va. Laws concern-	
Richmond City Code, 1910	1	ing education (Jones)	1
Charter City of Richmond and		Index to Enrolled Bills, 1777-1910	1
State statutes relating to cities		Index to Enrolled Bills, 1776-1916	1
and towns	1	Standard Dictionary of the English	
Report City of Richmond, 1911...	1	Language	1
Laws and Ordinances City of			
Roanoke	1		

APPENDIX

IN THE SUPREME COURT OF THE UNITED STATES.

Original No. October Term, 1915.

COMMONWEALTH OF VIRGINIA, Complainant,	}	Petition for Writ of Execution.
<i>vs.</i>		
STATE OF WEST VIRGINIA, Defendant.		

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of the Commonwealth of Virginia by Jno. Garland Pollard, her Attorney General, shows to the court that—

I. The Commonwealth of Virginia filed a bill in this court on leave on February 26, 1906, against the State of West Virginia praying that the State of West Virginia's proportion of the public debt of Virginia, as it stood prior to 1861, be ascertained and satisfied.

II. On June 14, 1915, this court entered its decree and judgment in the suit as follows:

"SUPREME COURT OF THE UNITED STATES.

"Original No. 2.—October Term, 1914.

"*Commonwealth of Virginia, Complainant,*
"vs.

"*State of West Virginia, Defendant.*

"This cause came on to be heard on 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, at four per cent. per annum, \$5,143,059.18; interest from July 1, 1891, to July 1, 1915, at three 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 five per cent. per annum.

"It is further ordered, adjudged and decreed that each party pay one-half of the costs.

"June 14, 1915."

III. The said judgment and decree has ever since remained and is now unpaid. The State of West Virginia has failed to pay the Commonwealth of Virginia the same or any part thereof, although payment has been respectfully requested by the Commonwealth of Virginia of the State of West Virginia.

IV. The correspondence showing the request of the Commonwealth of Virginia to the State of West Virginia for the payment of said decree and judgment, and the correspondence relating to a proposed joint conference of the Debt Commissions of the two States, as suggested by the West Virginia Commission, are hereto attached and made a part of this petition.

From said correspondence it will appear—

That on October 19, 1915, the chairman of the Virginia Debt Commission, in pursuance of authority from that body, addressed a letter to the Governor of West Virginia, requesting that provision be made for the payment of said decree and judgment.

That on October 28, 1915, the Governor of West Virginia replied that he had convened the West Virginia Debt Commission and in conjunction with them had reached the conclusion that it would be to the advantage of both States to have a joint conference of the commissions of the two States at the earliest date possible.

That on November 12, 1915, the chairman of the Virginia Debt Commission, in pursuance of authority from that body, replied suggesting that the proposed joint conference be held on November 23, 1915.

That on November 12, 1915, the Governor of West Virginia replied by telegram that he would communicate with the members of the West Virginia Commission and would later reply further, which later reply was duly received November 19th, and was to the effect that the West Virginia Commission would probably not be able to have the joint conference or meeting before some time early in December, of which he would advise the Virginia Commission later.

That on December 6, 1915, no further advice having been received from the Governor of West Virginia, the chairman of the Virginia Debt Commission addressed another letter to the Governor of West Virginia, expressing the hope that the Virginia Commission might receive a reply at an early date.

To this letter, addressed on December 6, 1915, to the Governor of West Virginia, no reply has been received.

Wherefore, your petitioner, Commonwealth of Virginia, prays that a writ of execution may issue from this court, directed to its marshal, against the State of West Virginia, directing its marshal to levy upon any property of the State of West Virginia, subject to such levy for the satisfaction of the said judgment and decree, and for such other and further relief in the premises as shall seem just and meet.

And your petitioner will ever pray, &c.

COMMONWEALTH OF VIRGINIA,
By JNO. GARLAND POLLARD,
Attorney General of Virginia.

October 19, 1916.

HON. H. D. HATFIELD,
Governor of West Virginia,
Charleston, W. Va.

DEAR SIR:

In the hope that the State of West Virginia would provide for the payment of the amount of the judgment, viz: \$12,393,929.50 with interest, entered against it by the Supreme Court of the United States in favor of the State of Virginia, we have postponed making any formal request.

We have recognized and have appreciated the fact that your State may need reasonable time in order to make the financial arrangements necessary for compliance with the decree of the court, and any request for such delay will be responded to in the spirit which should govern one State in dealing with another.

Nothing, however, having been done by your State, so far as we are advised, we feel constrained to call the matter to your attention.

Action by the legislature of your State will, of course, be necessary in order to comply with the court's decree, and as we are informed unless convened in extraordinary session upon the call of your Excellency, there will be no session of that body until January, 1917. To postpone until then the beginning of such action as may be necessary to carry out the decree of the court would involve unreasonable delay. We, therefore, on behalf of the State of Virginia which we represent, respectfully request the State of West Virginia to perform the court's decree, and to that end that your Excellency will, in the exercise of the power vested in you, convene the legislature of your State in extraordinary session for the purpose of dealing with this important subject and making provision for the payment of the decree.

We will be indebted to you if you will, at your early convenience, communicate your reply to this letter to the undersigned, chairman of the Virginia Commission, at Front Royal, Va.

Very truly yours,

H. H. DOWNING,
Chairman, Virginia Commission.

October 28, 1915.

HON. H. H. DOWNING,
Chairman, Debt Commission,
Front Royal, Va.

MY DEAR SIR:

Upon the receipt of your very courteous letter of the 19th instant, relative to the payment of the judgment of the Commonwealth of Virginia against the State of West Virginia, recently rendered by the Supreme Court of the United States, I convened the West Virginia Debt Commission, and, in conjunction with them, have reached the conclusion that it would be to the advantage of both States to have a joint conference of the two commissions at the earliest date possible.

In the hope that you will give me your views and wishes, and the views and wishes of your commission upon this subject, at your earliest convenience, I remain,

Yours sincerely,
 (Signed) HENRY D. HATFIELD,
Governor of West Virginia.

WASHINGTON, D. C., November 12, 1915.

HON. HENRY D. HATFIELD,
Governor of West Virginia,
Charleston, W. Va.

DEAR SIR:

I duly received your letter of the 28th ultimo, in response to mine of the 19th, in relation to the payment of the judgment of the Commonwealth of Virginia against the State of West Virginia recently rendered by the Supreme Court of the United States, and note that, upon consideration thereof, you, in conjunction with the West Virginia Debt Commission, had reached the conclusion that it would be to the advantage of both States to have a joint conference of the two commissions at an early date.

Your letter has been considered by the Virginia Debt Commission and I am instructed by them to say that they will be pleased to meet you and the West Virginia Debt Commission as requested, and receive and consider any communication you may desire to submit, and the Virginia Commission agreeing with your view that this conference should be held at the earliest possible date, I suggest the 23d day of November at 10 a. m., and The New Willard, Washington, D. C., as the time and place of such meeting.

Respectfully,
 (Signed) H. H. DOWNING,
Chairman, Virginia Debt Commission.

Kindly send reply to Front Royal, Va.

TELEGRAM

CHARLESTON, W. VA., November 12, 1915.

HON. H. H. DOWNING:

Your letter of this date to hand and contents noted. I will communicate with you just as soon as I have had opportunity to hear from other members of the West Virginia Commission.

(Signed) H. D. HATFIELD.

TELEGRAM

CHARLESTON, W. VA., November 19, 1915.

HON. H. H. DOWNING,
Front Royal, Va.

Replying further to your letter of some days ago, suggesting joint conference of two commissions in Washington on November 23d, beg to advise that I find it impossible to arrange meeting of West Virginia Commission on that date. Will probably not be able to have meeting before sometime early in December and will advise you later as to date agreeable to West Virginia Commission.

(Signed) HENRY D. HATFIELD,
Governor.

December 6, 1915.

HON. HENRY D. HATFIELD,
Governor of West Virginia,
Charleston, W. Va.

DEAR SIR:

Since your wire of November 19th, I have heard nothing from you with reference to a meeting of the commissions of Virginia and West Virginia, as requested by you sometime since. Your wire of the 19th of November stated—

“Will probably not be able to have meeting before sometime early in December. Will advise you later as to date agreeable to the West Virginia Commission.”

My commission had hoped to hear from you before this, and regret that no time, as yet, has been fixed for the conference. May I hope to hear from you at an early date?

Yours very respectfully,
(Signed) H. H. DOWNING,
Chairman, Virginia Debt Commission.

IN THE SUPREME COURT OF THE UNITED STATES

JOHN PIERPONT MORGAN, Defendant.	} In Equity No.
<i>vs.</i>	
COMMONWEALTH OF VIRGINIA, Complainant,	

Comes now the Commonwealth of Virginia, by Jno. Garland Pollard, its Attorney General, and moves for leave to file the annexed bill of complaint of the Commonwealth of Virginia against John Pierpont Morgan, of New York City, in the State of New York, and that due process of subpoena issue thereon according to the practice of this court.

March 1, 1915.

JNO. GARLAND POLLARD,
Attorney General of Virginia.

JNO. S. BARBOUR,
Of Counsel for Complainant.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1914

COMMONWEALTH OF VIRGINIA, Complainant,	} In Equity No.
<i>vs.</i>	
JOHN PIERPONT MORGAN, Defendant.	

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

Your oratrix, the Commonwealth of Virginia, complainant, by Jno. Garland Pollard, Attorney General thereof, brings this bill of complaint against John Pierpont Morgan, a citizen of the State of New York and a resident thereof, and alleges:

I. That your oratrix is one of the States of the United States of America, and that the defendant is a citizen of the United States of America, and that the defendant is a citizen of the United States and of the State of New York, another of the States of the United States of America, and a resident thereof.

II. That on June 21, 1802, the last will and testament of Martha Washington, deceased, the wife of the first President of the United States of America, dated September 2, 1800, was duly admitted to probate and record before the county court of Fairfax county, in the Commonwealth of Virginia; that, in accordance with the terms of the statute in such cases made and provided, said will and testament was left and remained in the clerk's office of the county court of Fairfax county, in the Commonwealth of Virginia; that said will and testament thereby became and now is the property of the Commonwealth of Virginia and a public record thereof, and a document belonging to the Commonwealth of Virginia; that said will and testament is a chattel which has such special, extraordinary, uncommon, and unique value that it cannot be replaced by means of money, and is not susceptible of being compensated for by any practicable or certain measure of damages; that said last will and testament is a muniment of title under which large and valuable real and personal estates located within the Commonwealth of Virginia have been disposed of; that said last will and testament, left as aforesaid in said clerk's office, was in the possession of the Commonwealth of Virginia at the time it was illegally abstracted as hereinafter set forth; that said last will and testament was wrongfully and illegally abstracted from the possession and control of the Commonwealth of Virginia and has come into the possession and under the control of the said defendant, and that as against your oratrix, who is the lawful owner of the said last will and testament, the said defendant has not acquired, either at law or in equity, any right, title, or interest in and to the said last will and testament.

III. That the said last will and testament came into the possession of the said defendant in a manner and at a time unknown to your oratrix, and the fact that the said document was in the possession or under the control of the said defendant was unknown to your oratrix until it was brought to the attention of the General Assembly of Virginia at the last regular session which began on the 14th day of January, 1914, although your oratrix has exercised all reasonable diligence in endeavoring to locate the said document, and to regain the possession thereof.

IV. That although the said defendant has been duly requested so to do, he has failed and refused, and still doth refuse to deliver to your oratrix the said document, which the said defendant from your oratrix unjustly detains; that the said defendant denies the right of your oratrix to the possession thereof, and asserts his absolute right thereto, and that if he should attempt to exercise such asserted right, he would seriously and might, by removing the same from the jurisdiction of this court or otherwise disposing thereof, irretrievably interfere with the efforts of your oratrix to recover the possession thereof.

Inasmuch, therefore, as your oratrix is remediless in the premises, save in a court of equity, she prays that the said John Pierpont Morgan be made a party defendant to this bill and be required to answer the same, an answer under oath being waived; that this court may order said defendant to deliver said document to your oratrix, and, pending a decree to that effect, that he be enjoined and restrained from disposing thereof and removing the same beyond the jurisdiction of this court or that he be required to place the same in some appropriate custody to await the said final judgment of this court, and that your oratrix be granted such other and further relief, general and special, as in the premises may seem meet.

And your oratrix will ever pray, etc.

COMMONWEALTH OF VIRGINIA,
By JNO. GARLAND POLLARD,
Attorney General of Virginia.

I have read the foregoing bill of complaint by me subscribed, and the facts therein stated are true, to the best of my information and belief.

JNO. GARLAND POLLARD.

Subscribed and sworn to, in the city of Richmond, State of Virginia, before me, G. Stanley Clarke, a notary public in and for the city of Richmond, this 25th day of February, 1915.

G. STANLEY CLARKE,
Notary Public.

Statement of the Recovery of the Will of Martha Washington.

At the outbreak of the Civil War, Fairfax county was rich in documents pertaining to her interesting development as a county and to those of her citizens who had borne a distinguished part in the Colonial Government as well as in the establishment of our independence. These papers were stored in the archives of the county, and were ruthlessly pillaged by federal soldiers during the Civil War.

Among the most valued papers thus lost to the county was the last will and testament of Mrs. Washington.

After the lapse of many years, one or more letters of inquiry were received by the clerk of Fairfax county, Mr. F. W. Richardson, inquiring if the document then offered for sale in some northern city as the original last will and testament of Martha Washington was an authentic one. The clerk responded to these inquiries that if the document in question was authentic that it could not be purchased with propriety as it was rightfully the property of Fairfax county.

In 1908 Hon. R. Walton Moore, a resident of Fairfax, heard that the will had been purchased by the elder Mr. J. P. Morgan and added to his large and valuable collection of original historical documents. Mr. Moore informed Hon. C. V. Ford, the Commonwealth's attorney of the county, of this fact, and Mr. Ford in turn called the matter to the attention of the board of supervisors. He was instructed by them to write Mr. Morgan, claiming the will as the property of Fairfax county, and asking for its return. Mr. Ford addressed two letters to Mr. Morgan on the subject, but received no response to either.

In 1913, after the death of Mr. Morgan, a local chapter of the D. A. R. determined to appeal to Mr. Morgan's son in the interest of the county. The following letter, properly endorsed by the clerk of the court, was forwarded to him:

THE OAKS, FAIRFAX, VA., November 10, 1913.

*To the Honorable J. Pierpont Morgan,
New York, N. Y.*

DEAR SIR:

Since the death of your lamented father, the statement has appeared several times in the press that among the valuable papers in his collection was to be found the will of Martha Washington. This will was stolen from the records of Fairfax county during the Civil War. Its loss has been deeply deplored by the Washington family, the State of Virginia and the county of Fairfax. The will of George Washington was miraculously preserved from the vicissitudes of the same war. It is among the archives of Fairfax county, and is kept in a fire-proof apartment of the clerk's office. It is an object of much reverence and interest, and many persons make the pilgrimage to this small Virginia village to see the will of the Father of our Country.

Surely there is no repository as appropriate for the will of Martha Washington as an honored place by her husband's will among the records of that Virginia county in which they lived and died.

If this will is in your father's collection of historic papers, I most respectfully and earnestly request you to return it to the people of Fairfax county, and assure you that your generous action in so doing will be acclaimed by our entire Commonwealth.

Yours with great respect,

(Signed) MARY GRIMSLEY BARBOUR,
*Regent, Falls Church Chapter National Society,
Daughters of the American Revolution.*

(Mrs. Jno. S. Barbour.)

To which this reply was received:

23 WALL ST., NEW YORK, *November 11, 1913.*

MRS. J. S. BARBOUR,
Fairfax, Va.

DEAR MADAM:

Your letter of November 10th has been received. Mr. Morgan is at present in Europe. I will place your letter before him on his return to this country, which is expected about the middle of December.

Yours very truly,
(Signed) A. L. BANGERT,
Secretary pro tem.

And later a second reply:

MR. MORGAN'S LIBRARY, NEW YORK, *December 26, 1913.*

MRS. J. S. BARBOUR,
Fairfax, Va.

DEAR MADAM:

Upon his return from England, Mr. J. P. Morgan has read your letter of November 10th, and in reply has asked me to say that he regrets he is unable to accede to your request that the will of Martha Washington be returned to the archives of Fairfax county.

Mr. Morgan desires me to say that he will be glad to have this will photographed and send you a set of such photographs, if you so desire. He would appreciate the return courtesy of a photographic reproduction of the will of George Washington, which is deposited in the archives of Fairfax county.

Very truly yours,
(Signed) BELLE DA COSTO GREENE,
Librarian.

This response was not satisfactory and was the subject of discussion at an impromptu gathering on the evening of January 4, 1914, at which Mr. and Mrs. J. S. Barbour, Mr. and Mrs. R. W. Woolley and Mr. and Mrs. R. E. Thornton were present. It was decided then not to accept Mr. Morgan's refusal as final.

Confident of the justness of the demand, they sought some method of presenting it to Mr. Morgan not offensively, but as expressive of the deliberate judgment of the State, and, in event of his continued refusal to accede thereto, of submitting the claim to an impartial and competent tribunal whose decision could be enforced without the delay and expense so incident to litigation between individuals.

Owing to the fact that the Virginia legislature, then about to assemble, meets but once in two years, and that further delay might prejudice the rights of the county and State, it was thought prudent to have both purposes provided for in a single bill pursuant to a plan first suggested by Hon. John S. Barbour.

Efforts by the local authorities and the Daughters of the American Revolution to recover the will having proved unavailing, the Hon. R. E. Thornton, representing the counties of Fairfax, Prince William and Alexandria, introduced in the Senate of Virginia, the following bill, which was duly passed by both Houses of the General Assembly and on the 30th day of January, 1914, approved by the Governor:

CHAP. 5 (of Acts of 1914, page 7.)—An Act to authorize the institution of proper proceedings in the name of the Commonwealth of Virginia to enforce the return to it of the original will of Martha Washington.

Whereas, The original last will of Martha Washington, of Mt. Vernon, the widow of George Washington, dated September second, eighteen hundred, was duly proven before the county court of Fairfax county in the State of Virginia on June twenty-first, eighteen hundred and two, and was ordered to be recorded therein, and thereupon was deposited among the archives of the

county court of Fairfax county, whereby it became a public record and document of the State of Virginia and remained thereafter in its possession among the archives of Fairfax county until it was stolen from among the same at some time during the War between the States on a day and by a person unknown; and

Whereas, The said document is of great historic, literary and pecuniary value apart from its value as a muniment of title to the large real and personal estate within the State of Virginia disposed of under its provisions and should therefore be restored to its legal and proper custody; and

Whereas, It has recently been ascertained that the said original document so stolen as aforesaid is now in the custody and control of one John Pierpont Morgan, a citizen of the State of New York, who has declined to restore the same to the archives of the said county of Fairfax, although he has been informed of the circumstances of its removal therefrom and has been requested to restore the same; now, therefore,

1. Be it enacted by the General Assembly of Virginia, That the Governor of this Commonwealth be, and he hereby is, authorized and directed to cause formal demand to be made on the said John Pierpont Morgan for the return of the said last will and testament of Martha Washington to the State of Virginia.

2. That in event the said demand be not complied with within a reasonable time, the Attorney General of this Commonwealth is hereby authorized and directed to institute in the Supreme Court of the United States of America and prosecute to final conclusions, in the name of the Commonwealth of Virginia, such suit or suits at law or in equity against the said John Pierpont Morgan, his heirs, or assigns, and such other person or persons as may be proper, in order to enforce the right of the Commonwealth of Virginia to the possession and custody of said document, and the Attorney General is hereby authorized to associate with him in the prosecution of said suit the Commonwealth's attorney of Fairfax county, Va., and such other attorney or attorneys as the board of supervisors of Fairfax county may request to be associated with him, provided that the compensation, if any, of such associate attorneys shall be provided for by the said board of supervisors of Fairfax county.

3. Upon the recovery of the possession of the said document, it shall be delivered to the clerk of the circuit court of Fairfax county, Va., for deposit and safe keeping among the archives of Fairfax county.

In view of the importance of the immediate restoration of the paper to its proper place as one of the records of the clerk's office of the county of Fairfax, an emergency is declared to exist, and this act shall be in force from its passage.

The Governor, in pursuance of the foregoing act, requested his friend, Mr. Walter L. McCorkle, president of the New York Southern Society, to approach Mr. Morgan with a view of securing the surrender of the will. Mr. McCorkle interviewed Mr. Morgan, and, as a result of such interview, suggested to the Governor that he address Mr. Morgan directly on the subject. The Governor accordingly addressed the following communication to Mr. Morgan:

March 16, 1914.

MR. J. P. MORGAN,
New York City.

MY DEAR SIR:

Realizing that you are fully informed as to the recent agitation in Virginia on the question of the Martha Washington will, and the various proceedings in relation thereto, I feel that it is unnecessary to present to you any detailed statement on the subject.

Coming into the Governorship of the State on February 1st of this year, and looking carefully into the whole situation of affairs as then presented, it occurred to me that it would be proper to take the matter up with you through a representative Virginian living in New York.

Acting on this idea, I requested Mr. Walter L. McCorkle, president of the New York Southern Society, to call on you and state my desire that some line of action might be taken which would be deemed mutually agreeable. This has been done as my friend and representative.

In accordance with his suggestion, I now write to you personally on the subject to express the hope that some happy adjustment of the matter may have occurred to you, which will be satisfactory to all parties concerned.

Awaiting your suggestions, which I trust will be responsive at least in spirit to the respectful and courteous consideration which controls my own action, I am,

Very truly yours,

H. C. STUART,
Governor.

To which Mr. Morgan replied:

23 WALL STREET, NEW YORK, March 17, 1914.

HON. H. C. STUART,
Governor of Virginia,
Richmond, Va.

MY DEAR SIR:

I am very pleased indeed to receive your letter of March 16th in regard to the will of Martha Washington, which is now in my possession. I may mention that the visit of Mr. Walter L. McCorkle, to which you refer, and your very agreeable letter, constitute the only official word I have had upon this subject.

In regard to the will, I have only one desire, which is that the document should be where it can be best preserved and of most use to the people of the United States. I am sure that this is also the desire of yourself and of the Commonwealth of Virginia. I therefore venture to make the following suggestions:

The Fairfax county court-house, from what I am informed, is not fire-proof, nor are documents there kept in such a way as to make them available to any large number of people. I also understand that the original will of George Washington is at present stored in that court-house. I suggest, therefore, that the Commonwealth of Virginia, or Fairfax county, should direct the keeper of the documents in the court-house to place the original will of George Washington on exhibition at Mount Vernon, for an indefinite period, where it would be available for the instruction of a large number of people, and where it would have the benefit of the great care and protection against fire now given to Mount Vernon. If this were done, I should be glad to present the will of Martha Washington to the Mount Vernon Ladies' Association for permanent exhibition there. By this arrangement the two documents would be together at the place where they were made and where a great number of people will have the satisfaction of seeing them.

Should the Commonwealth of Virginia not be willing to do this, because of the well-known fact that Mount Vernon itself is not fireproof, though such excellent care is taken to prevent accidents, then I propose that the Commonwealth should present the will of George Washington to the Library of Congress, to be forever kept with the public records there, and I should present the will of Martha Washington to the nation for the same disposition. It seems to me that the bringing together of the two documents is of interest and importance. If they are placed at Mount Vernon they remain in Fairfax county and would be given as good care as possible there; if they are placed in the Library of Congress they leave the Commonwealth of Virginia, but, on the other hand, they would be in the custody of one of the great libraries of the world and in a place which belongs to the whole nation. It seems to me that either arrangement would be quite appropriate, and I shall be pleased indeed to do my part in carrying out whichever of the two would be most satisfactory to the Commonwealth of Virginia.

I am, dear sir, with great respect,

Yours very truly,

J. P. MORGAN.

To which the Governor replied:

April 8, 1914.

J. P. MORGAN, ESQ.,
23 Wall Street,
New York City.

MY DEAR SIR:

I am in receipt of your very courteous letter of March 17, which would have been acknowledged earlier but for the necessity for some correspondence in connection with the subject in hand, and consequent delay incident thereto.

After getting the facts fully before me, I regret to have to say that your letter does not meet the views of the people whom I represent and for whom I speak. The objection you urge against the delivery of the Martha Washington will to Fairfax county is, I fear, unfounded, since it is stated by prominent persons of that county that the clerk's office, in which this will would be kept, and in which the George Washington will is now on exhibition, is a brick building with fireproof vaults, in which all the county records are preserved. It is thought by capable and observant people that the will would be absolutely safe in this building.

I will suggest, therefore, though I will not urge upon your attention at this juncture, that the people of Virginia hold that the Martha Washington will is a part of the records of Fairfax county, and that it belongs there, if anywhere in Virginia.

We had hoped, and indeed expected, that some agreement could be arrived at with respect to this matter which would be mutually satisfactory. Not wishing to drop the negotiations at this stage, I now venture to renew the request made through my friend and representative, Mr. Walter L. McCorkle.

Awaiting your further advices, I am,
Very truly yours,

H. C. STUART,
Governor.

To which Mr. Morgan replied:

23 WALL STREET, NEW YORK, *April 17, 1914.*

HON. H. C. STUART,
Governor of Virginia,
Richmond, Va.

MY DEAR SIR:

I am in receipt of your letter of April 8th and regret to learn from it that neither of my suggestions meets with your approval. The dispositions which I proposed, reached in deliberation, still impresses me as the best that could be made of these historic documents, and their declination leaves me at a loss for additional suggestion.

Thanking you for the courtesy which you have accorded me throughout our exchange of letters, I am, dear sir, with great respect,

Yours very truly,

J. P. MORGAN.

After passing these letters, the Governor had a personal interview with Mr. Morgan, in Mr. Morgan's home in New York, but no settlement was reached.

On July 15, 1914, the Governor addressed Mr. Morgan the following letter:

MR. JOHN PIERPONT MORGAN,
New York City.

SIR:

In pursuance of chapter 5 of the Acts of the General Assembly of Virginia, 1914, I hereby make, through my representative, Mr. Robert L. Parrish, a formal demand on you for the return to the State of Virginia of the last will and testament of Martha Washington.

I am handing you, herewith, a copy of the statute under which it becomes my duty to make this demand.

Respectfully,

H. C. STUART,
Governor of Virginia.

Mr. Morgan not having returned the will, in response to the foregoing formal demand, the Governor notified the Attorney General who, with Hon. Jno. S. Barbour, of Fairfax county, who had been associated in the case by action of the board of supervisors of Fairfax county, drafted and filed in the Supreme Court of the United States the following bill of complaint:

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1914.

COMMONWEALTH OF VIRGINIA, Complainant,	} In Equity No.
<i>vs.</i>	
JOHN PIERPONT MORGAN, Defendant.	

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

Your oratrix, the Commonwealth of Virginia, complainant, by Jno. Garland Pollard, Attorney General thereof, brings this bill of complaint against John Pierpont Morgan, a citizen of the State of New York and a resident thereof, and alleges:

I. That your oratrix is one of the States of the United States of America, and that the defendant is a citizen of the United States of America, and that the defendant is a citizen of the United States and of the State of New York, another of the States of the United States of America. and a resident thereof.

II. That on June 21, 1802, the last will and testament of Martha Washington, deceased, the wife of the first President of the United States of America, dated September 2, 1800, was duly admitted to probate and record before the county court of Fairfax county, in the Commonwealth of Virginia; that, in accordance with the terms of the statute in such cases made and provided, said will and testament was left and remained in the clerk's office of the county court of Fairfax county, in the Commonwealth of Virginia; that said will and testament thereby became and now is the property of the Commonwealth of Virginia and a public record thereof, and a document belonging to the Commonwealth of Virginia; that said will and testament is a chattel which has such special, extraordinary, uncommon, and unique value that it cannot be replaced by means of money, and is not susceptible of being compensated for by any practicable or certain measure of damages; that said last will and testament is a muniment of title under which large and valuable real and personal estates located within the Commonwealth of Virginia have been disposed of; that said last will and testament, left as aforesaid in said clerk's office, was in the possession of the Commonwealth of Virginia at the time it was illegally abstracted as hereinafter set forth; that said last will and testament was wrongfully and illegally abstracted from the possession and control of the Commonwealth of Virginia and has come into the possession and under the control of the said defendant; and that as against your oratrix, who is the lawful owner of the said last will and testament, the said defendant has not acquired, either at law or in equity, any right, title, or interest in and to the said last will and testament.

III. That the said last will and testament came into the possession of the said defendant in a manner and at a time unknown to your oratrix, and the fact that the said document was in the possession or under the control of the said defendant was unknown to your oratrix until it was brought to the attention of the General Assembly of Virginia at the last regular session which began on the 14th day of January, 1914, although your oratrix has exercised all reasonable diligence in endeavoring to locate the said document, and to regain the possession thereof.

IV. That although the said defendant has been duly requested so to do, he has failed and refused, and still doth refuse to deliver to your oratrix the said document, which the said defendant from your oratrix unjustly detains; that the said defendant denies the right of your oratrix to the possession

thereof, and asserts his absolute right thereto, and that if he should attempt to exercise such asserted right, he would seriously and might, by removing the same from the jurisdiction of this court or otherwise disposing thereof, irretrievably interfere with the efforts of your oratrix to recover the possession thereof.

Inasmuch, therefore, as your oratrix is remediless in the premises, save in a court of equity, she prays that the said John Pierpont Morgan be made a party defendant to this bill and be required to answer the same, an answer under oath being waived; that this court may order said defendant to deliver said document to your oratrix, and pending a decree to that effect, that he be enjoined and restrained from disposing thereof and removing the same beyond the jurisdiction of this court or that he be required to place the same in some appropriate custody to await the said final judgment of this court, and that your oratrix be granted such other and further relief, general and special, as in the premises may seem meet.

And your oratrix will ever pray, etc.

COMMONWEALTH OF VIRGINIA,

By JNO. GARLAND POLLARD,

Attorney General of Virginia.

JNO. S. BARBOUR,

Of Counsel for Complainant.

I have read the foregoing bill of complaint by me subscribed, and the facts therein stated are true, to the best of my information and belief.

JNO. GARLAND POLLARD.

Subscribed and sworn to, in the city of Richmond, State of Virginia, before me, G. Stanley Clarke, a notary public in and for the city of Richmond, this 25th day of February, 1915.

G. STANLEY CLARKE,

Notary Public.

Process was issued from the court, requiring Mr. Morgan to file his answer to the said bill of complaint on the 11th day of October, 1915. Under date of September 25, 1915, Mr. Morgan addressed the Honorable James Keith, President of the Supreme Court of Appeals of Virginia, the following communication:

MR. MORGAN'S LIBRARY, NEW YORK, *September 25, 1915.*

THE HON. JAMES KEITH,

*President of the Supreme Court of Appeals,
Richmond, Va.*

MY DEAR SIR:

You are, of course, aware of the unfortunate controversy which has arisen as to the ownership and possession of the original will of Martha Washington. When I was first approached on this subject, an imputation seemed to me to be involved which was most unjust in character and deeply painful to me; this caused me, at the time, to determine to stand upon what seemed to be my legal rights, and to make no concessions in regard to them.

The facts in regard to the history of this paper are as follows, according to the statement of Miss Mary Espy Thomson, from whom it was purchased by my father in the year 1903. Miss Thomson's statement is:

Lieutenant-Colonel David Thomson, commanding the Eighty-second Regiment, Ohio Volunteer Infantry, was, during the spring or autumn of 1862, stationed at Fairfax Court-house, Va. His headquarters were in the court-house building. The safes had previously been broken open by the Blenkers, a command of men noted for their reckless vandalism. The papers were on the floor, and had been destroyed in large quantities, used to kindle fires. My father, going into the office, found his men shoveling the material from the floor for this use—called them to stop, and, looking over them, found the document in question. Just preceding his death in 1892, he gave the document to me to be done with as I thought proper.

(Signed) MARY ESPY THOMSON.

2655 Irving Avenue, South Minneapolis, Minn.

The facts in the case have been submitted to eminent counsel, and I am advised that the title of my father's estate is, on well-recognized legal principles, perfect and unassailable. An answer to the suit in the Supreme Court of the United States, brought by the Commonwealth of Virginia, has been prepared and is ready to be filed. Should the case, however, come to trial, issues will be raised as to the late war and the status of participants therein, which, it seems to me, better should not be raised, in view of the fifty years of peace and unity which have elapsed since the termination of the war. I do not wish that, through any act of mine, differences long settled should be recalled. Rather than revive the memories of ancient strife, long since consigned to oblivion by the good sense and good feeling and patriotism of the people of the United States, I greatly prefer to waive such personal rights as I believe I have in this matter.

Moreover, I have the highest regard for the people of Virginia, and the pride of all Americans in their splendid traditions and lofty spirit. I have good reason to believe that their sentiment and interest have been aroused in respect to this document, and feel it to be a proper act on my part to return it to their keeping.

In view of the foregoing, and of your eminent position as presiding justice of the Supreme Court of Virginia, and of the confidence and esteem in which you are justly held by that Commonwealth, I hand you herewith the original will of Martha Washington, with a request that it be disposed of by you in such way as will best meet the approval and gratify the sentiment of Governor Stuart and the people of Virginia.

If I might be allowed to offer a suggestion, it would be that, because of my father's well known interest in Mount Vernon and of my own connection with it as a member of the advisory board of the Mount Vernon Association, it seems to me peculiarly appropriate that a relic so closely associated with Washington should be preserved and available to the public at the place especially consecrated to his personal memory. I should be much gratified if you could, in consultation with Governor Stuart, find a way by which this will shall eventually be placed at Mount Vernon and confided to the keeping of the Mount Vernon Association. This suggestion is in accordance with the suggestion in my letter to Governor Stuart of March 17, 1914, and is what I had hoped to do when the Supreme Court had upheld my title to the document. Should it become possible to carry out this idea, it would give me satisfaction to provide at Mount Vernon an appropriate and fireproof receptacle for the safe keeping and preservation of this and other precious relics of the place.

I have intrusted this letter, together with the original will of Martha Washington, to our mutual friend, Mr. Fairfax Harrison, who has kindly undertaken to deliver them to you.

With great respect, I am,

Sincerely yours,

(Signed) J. P. MORGAN.

To which Judge Keith replied as follows:

September 30, 1915.

MR. J. P. MORGAN,
New York City.

DEAR SIR:

I have received the original will of Martha Washington and the letter which you entrusted to our friend, Mr. Fairfax Harrison, and I shall endeavor to dispose of it in such a way "as will best meet with the approval and gratify the sentiment of Governor Stuart and the people of Virginia." I am in full sympathy with your suggestion that Mount Vernon should be the final repository of the will of Martha Washington. As you well say, "it is peculiarly appropriate that a relic so closely associated with Washington should be preserved and available to the public at the place specially consecrated to his personal memory," and I shall cheerfully endeavor in consultation with Governor Stuart and others to bring about this result. There are, however, difficulties in the way which you will at once recognize. The people of Fairfax county have a just pride in being the custodians of the wills of Washington and his wife, but I trust that this sentiment will yield to the

advantages presented by Mount Vernon, which must for all time be hallowed as the home and final resting-place of Washington, where it will be available to the public and safely preserved for all coming time in the fireproof receptacle which you generously offer to provide. The people of Fairfax will, I trust, remember that this relic, if placed at Mount Vernon, will still be within the limits of the county of Fairfax.

Permit me, sir, to express my appreciation of your position in this matter. Much, doubtless, has been said and written which must have distressed you and excited a spirit of resentment, but you have risen to a higher plane and viewed the subject in a spirit of generosity and magnanimity, which, I am sure, will be recognized and appreciated by the Governor and good people of this Commonwealth.

I do not understand your letter as imposing any condition with respect to my disposition of the will. The only trust imposed is that it shall be disposed of in such a way "as will best meet the approval and gratify the sentiment of Governor Stuart and the people of Virginia." You then proceed to offer as a suggestion, but not by way of imposing a condition, that Mount Vernon shall be the final repository of this interesting relic. I shall endeavor to discharge the trust reposed in me to the best of my ability, and shall earnestly endeavor to have your suggestion adopted.

I thank you for the kindly terms in which you refer to me personally, and beg to remain, with great respect,

Very sincerely yours,

(Signed) JAMES KEITH.

Before making said reply, Judge Keith had requested the Governor to make request of the Attorney General to postpone further proceedings in said suit and not require answer of same until after the next meeting of the General Assembly, in order that that body might have an opportunity to pass upon the suggestion of Mr. Morgan that the will be placed at Mount Vernon; but this request was not accompanied by any agreement on the part of Mr. Morgan to surrender the will in the event the General Assembly should decline to accede to his suggestion. The request made by Judge Keith was declined by the Attorney General, and the will was then unconditionally surrendered to the Governor, with the request that he retain possession of the same at his office until the meeting of the next General Assembly, in order to afford that body an opportunity to pass upon the suggestion of Mr. Morgan for the deposit of the will at Mount Vernon. This request, becoming known to the people of Fairfax, the board of supervisors of that county met on the 6th day of October, 1915, and passed the following resolution, which was transmitted to the Governor:

Whereas, The board of supervisors of Fairfax county, finding that repeated efforts to recover from Mr. John P. Morgan, of New York, the will of Martha Washington (ascertained and acknowledged to be in his possession), which will was illegally and wrongfully abstracted from the records of the county of Fairfax by some Union soldier in the year 1862, were fruitless of result, and that said Morgan would not relinquish the will except upon conditions which were wholly objectionable to Fairfax county and which he had no legal or moral right to impose, and

Whereas, The act of the General Assembly of Virginia, authorizing the Governor to negotiate for the return of said will and to bring suit, if necessary, for its recovery, provided that "upon the recovery of the possession of the said document it shall be delivered to the clerk of the circuit court of Fairfax county, Va., for deposit and safe keeping among the archives of Fairfax county," and

Whereas, The will has been delivered into the hands of the Governor, be it therefore,

Resolved, 1st, That this board on behalf of the county of Fairfax, hereby requests Governor Stuart to deliver the said will into the hands of Mr. F. W. Richardson, the clerk of the circuit court of Fairfax county, as provided by the act hereinbefore referred to, and

Resolved, 2d, That Mr. F. W. Richardson, clerk of the circuit court as aforesaid, do forthwith furnish Governor Stuart with a certified copy of these preambles and resolutions, in order that the object of the proceedings against Mr. Morgan may be immediately achieved and further litigation rendered unnecessary.

Whereupon, the Governor addressed the following communication to the Attorney General:

October 14, 1915.

HON. JOHN GARLAND POLLARD,
Attorney General of Virginia,
Richmond, Va.

MY DEAR SIR:

I have received from Mr. John Pierpont Morgan, through Judge James Keith, the original will of Martha Washington, which will was the subject of litigation in the Supreme Court of the United States, instituted in pursuance of chapter 5 of Acts of 1914. The delivery of said will to me was unconditional but was accompanied with the request that I retain possession of the same until after the session of the coming General Assembly in order to afford that body an opportunity of acceding to the suggestion of Mr. Morgan that the will be placed at Mount Vernon to be kept in a fireproof receptacle to be furnished by him. I request your opinion as to my legal right to grant said request. In this connection I may add that I have received a resolution of the board of supervisors of Fairfax county asking that the will be sent at once to the clerk of the circuit court of that county.

Very truly yours,

H. C. STUART,
Governor.

To which the Attorney General replied as follows:

October 14, 1915.

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

DEAR SIR:

You have informed me that Judge James Keith, President of the Court of Appeals of Virginia, has delivered to you on behalf of Mr. John Pierpont Morgan, the will of Martha Washington, which will was the subject of litigation instituted by me, in pursuance of chapter 5 of the Acts of 1914, in the Supreme Court of the United States, and that though the delivery of said will was unconditional, it was accompanied by a request that you retain possession of said will at Richmond until the convening of the coming General Assembly in order to afford that body an opportunity to consider the suggestion of Mr. Morgan that the will be sent to Mount Vernon to be kept in a fire-proof receptacle to be furnished by him. You also inform me that you have received from the board of supervisors of the county of Fairfax a resolution requesting you to deliver the will to the clerk of the circuit court of said county.

Upon this state of facts, you request me to advise you whether you have a legal right to comply with the request made by Judge Keith on behalf of Mr. Morgan.

By reference to the act authorizing the institution of proceedings for the recovery of the will (Acts 1914, p. 7), it will be seen that section 3 of the statute reads as follows:

"Upon the recovery of the possession of said document, it shall be delivered to the clerk of the circuit court of Fairfax county, Virginia, for deposit and safe keeping among the archives of Fairfax county."

It, therefore, appears that the General Assembly has already declared where said will should be deposited, and directs that upon its recovery it shall be delivered to the clerk of the circuit court of said county. This

being the case, no officer of the State has a right to postpone the operation of the statute in order to await the result of an effort to have the General Assembly change existing laws on the subject. To take any other view would be giving an officer the right to suspend the operation of the law and to postpone obedience to its mandates.

Yours truly,

JNO. GARLAND POLLARD,
Attorney General of Virginia.

Whereupon, the Governor addressed the following communication to the Attorney General:

October 14, 1915.

HON. JOHN GARLAND POLLARD,
Attorney General of Virginia,
Richmond, Va.

MY DEAR SIR:

I herewith hand you the original will of Martha Washington, delivered to me as Governor of the Commonwealth of Virginia by Judge James Keith on behalf of John Pierpont Morgan. This will was the subject of litigation in the Supreme Court of the United States, instituted in pursuance of chapter 5 of Acts of the General Assembly of 1914, which provides that upon the recovery of the possession of said will it shall be delivered to the clerk of the circuit court of Fairfax county, Virginia. Having been informed that you will, on October 18th, be in Washington for the purpose of moving to dismiss said suit, I request you to deliver the said will to the clerk of the said court and take his receipt therefor.

Very truly yours,

H. C. STUART,
Governor.

In compliance with the request contained in the letter, the Attorney General, on the 18th day of October, 1915, went in person to Fairfax Court House, where he delivered the will to the Hon. F. W. Richardson, clerk of said court, in the presence of the board of supervisors of the county and a large assembly of the people of Fairfax, including the members of the Daughters of the American Revolution.

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